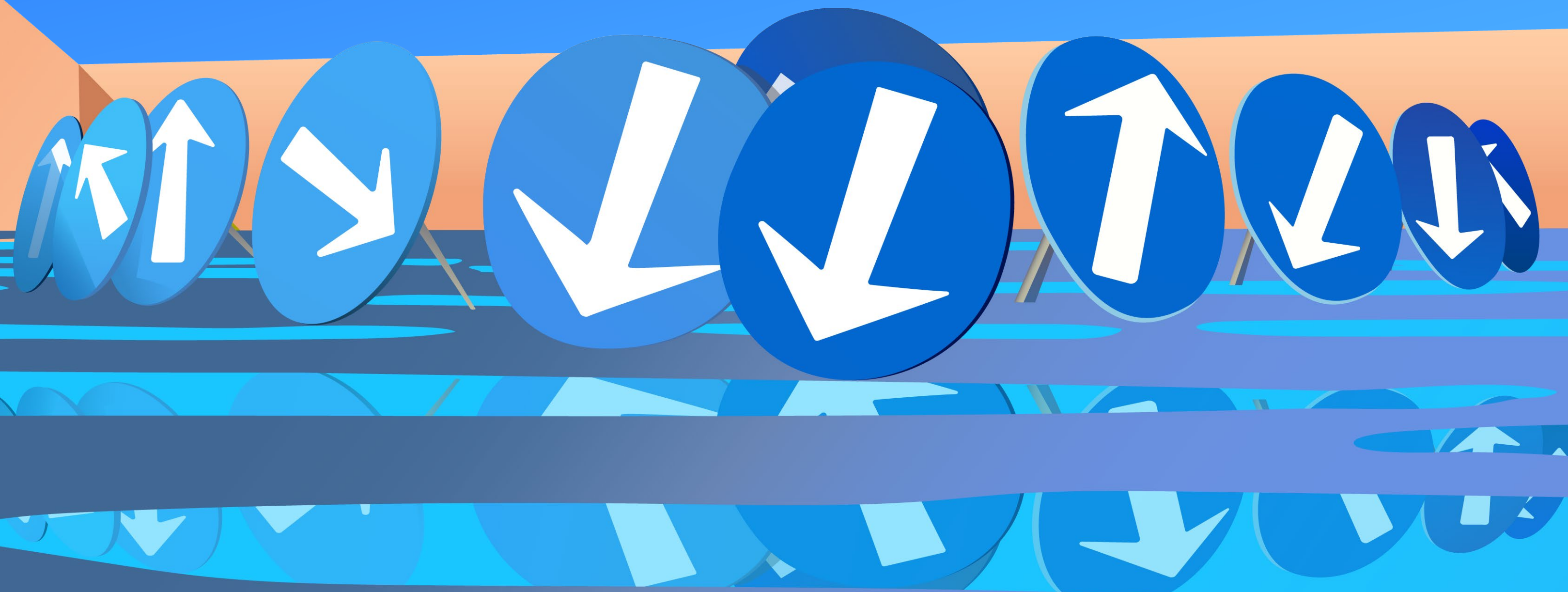


# FINDING THE RIGHT DIRECTION

Arbitrators' duties and standards of disclosure in 2024

Loretta Malintoppi, Independent Arbitrator

*39 Essex Chambers*



## INTRODUCTION

- Institutional statistics confirm challenges have become a common practice
- Plethora of instruments (hard law v soft law)
- Standards of independence and impartiality: *only* similar?
- Uniformity: *impossible* aspiration or *already* a reality?



## INVESTOR-STATE ARBITRATION

- ICSID, UNCITRAL, PCA, SIAC, ICC, SCC
- Manifest lack of qualities
- Nationality of arbitrators
- Justifiable doubts



## INTERNATIONAL COMMERCIAL ARBITRATION

- ICC: subjective test (eyes of the parties)
- SIAC/HKIAC/LCIA/SCC: « justifiable doubts »
- UNCITRAL Model Law: “justifiable doubts”, lack of the “ qualifications agreed to by the parties”
- Publication of abstracts of decisions on challenges (LCIA)



## IBA GUIDELINES

- Justifiable doubts test & examples on color-coded scale
- Recognition as “transnational consensus”
- Used as reference by counsel and tribunals
- Source of inspiration: e.g. CETA Code of Conduct



## INTERNATIONAL INVESTMENT AGREEMENTS

- Usually more demanding standards compared to institutional rules
- Other possible sources of improper influence on arbitrators?
- Additional requirements of legal expertise or PIL experience



## ICSID UNCITRAL CODE: *NEC PLUS ULTRA* CODIFICATION IN 2024?

- Context — Joint institutional work as part of UNCITRAL's ISDS reform
- Consensus to distinguish rules on judges v. arbitrators
- Independence/impartiality standard – recognition that « IBA Guidelines may provide useful guidance »



## ICSID UNCITRAL CODE: *NEC PLUS ULTRA* CODIFICATION IN 2024?

- Prohibition of double hatting (unless parties allow)
- Diligence, integrity and competence
- Rules on assistants
- Extensive disclosure requirements (mandatory for certain elements)
- Compliance (renvoi to instrument of consent for challenges)



## CASE LAW TRENDS

- High ethical qualities
- Pre-existing relationship with a party
- Repeat appointments
- Double-hatting
- Issue conflicts



## Conclusion

- Institutional (re)drafting of rules alongside IBA Guidelines
- Treaty parties drafted codes of conduct inspired by IBA Guidelines
- Effort to ensure systemic consistency (to the extent possible)
- Are we over-regulating ourselves?

