

# **Legitimacy Concerns regarding the Application of Soft Law in International Arbitration in Connection with the Independence and Impartiality of Arbitrators**

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## **Abstract**

The growing body of soft law instruments in the field of arbitration may provide us with numerous positive outcomes; however, its application has also gathered a substantial amount of criticism. The present article addresses concerns of legitimacy voiced in today's arbitral practice and the possible negative consequences of the excessive application of soft law in arbitration. In order to put these concerns into a more concrete perspective, the article discusses these legitimacy questions, focusing on soft law regarding issues of conflicts of interest and the impartiality and independence of arbitrators, and provides the reader with an outlook for the international acceptance and applicability of the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration.

Keywords: soft law, arbitration, independence, impartiality, legitimacy, IBA Guidelines

## **I Introduction**

At present, one may conclude that the influence of soft law instruments in certain fields of arbitration has almost risen to the level enjoyed by other rules of international arbitration. Although this growing body of law may provide us with numerous positive outcomes, its application has gathered a substantial amount of criticism in the past years. The present

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article intends to analyse the concerns over legitimacy as voiced in today's arbitral practice and the possible negative consequences of the excessive application of soft law in arbitration.

To address these concerns, the article starts by defining what is understood today as soft law in general, and then specifically in the sphere of arbitration. Afterwards, it proceeds to address the possible concerns of legitimacy raised in the legal scholarship, discussing the application of soft law instruments in arbitration. In order to put these concerns into a more concrete perspective, the article will discuss these legitimacy questions, focusing on the impartiality and independence of arbitrators, and will provide the reader with an extensive outlook for the international acceptance and applicability of the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration, as well as for the relevant case law of Hungarian courts.

## II On Soft Law in General

We cannot find a widely and generally accepted definition of the 'soft law'; the term lacks precision and is to some extent even misleading.<sup>1</sup> Nevertheless, 'soft law norms' are generally understood to be norms which cannot be enforced through public force<sup>2</sup> and have extra-legal binding effect.<sup>3</sup> As *Lüth* and *Wagner* observed, soft law refers to 'quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat "weaker" than the binding force of traditional law, which is in contrast often referred to as "hard law"'.<sup>4</sup>

Several types of documents fall under this category, including resolutions of international organisations, codes of conduct and recommendations, non-binding agreements, programmes of action, reports adopted by international agencies or at international conferences, texts of treaties not yet in force or not binding on a specific actor, and interpretative instruments pertaining to international conventions.<sup>5</sup> These instruments are considered to be sources of international law, but only as subsidiary means for the determination of the rules of law within the meaning of Article 38(1)(d) of the Statute of the International Court of Justice.<sup>6</sup> Their purpose, therefore, is to serve as secondary sources for interpreting the primary rules of international law.

As *Gabrielle Kaufmann-Kohler* explains, the term 'soft' can refer to various characteristics of the norm: it may indicate that it is too vague to be applied to specific facts,

<sup>1</sup> Daniel Thürer, 'Soft Law' (2009) Max Planck Encyclopedia of Public International Law [MPEPIL] para 36. <https://doi.org/10.1093/law/epil/9780199231690/e1469>

<sup>2</sup> Gabrielle Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity' (2010) *Journal of International Dispute Settlement* 283, 284, <https://doi.org/10.1093/jnlids/idq009>

<sup>3</sup> Thürer (n 1) para 5.

<sup>4</sup> Felix Lüth, Philipp K. Wagner, 'Soft Law in International Arbitration – Some Thoughts on Legitimacy' (2012) *STUDZR* 409, 411.

<sup>5</sup> Thürer (n 1) para 2.

<sup>6</sup> United Nations, Statute of the International Court of Justice, 18 Apr. 1946, Article 38 (1) (d).

that it cannot be a basis for a cause of action, or that its support lacks any binding character.<sup>7</sup> However, it certainly does not mean that it lacks any kind of normative character.<sup>8</sup> Its normativity is often called ‘soft normativity’, and it depends on whether or not the rules are codified in a code, their degree of influence on judicial practice, and their recognition or reference by tribunals.<sup>9</sup> Nevertheless, pursued objective of soft law is most commonly to assemble the existing, scattered elements of norms, and thereby creating new ones.<sup>10</sup>

### III Soft Law Instruments in the Field of International Arbitration

One of the most important fields of law where soft law provides valuable guidance is arbitration.<sup>11</sup> Its main purpose is to assist and instruct arbitrators and other practitioners in the event of deficiencies in the applicable law. Most often, and also most relevantly, soft law is made by non-State actors.<sup>12</sup> Many international institutions provide important guidance on certain practical aspects of arbitration, including the International Bar Association, the UNCITRAL, or the International Chamber of Commerce.<sup>13</sup> These institutions influence the development of international law by promoting the exchange of information between practitioners and codifying arbitral rules with the aim of filling the gaps of existing international law. This goal is adequately mirrored in the term ‘best practices,’ referring to soft law specifically in the sphere of arbitration.

Soft law in arbitration is composed of two types of rules, procedural soft law on the one hand and substantive soft law on the other.<sup>14</sup> Although both are valuable sources, substantive soft law norms were originally intended to be applied to commercial transactions in general. These sets of rules include the UNIDROIT Principles of International Commercial Contracts, the OECD Principles of Corporate Governance and trade customs. Regarding arbitration more specifically, procedural codes of conduct are regularly referred to in arbitral proceedings, even when the parties did not set them out in their arbitral agreements. The above referred gap-filling function of soft law instruments is especially relevant regarding

<sup>7</sup> Kaufmann-Kohler (n 2) 284.

<sup>8</sup> Kaufmann-Kohler (n 2) 284.

<sup>9</sup> Kaufmann-Kohler (n 2) 315.

<sup>10</sup> David Arias, ‘Soft Law Rules in International Arbitration: Positive Effects and Legitimation of the IBA as a Rule-Maker’ (2017–2018) 6 *Indian Journal of Arbitration Law* 29–41, 30.

<sup>11</sup> Gary B. Born, *International Commercial Arbitration* (The Netherlands, 1852, 2nd edn, 2014); Arias (n 10) 31; Elina Mereminskaya, ‘Results of the Survey on the Use of Soft Law Instruments in International Arbitration’ *Kluwer Arbitration Blog* 6 June 2014 <<https://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/>> accessed 15 February 2023.

<sup>12</sup> Kaufmann-Kohler (n 2) 285.

<sup>13</sup> Van Vechten Veeder, ‘Procedural Soft Law in International Arbitration’ (2019) *Max Planck Encyclopedia of Public International Law* [MPEPIL] para 14.

<sup>14</sup> Lüth, Wagner (n 4) 411; Kaufmann-Kohler (n 2) 286.

procedural materials, as they complement arbitration rules guiding the dispute, but might not cover certain important questions of law.<sup>15</sup>

The most outstanding examples of this are the UNCITRAL Model Law on International Commercial Arbitration, which seeks to develop domestic commercial arbitration rules,<sup>16</sup> the UNCITRAL Arbitration Rules, containing procedural rules for ad-hoc arbitration,<sup>17</sup> the IBA Rules on the Taking of Evidence in International Commercial Arbitration<sup>18</sup> and the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration (IBA Guidelines or Guidelines), which incorporate national standards on independence and impartiality, and illustrate them with specific examples to ensure that arbitrators act impartially.<sup>19</sup> These Guidelines will be further discussed in the context of the interaction between soft law and the impartiality and independence of arbitrators.

#### **IV Concerns of Legitimacy regarding the Application of Soft Law Rules in Arbitral Adjudication**

Legitimacy is ‘the right to rule,’ as a consequence of which the addressees of legal norms and the decisions of international institutions regard the authority of the tribunal to be justified, and obey its rules and decisions.<sup>20</sup> One must note that concerns of legitimacy in the matter at hand concern the application of the norm not its creation.<sup>21</sup> Just as much as in litigation in general, in the field of arbitration more specifically, *consistency*, *certainty* and *predictability* are the key elements of building a legitimate adjudication system.<sup>22</sup> Although these principles are safeguarded differently by or even within countries, they often share common

<sup>15</sup> Gregory C. Shaffer, Mark A. Pollack, ‘Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance’ (2010) 94 Minnesota Law Review 706–799, 721.

<sup>16</sup> G.A. Res 40/72, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), amended by G.A. Res 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

<sup>17</sup> United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>> accessed 15 February 2023.

<sup>18</sup> IBA Working Party Commentary on the New IBA Rules of Evidence in International Commercial Arbitration.. (2000) Bus Law Int’l 2, 14.

<sup>19</sup> Anne K. Hoffmann, ‘Duty of Disclosure and Challenge of Arbitrators: The Standard Applicable Under the New IBA Guidelines on Conflicts of Interest and the German Approach’ (2005) 21 Arbitration International 427–436, <https://doi.org/10.1093/arbitration/21.3.427>; David A. Lawson, ‘Impartiality and Independence of International Arbitrators – Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration’ (2005) 23 ASA Bulletin 22, <https://doi.org/10.54648/asab2005003>

<sup>20</sup> Harlan G. Cohen, Andrea Føllesdal, Nienke Grossman, Geir Ulfstein, *Legitimacy and International Courts* (Cambridge, 2018).

<sup>21</sup> Lüth, Wagner (n 4), 419.

<sup>22</sup> Susan D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 Fordham L Rev. 1521, 1584.

features and can be assured through the appropriate interpretation of soft law arbitration instruments, among the sources of international law.

On one hand, these rules and methods may establish objective mechanisms for determining, for instance, the impartiality and independence of arbitrators, ensuring the transparency of proceedings, and providing for the review of decisions.<sup>23</sup> They protect the legitimacy of the proceedings and their outcomes. On the other, however, inconsistencies in this process contribute to the fragmented nature of the international arbitration regime.<sup>24</sup> A substantial proportion of such inconsistencies arise from the application of soft law instruments, such as codes and guidelines prepared, for instance, by the International Bar Association (IBA), and the author will address the potential negative consequences.

At the outset, the adoption of soft law instruments results in some kind of a normative confusion regarding their optional application and its unpredictable outcome. This means that actors in the arbitral sphere can never be sure of the degree of normativity of such instruments in the given case, and whether the tribunal will apply them in the absence of other binding materials. The test of this normativity lies in court practice: whether courts refer to these soft law rules, and what they pronounce to be their value.<sup>25</sup>

As *Gabrielle Kaufmann-Kohler* stresses, there may be instances where the parties are adjudged by the standards set by these soft law codes and guidelines, as can be assessed from the tribunals' awards, without their being explicitly invoked in the submissions of the parties.<sup>26</sup> This is rooted in the wide procedural discretion of the arbitrators,<sup>27</sup> but results in the impairment of and derogation from the arbitration agreement, therefore the parties' right to decide on the rules and circumstances of arbitration.<sup>28</sup>

An additional criticism regarding soft law is it can make the system less flexible, because while soft law rules may increase the certainty of the proceedings, including more and more rules on the procedure of the tribunal,<sup>29</sup> this increase may be accompanied with the loss of procedural flexibility. A leading author in this regard, *William Park*, views this effect as desirable, as it balances efficiency with the fairness of the proceedings, by jokingly citing

<sup>23</sup> Nathalie Bernasconi-Osterwalder, Lise Johnson, Fiona Marshall, 'Arbitrator Independence and Impartiality: Examining the Dual Role of arbitrator and counsel' (2011) 12 International Institute for Sustainable Development (IISD) 1.

<sup>24</sup> Miluše Hrnčířková, 'The Meaning of Soft Law in International Commercial Arbitration' (2016) 16 International and Comparative Law Review 97, 104, <https://doi.org/10.1515/iclr-2016-0007>

<sup>25</sup> Kaufmann-Kohler (n 2) 297; Decision of the Swiss Federal Court of 22 March 2008. ASA bull, 26. (2008) 565–579.

<sup>26</sup> Kaufmann-Kohler (n 2) 297; Lüth, Wagner (n 4) 418.

<sup>27</sup> Lüth, Wagner (n 4) 418.

<sup>28</sup> William Park, 'The Procedural Soft Law of International Arbitration: Non-Governmental Instruments' in Loukas Mistelis, Julian Lew (eds), *Pervasive Problems in International Arbitration* (The Netherlands, 2006, 141) 144.

<sup>29</sup> Arias (n 10) 35.

the example of a chef who aimed to provide fine dining and ‘might fail either by making customers wait too long or by serving junk food instead of a gourmet meal’.<sup>30</sup>

The above concern for flexibility brings about another frequently criticised aspect, namely the prospective *judicialisation* of arbitral proceedings,<sup>31</sup> in that, due to the proliferation of soft law rules in the field of arbitration, the arbitral dispute resolution system takes on a different procedural character, and as a result resembles litigation.<sup>32</sup> Arbitration was originally created to exclude this procedural and highly formal system of litigation, allowing the parties themselves to shape the arbitral proceedings they wish to have as deciding their dispute. As a consequence, the more procedural rules we have, the more arbitral autonomy is constrained by them. This is especially relevant in the event described by *Kaufmann-Kohler*, namely when autonomy is at peril from the tribunal’s application of these rules without the explicit agreement of the parties.<sup>33</sup> Nevertheless, scholars such as *Park* regard consistency as a primary value rather than a stricter arbitral process.<sup>34</sup>

Another legitimacy question arises when the soft law instrument contradicts the underlying applicable procedural rules chosen by the parties. This possibility was analysed by *Lüth* and *Wagner*, who reflected on the potential clash of rules on impartiality in the IBA Guidelines, and the obligation of disclosure prescribed in the ICC Arbitration Rules.<sup>35</sup> Although these disputable scenarios are less likely to occur, they manifest the inconsistencies in this regard.

As we can see, a number of concerns that can have negative consequences may be seen as germane to the legitimacy of the arbitral process as a consequence of the proliferation of soft law codes and regulations. These concerns relate to the application of these rules, and involve uncertainty over their normativity, the flexibility of the arbitration regime, risks of the judicialisation of arbitration, and contradictions with institutional rules. They are implicitly present in the specific context of arbitrator impartiality and independence. introduced in the coming sections of this article.

<sup>30</sup> Park (n 28) 142.

<sup>31</sup> Günther J. Horvath, ‘The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes?’ in Stefan Michael Kröll, Loukas Mistelis et al (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Alphen van den Rijn: Kluwer Law International 2011, 251–271).

<sup>32</sup> Park (n 28) 146., paras 7–18.; ‘University of Virginia’s 12th Sokol Colloquium’ in Richard Lillich, Charles Brower (eds), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (Leiden, 1993).

<sup>33</sup> Lüth, Wagner (n 4), 418.

<sup>34</sup> Park (n 28) 147, para 7–21.

<sup>35</sup> Lüth, Wagner (n 4) 421.

## V A Concrete Example: Rules on the Independence and Impartiality of Arbitrators

The principle that a judicial institution shall be independent and impartial is firmly emphasised in all legal systems. It is likewise a core principle in the field of arbitration that arbitrators must be independent and impartial of the parties at the time of appointment and for the duration of the proceedings.<sup>36</sup> Impartiality requires that an arbitrator is free from bias due to preconceived notions regarding the dispute, or any other reason that may result in favouring one party over the other,<sup>37</sup> whereas independence reflects the lack of a pre-existing relationship between the arbitrator and the parties.<sup>38</sup>

The integrity of the arbitral process has a number of guarantees, one of the most prominent being the impartiality and independence of the arbitral tribunal.<sup>39</sup> For this reason, arbitral institutions and other international organisations started to codify the rules on impartiality and independence in order to clarify the existing and developing standards in international law.<sup>40</sup> Among the most prominent ones, we recognise the American Bar Association and American Arbitration Association Code of Ethics for Arbitrators, the International Bar Association Rules of Ethics for International Arbitrators (IBA Code of Ethics), the IBA Guidelines on Conflicts of Interest, the International Bar Association Guidelines on Party Representation in International Arbitration and the Burgh House Principles on the Independence of the International Judiciary. The eminent role of these documents among soft law instruments, and in international arbitral practice in general, cannot be disputed, as they provide utterly valuable input for filling the gaps in the regulation of impartiality rules.

The IBA Guidelines focus on the question of disclosure of potential conflicts of interest by an arbitrator and were designed as an expression of best practices in the field of international arbitration.<sup>41</sup> The Guidelines apply to international commercial arbitration as well as to international investment arbitration, and are quite influential at a time when

<sup>36</sup> Lawson (n 19).

<sup>37</sup> Margaret L. Moses, *The Principles and Practices of International Commercial Arbitration*. (3rd edn, Cambridge, 2017) 140–141.

<sup>38</sup> Nigel Blackaby, Constantine Partasides, Redfern and Hunter on *International Arbitration* (6th edn, Oxford, 2015) 255.

<sup>39</sup> Sharanya Shivaraman, 'Relationship between the Arbitrators and their Law Firm: A case for Dynamic Application of the IBA Guidelines on Conflicts of Interest', *Kluwer Arbitration Blog*, 19 June 2018 <<https://arbitrationblog.kluwerarbitration.com/2018/06/19/relationship-arbitrators-law-firm-case-dynamic-application-iba-guidelines-conflicts-interest/>> accessed 15 February 2023; Lawson (n 19) 23; Leela Kumar, 'The Independence and Impartiality of Arbitrators in International Commercial Arbitration' *SSRN*, 24 April 2014., <<https://ssrn.com/abstract=2428632>> accessed 7 February 2023.

<sup>40</sup> Kaufmann-Kohler (n 2) 286; Arias (n 10) 30.

<sup>41</sup> IBA Guidelines, 11., para 4.; Mark R. Joelson, 'A critique of the 2014 international bar association guidelines on conflicts of interest in international arbitration' (2015) 26 (3) *The American Review of International Arbitration* 483, <https://doi.org/10.54648/asab2016046>

challenging arbitrators' decisions and applications for the annulment of awards on the basis of arbitrator bias have increased.<sup>42</sup> They are considered as providing the relevant criteria for assessing the impartiality and independence of a challenged arbitrator.

However, a number of concerns were raised by legal scholarship and jurisprudence regarding their application.

The first is rooted in their soft law character, subjecting the IBA Guidelines to a major limitation regarding their invocation. Arbitral tribunals have ruled differently on whether the Guidelines are to be followed or not. The ICC International Court of Arbitration explicitly stated that the articles do not bind the Court; any reference to them, even by the Court itself, does not mean an acceptance of their normative status.<sup>43</sup> This is further mirrored in the statistics published by the ICC which showed that, of the analysed cases from between 2012 and 2015 only 28.4% of them referred to the IBA Guidelines.<sup>44</sup>

The soft character of the Guidelines was reflected in the case of *W Limited vs. M SDN BHD*.<sup>45</sup> The UK High Court of Justice ruled on the challenge of an arbitrator claiming apparent bias, based on an alleged conflict of interest regarding regular legal services rendered by the law firm of the arbitrator to an affiliate of one of the parties in question. Although the court referred to item 1.4 of the red list in the IBA Guidelines as covering the situation, it decided that there were no doubts as to the independence of the arbitrator. This suggests that situations described in the lists of the IBA Guidelines do not necessarily result in the partiality and therefore the disqualification of an arbitrator. Since each factual situation is different and is to be assessed on a case-by-case basis,<sup>46</sup> the listing cannot be comprehensive and all-embracing.<sup>47</sup>

Similarly, US courts and tribunals refused to rely on the Guidelines on several occasions, despite the fact that the parties before them had made explicit references to them. This was the case on the appeals stage in the *Aimcor* case, where, despite the fact that the District Court relied on them, the Court of Appeals adopted a different standard of disclosure from that set out in the Guidelines.<sup>48</sup> In the *HSN Capital LLC (USA) v Productora y*

<sup>42</sup> Margaret Moses, 'The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges' Kluwer Arbitration Blog, 23 November 2017, <<https://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/>> accessed 15 February 2023.

<sup>43</sup> Anne Marie Whitesell, 'Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators' (2007) 36 ICC International Court of Arbitration Bulletin; Jason Fry, Simon Greenberg, 'Appendix: References to the IBA Guidelines on Conflicts of Interest in International Arbitration When Deciding on Arbitrator Independence, ICC Cases' (2009) 20 ICC International Court of Arbitration Bulletin 33.

<sup>44</sup> Arbitrator Challenges Under the ICC Rules and Practice. 8., ICC Digital Library.

<sup>45</sup> *W Limited v M SDN BHD*, Case No CL-2015-000344, [2016] EWHC 422, para 36.

<sup>46</sup> Bernasconi-Osterwalder, Johnson, Marshall (n 23) 31; IBA Guidelines, part I (6)(a).

<sup>47</sup> Joelson (n 41) 1.

<sup>48</sup> *Applied Industrial Materials Corp v Ovalar Makine Ve Ticaret Sanayi*, 492 F.3d 132, C A 2 (N Y) (9 July 2007).

*Comercializador de Televisión SA de CV* ICC arbitration, the US District Court in Florida also refused to accept the Guidelines despite the respondent's express reliance on them.<sup>49</sup>

Moreover, a vast number of interpretative and codificatory uncertainties surround the IBA Guidelines. The impartiality standard applicable in international arbitration is codified differently in different instruments, and law and practice in commercial and investment arbitration in fact establish differing tests through interpretation. The Guidelines provide us with the wording 'justifiable doubts,' worded also to mean the mere appearance of a standard of bias. The UNCITRAL Model Law<sup>50</sup> applies the justifiable doubts test as interpreted for instance in the case of *AWG Group Ltd. v Argentine Republic*,<sup>51</sup> and the heavy burden on the challenging party posed by the ICSID Convention<sup>52</sup> certainly requires more than justifiable doubts, as interpreted in the case of *Suez and Others v Argentine Republic*.<sup>53</sup> Due to these differences, the Guidelines and codes can hardly provide assistance for one another and reflect the heterogenous acceptance of the different standards.<sup>54</sup>

Regarding questions of interpretation, arbitral tribunals tend to interpret the impartiality standard codified in the IBA Guidelines differently due to the ambiguous wording of the article, the open-ended list of scenarios for disclosure, and the lack of any guidance as to the effect of those disclosures on the outcome of challenges and annulments.

The Guidelines provide that an arbitrator is impartial if 'facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence'.<sup>55</sup> The article continues by defining justifiable doubts as 'doubts [which] are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision'.<sup>56</sup>

The above wording, however, causes confusion as to whether mere apparent bias is enough to disqualify an arbitrator, or such bias must in some way be further justified to

<sup>49</sup> *HSN Capital LLC (USA) v Productora y Comercializador de Televisión SA de CV (Mexico)*, 2006 WL 1876941 (M D Fla) (5 July 2006).

<sup>50</sup> UN Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985 (UN Doc A/40/17) with amendments adopted in 2006 (Model Law).

<sup>51</sup> *AWG Group Limited v Argentine Republic* (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008) UNCITRAL Arbitration, 22.

<sup>52</sup> *ICSID Convention, Regulations and Rules*. Washington, D.C., 2003.

<sup>53</sup> ICSID Case No. ARB/03/19, 29, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008).

<sup>54</sup> Bernasconi-Osterwalder, Johnson, Marshall (n 23) 18.

<sup>55</sup> IBA Guidelines, General Standard 2, paragraph b).

<sup>56</sup> IBA Guidelines, General Standard 2, paragraph c).

raise legitimate concerns. This confusion translates into frequent controversies about the applicability of IBA standards.

In most cases the standard of justifiable doubts has been interpreted as meaning apparent bias and not actual bias.<sup>57</sup> In the *Case of I ZB*, the German Federal Supreme Court found that the judge was disqualified for objective reasons and this was irrespective of whether bias actually occurred.<sup>58</sup> The tribunal in *Vivendi v Argentina* also had to rule on impartiality and, by way of relying on the IBA Code of Ethics, adopted the appearance of bias standard.<sup>59</sup>

However, the Guidelines were also invoked during the challenge procedure of Judge Greenwood in the course of the *Mauritius v United Kingdom* arbitration, where the Permanent Court of Arbitration reflected on their value by stating that rules adopted by non-governmental institutions such as the IBA Guidelines do not form part of a general practice accepted as law, nor do they fall within any other of the sources of international law enumerated in the ICJ Statute.<sup>60</sup> In line with the arguments of the United Kingdom, the PCA denied the application of the apparent bias standard and stated that a party challenging an arbitrator must demonstrate and prove that there are justifiable grounds for doubting the independence and impartiality of the challenged arbitrator.<sup>61</sup>

As seen from the above, the international jurisprudence regarding the IBA Guidelines and the standards included therein – although generally reflecting its best practice status – tends to follow an explicitly case-by-case approach. This, willingly or not, results in removing a level of practical uniformity and normativity from the IBA Guidelines. Despite this, there are a number of states where the Guidelines are incorporated into national legislation, and domestic court practice makes consistent reference to them in a high number of states.

<sup>57</sup> Otto L. O. De Witt Wijnen, Nathalie Voser, Neomi Rao, 'Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration' (2004) 5 (3) *Bus. L. Int'l* 433; *Pullar v United Kingdom*, no. 20/1995/526/612, 10 June 1996, §§ 30, 33; *Vito G. Gallo v Government of Canada* (Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 Oct. 2009) NAFTA/UNCITRAL, 19.

<sup>58</sup> Susanne Keck, Niharika Dhall, 'Setting Aside of Arbitral Award Due to Improper Constitution of the Tribunal' *Kluwer Arbitration Blog*, 27 August 2015, <<https://arbitrationblog.kluwerarbitration.com/2015/08/27/setting-aside-of-arbitral-award-due-to-improper-constitution-of-the-tribunal/>> accessed 15 February 2023.

<sup>59</sup> ICSID Case No. ARB/97/3, 20, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v Argentine Republic)* (Decision on the Challenge to the President of the Committee, 3 October 2001).

<sup>60</sup> *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Reasoned Decision on Challenge)* (2011), para 167.

<sup>61</sup> *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Reasoned Decision on Challenge)* (2011), para 167.

## VI An International Outlook on the Acceptance and Application of the IBA Guidelines

Arbitration rules and case law both provide useful guidance, as well as some clarity as to the application of the IBA Guidelines and the considerations that arbitrators should bear in mind with regard to their compliance with their duty of independence and impartiality. As will be seen below, three categories may be distinguished based on the general pattern of compliance by States with the IBA Guidelines and their implementation: (1) countries whose national legislation and institutional rules have been based on or refer to the IBA Guidelines, (2) countries whose legislation does not reflect or explicitly refer to the Guidelines, but where they are applied in practice, and (3) those without any general reliance on them.

### 1 States whose National Regulations and Institutional Rules are Based on or Refer to the IBA Guidelines

There are a number of states whose arbitration laws are based on or explicitly make reference to the IBA Guidelines with respect to the rules on arbitrator impartiality and independence and ethical expectations formulated towards arbitrators. As regards, for example, the practice of the *Russian Federation*, mention must be made of the Rules on Impartiality and Independence of Arbitrators adopted by the Russian Chamber of Commerce and Industry on 27 August 2010 (Russian Rules). Although the rules are non-binding, they seek to take into account the best practices of arbitration in the material area, in particular the IBA Guidelines,<sup>62</sup> and were endorsed by the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry, and by the management board of the Russian Centre for Assistance to Arbitration.<sup>63</sup> The adoption of the Russian Rules followed a number of cases in which Russian courts annulled arbitral awards on the grounds of alleged bias or lack of impartiality on the part of an arbitrator, such as in *Yukos Capital v Rosneft*, where four awards issued by the International Court of Commercial Arbitration of the Moscow Chamber of Commerce were set aside for the failure of a party-nominated arbitrator to disclose that he had spoken at conferences co-sponsored by the law firm of Yukos Capital.<sup>64</sup>

<sup>62</sup> As the Russian Rules on Impartiality and Independence of Arbitrators has been adopted in 2010, it must be noted that it incorporates the 2004 version of the IBA Guidelines on Conflicts of Interest in International Arbitration.

<sup>63</sup> *IBA Arbitration Country Guide* prepared by the Arbitration Committee of the International Bar Association – Russian Federation, 10. The IBA Arbitration Country Guides are accessible at: <[https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Arbcountryguides#arbitrationguides](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides#arbitrationguides)> accessed 15 February 2023.

<sup>64</sup> Patricia Nacimiento, 'Recognition and enforcement of annulled arbitral awards – the Yukos Capital decision' *Kluwer Arbitration Blog*, 14 October 2009, <<https://arbitrationblog.kluwerarbitration.com/2009/10/14/recognition-and-enforcement-of-annulled-arbitral-awards-the-yukos-capital-decision/>> accessed 15 February 2023.

Similarly, the corresponding regulation of *India* also incorporates the main findings of the IBA Guidelines.<sup>65</sup> The amendments to the Indian Arbitration and Conciliation Act of 1996 directly adopted the international best practices included in the IBA Guidelines in 2015.<sup>66</sup> The amendment not only attempted to strengthen the neutrality of arbitrators but, by listing the grounds and circumstances that would give rise to justifiable doubts as to the independence or impartiality of an arbitrator, it also explained the circumstances under which such arbitral appointments may be challenged.<sup>67</sup>

The IBA Guidelines have been increasingly recognised in *Japan* since their first introduction in 2004. The Japan Association of Arbitrators, which was established to provide professional training to arbitrators and promote the application of arbitration in Japan, published a Code of Ethics for arbitrators in 2008<sup>68</sup> and also substantively amended its institutional arbitration rules in order to change the scope of arbitrators' duties to ensure impartiality. As for the relevant Japanese jurisprudence, mention must be made of a case before the Supreme Court of Osaka, in which the court has overturned the decision of the Osaka High Court regarding the extent of disclosure by arbitrators in the event of a possible conflict of interest, as required by both Japan's Arbitration Act and international best practice under the IBA Guidelines.<sup>69</sup>

Further addressing the Asian continent's arbitral practice, namely that of *Vietnam*, *Malaysia* and *China*, one may observe that the relevant regulations of all of these States and their local arbitration institutions reflect the general principles related to impartiality, independence and disclosure of conflicts contained in the IBA Guidelines. For instance, the guidelines provided for arbitrators by the Vietnam International Arbitration Centre were drafted by way of referring to and adopting some parts of the IBA Guidelines.<sup>70</sup> The Guidelines have also been frequently discussed and used in Malaysian practice and jurisprudence. Both the Pertubuhan Arkitek Malaysia and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) have specific declaration forms to be submitted by all arbitrators before their appointment, and the KLRCA's Code of Conduct for Arbitrators incorporates the IBA Guidelines on Conflict of Interest as a point of reference.<sup>71</sup> The general principles stipulated in the IBA Guidelines are also reflected in the ethical codes of Chinese local arbitration institutions. The CIETAC Code of Ethics for Arbitrators contains separate provisions resembling the Red List and the Orange List of the IBA Guidelines.<sup>72</sup>

<sup>65</sup> *IBA Arbitration Country Guide – India*, 13.

<sup>66</sup> The Ordinance of the President of India issued on 23 October 2015 amending the Arbitration and Conciliation Act, 1996.

<sup>67</sup> Apoorva J. Patel, 'Evaluating the reforms to India's arbitration regime' IBANet, 6 January 2017, <<https://www.ibanet.org/Article/Detail.aspx?ArticleUid=d4f5de8f-5df2-4f59-8f74-6ebf766323dd>> accessed 7 February 2023.

<sup>68</sup> *IBA Arbitration Country Guide – Japan*, 11.

<sup>69</sup> Supreme Court Third Bench decision on 12 December 2017, Case No. Heisei 28 (Kyo) 43.

<sup>70</sup> *IBA Arbitration Country Guide – Vietnam*, 14.

<sup>71</sup> *IBA Arbitration Country Guide – Malaysia*, 14.

<sup>72</sup> *IBA Arbitration Country Guide – China*, 12.

Courts and tribunals in *Switzerland* also frequently rely on the Guidelines. In 2008, the Swiss Federal Supreme Court reflected on the IBA Guidelines, stating that although they do not have the same value as statutory law, they nevertheless constitute a valuable tool to influence the practice of Swiss institutions and courts.<sup>73</sup> In another notable case, the Swiss Federal Supreme Court examined a possible failure of disclosure on the part of an arbitrator of a Swiss law firm and in acquitting him, it cited the Green list of the IBA Guidelines to argue that the circumstance in question was not a ground to challenge the arbitrator.<sup>74</sup> In 2021, the legislative revisions to Chapter 12 of the Swiss Private International Law Act reinforced party autonomy and codified leading Federal Supreme Court decisions. Article 179(6) now regulates the arbitrator's duty to disclose, without delay, any facts which could raise legitimate doubts regarding independence or impartiality.<sup>75</sup> Article 180 codifies the grounds for challenging an arbitrator, including circumstances that give rise to justifiable doubts as to the arbitrator's independence or impartiality. These modifications embody the principles of the IBA Guidelines that had already been referenced by courts.

As for *Finland's* stance with regard to the IBA Guidelines, the Finnish Code of Judicial Procedure contains specific rules on conflict of interest of arbitrators, and the circumstances deemed relevant in this regard are mostly the same as the circumstances mentioned in the IBA Guidelines. Furthermore, in the guidelines provided to arbitrators by the Arbitration Institute of the Finland Chamber of Commerce, the IBA Guidelines are explicitly referenced as an instrument to be followed when assessing possible conflicts of interest.<sup>76</sup>

## 2 Countries where the IBA Guidelines are Commonly Referred to in Jurisprudence

In the second category, we may find states whose relevant legislation is not explicitly based on or referring to the IBA Guidelines but in principle correlates with the directions set out in the IBA Guidelines and its jurisprudence makes reference to them. Certain notable examples will be examined in more detail below.

*Colombian* jurisprudence reflects on international best practices in the material area.<sup>77</sup> A notable example is in *Tampico Beverages Inc. v Productos Naturales de la Sabana S.A. Alquería* decided by the Colombian Supreme Court in 2017. Alquería requested the denial of the enforcement of an arbitration award based on the circumstance that Tampico's counsel was an arbitrator in a previous ICSID case in which its party-appointed arbitrator was counsel. The Supreme Court first had recourse to the Colombian Arbitration Act,

<sup>73</sup> *IBA Arbitration Country Guide – Switzerland*, 11.

<sup>74</sup> Decision n. 4A\_386/2015 of the Swiss Federal Supreme Court, 7 September 2016.

<sup>75</sup> Catherine Anne Kunz, Courtney Furner, 'International Arbitration 2022 – Switzerland, International Arbitration Laws and Regulations 2022' (ed. Joe Tirado Garrigues).

<sup>76</sup> *IBA Arbitration Country Guide – Finland*, 11.

<sup>77</sup> *IBA Arbitration Country Guide – Colombia*, 8.

in connection with which it noted that its relevant article<sup>78</sup> does not provide for specific grounds for challenging arbitrators. In the absence of such an explicit legal basis, the Supreme Court went on to examine relevant international standards. It noted that the IBA Guidelines reflect the practice of the arbitral community, which indicates that these guidelines are frequently used by arbitral institutions, and concluded that none of the situations listed in the Guidelines were met in the material case.

The IBA Guidelines are frequently followed by Italian arbitration practitioners as well.<sup>79</sup> Pursuant to the 2016 Report on the Reception of the IBA Arbitration Soft Law Products in Italy, the IBA Guidelines were referenced in 53 percent of relevant arbitral cases and practitioners frequently consulted the Guidelines when deciding on questions of disclosure.<sup>80</sup> As to the application of the Guidelines in national jurisprudence, however, there appear to be not much relevant case law where the IBA Guidelines were directly applied.<sup>81</sup>

Besides the above-detailed examples, arbitral practice in several other States consistently shows the Guidelines' wide acceptance and reliance on them. The table below provides the reader with a summary of the reception and handling of the IBA Guidelines among the members of the international community.

<b>Country name</b>	<b>Status of the IBA Guidelines as referenced in the IBA Arbitration Guides</b>	<b>Relevant national legislation stipulating the impartiality and independence of arbitrators</b>
<b>Australia</b>	The Guidelines are frequently used and cited by arbitrators and counsel. <sup>82</sup>	International Arbitration Act of 1974 and its revision of 2010
<b>Austria</b>	The Guidelines are referred to in practice from time to time. <sup>83</sup>	Sections 587-588 of the Law of 1 August 1895 Austrian Code of Civil Procedure, RGBl. Nr. 113/1895 as amended by the 2013 Amendment to the Austrian Arbitration Act
<b>Belgium</b>	Arbitrators tend to refer to the specific lists included in the Guidelines. <sup>84</sup>	Belgian Law on Arbitration included as Title I VI in the Belgian Judicial Code

<sup>78</sup> Colombian Arbitration Act (Law No. 1563), Article 75.

<sup>79</sup> *IBA Arbitration Country Guide – Italy*, 13.

<sup>80</sup> IBA Arbitration Guidelines and Rules Subcommittee, Report on the Reception of the IBA Arbitration Soft Law Products, 16 September 2016, <<https://dernegocios.uexternado.edu.co/wp-content/uploads/sites/2/2016/09/IBAsoftlawArbproducts-ArbGuidelinesandRulesSubcommittee-2.pdf>> accessed 15 February 2023, para 120.

<sup>81</sup> Report on the Reception of the IBA Arbitration Soft Law Products (n 80) para 167.

<sup>82</sup> *IBA Arbitration Country Guide – Australia*, 8.

<sup>83</sup> *IBA Arbitration Country Guide – Austria*, 10.

<sup>84</sup> *IBA Arbitration Country Guide – Belgium*, 12.

Country name	Status of the IBA Guidelines as referenced in the IBA Arbitration Guides	Relevant national legislation stipulating the impartiality and independence of arbitrators
<b>Brazil</b>	Grounds in the Brazilian Code of Civil Procedure are similar to the red and orange lists, and it is common for the parties, arbitral institutions or the tribunal to refer to the Guidelines as relevant authority. <sup>85</sup>	Brazilian Arbitration Act – Federal Law n. 9307/1996
<b>Bulgaria</b>	The standards established by the Guidelines are generally applied in Bulgaria. <sup>86</sup>	International Commercial Arbitration Act of 1988
<b>Canada</b>	The Guidelines are frequently consulted by tribunals and courts. <sup>87</sup>	Code of Civil Procedure
<b>Chile</b>	The Guidelines are commonly used in international arbitrations with seat in Santiago, Chile. <sup>88</sup>	Code of Civil Procedure, 1902
<b>Croatia</b>	The Guidelines are taken into account. <sup>89</sup>	Croatian Arbitration Act Official Gazette no. 88/2001
<b>Ecuador</b>	The Guidelines are followed by the arbitral institutions. <sup>90</sup>	Constitution of Ecuador; Arbitration and Mediation Law
<b>Denmark</b>	The Guidelines are widely recognised and applied. <sup>91</sup>	Danish Arbitration Act
<b>England and Wales</b>	The Guidelines are commonly used and courts derive assistance from them when considering a challenge. <sup>92</sup>	Arbitration Act 1996; Solicitors' Code of Conduct 2011; Barristers' Code of Conduct 2000
<b>Germany</b>	The Guidelines influenced German arbitration case law and are recognised by German courts. <sup>93</sup>	German Code of Civil Procedure
<b>Ghana</b>	The Guidelines are sometimes used. <sup>94</sup>	Alternative Dispute Resolution Act

<sup>85</sup> *IBA Arbitration Country Guide* – Brazil, 14.

<sup>86</sup> *IBA Arbitration Country Guide* – Bulgaria, 10.

<sup>87</sup> *IBA Arbitration Country Guide* – Canada, 11

<sup>88</sup> *IBA Arbitration Country Guide* – Chile, 13

<sup>89</sup> *IBA Arbitration Country Guide* – Croatia, 10.

<sup>90</sup> *IBA Arbitration Country Guide* – Ecuador, 11.

<sup>91</sup> *IBA Arbitration Country Guide* – Denmark, 7.

<sup>92</sup> *IBA Arbitration Country Guide* – England and Wales, 10.

<sup>93</sup> *IBA Arbitration Country Guide* – Germany, 10.

<sup>94</sup> *IBA Arbitration Country Guide* – Ghana, 6.

Country name	Status of the IBA Guidelines as referenced in the IBA Arbitration Guides	Relevant national legislation stipulating the impartiality and independence of arbitrators
<b>Greece</b>	It is quite common to use the Guidelines as a guide. <sup>95</sup>	Law 2735/1999 on International Arbitration; Greek Code of Civil Procedure
<b>Hong Kong</b>	There is no requirement to use the Guidelines, but parties may agree to apply them. <sup>96</sup>	The Hong Kong Arbitration Ordinance
<b>Hungary</b>	The Guidelines are usually followed. <sup>97</sup>	Act LX of 2017 on Arbitration
<b>Indonesia</b>	Most professional arbitrators are cognisant of the Guidelines and tend to respect them. <sup>98</sup>	Law Number 30 Year 1999 – Arbitration Law
<b>Ireland</b>	The Guidelines are widely used. <sup>99</sup>	Arbitration Act of 2010
<b>Lebanon</b>	In substance, the Lebanese Code of Civil Procedure mirrors the Guidelines, which serve as a useful source and are consulted in practice <sup>100</sup>	Lebanese Code of Civil Procedure
<b>Lithuania</b>	The Guidelines are commonly applied in practice. <sup>101</sup>	Law on Commercial Arbitration
<b>Luxembourg</b>	The Guidelines are commonly used as reference. <sup>102</sup>	Luxembourg New Code of Civil Procedure
<b>Mexico</b>	It is common that arbitral tribunals and arbitration institutions take the Guidelines into consideration <sup>103</sup>	Commerce Code
<b>Netherlands</b>	The Guidelines are applied in international arbitrations seated in the Netherlands, and used as guidance in domestic arbitrations. <sup>104</sup>	2015 Amendment of the Dutch Arbitration Act

<sup>95</sup> *IBA Arbitration Country Guide* – Greece, 8.

<sup>96</sup> *IBA Arbitration Country Guide* – Hong Kong, 11.

<sup>97</sup> *IBA Arbitration Country Guide* – Hungary, 9.

<sup>98</sup> *IBA Arbitration Country Guide* – Indonesia, 10.

<sup>99</sup> *IBA Arbitration Country Guide* – Ireland, 7.

<sup>100</sup> *IBA Arbitration Country Guide* – Lebanon, 8–9.

<sup>101</sup> *IBA Arbitration Country Guide* – Lithuania, 10.

<sup>102</sup> *IBA Arbitration Country Guide* – Luxembourg, 12.

<sup>103</sup> *IBA Arbitration Country Guide* – Mexico, 10.

<sup>104</sup> *IBA Arbitration Country Guide* – Netherlands, 9.

<b>Country name</b>	<b>Status of the IBA Guidelines as referenced in the IBA Arbitration Guides</b>	<b>Relevant national legislation stipulating the impartiality and independence of arbitrators</b>
<b>Romania</b>	The Guidelines are followed voluntarily by the arbitrators. <sup>105</sup>	Romanian Civil Procedural Code
<b>Nigeria</b>	The Guidelines are often used as guidance. <sup>106</sup>	Arbitration and Conciliation Act, Cap A19, Laws of the Federation of Nigeria, 2004
<b>Peru</b>	The Guidelines are employed as illustrative criteria. <sup>107</sup>	Arbitration Act Legislative Decree 1071 of 2008
<b>Poland</b>	The Guidelines are generally adopted in practice. <sup>108</sup>	Code of Civil Procedure of 1964
<b>Portugal</b>	The Guidelines are referenced in several state court decisions. <sup>109</sup>	Portuguese Arbitration Law
<b>Scotland</b>	Regard is commonly had to the Guidelines. <sup>110</sup>	Arbitration Act of 2010
<b>Senegal</b>	The Guidelines have recently been used as best practice. <sup>111</sup>	Decree No 98-492; Arbitration Act No 98-30 dated 14 April 1998
<b>Singapore</b>	The Guidelines are frequently referred to. <sup>112</sup>	The Arbitration Act and the International Arbitration Act
<b>South Africa</b>	The Guidelines are increasingly followed. <sup>113</sup>	Arbitration Act of 1965
<b>South Korea</b>	The Guidelines gained increasing prominence and influence, and the judicial standards appear to be largely consistent with them. <sup>114</sup>	Korean Arbitration Act
<b>Spain</b>	The Guidelines are frequently followed. <sup>115</sup>	Arbitration Act 60/2003 of 23 December

<sup>105</sup> *IBA Arbitration Country Guide* – Romania, 8.

<sup>106</sup> *IBA Arbitration Country Guide* – Nigeria, 10.

<sup>107</sup> *IBA Arbitration Country Guide* – Peru, 10.

<sup>108</sup> *IBA Arbitration Country Guide* – Poland, 10–11.

<sup>109</sup> *IBA Arbitration Country Guide* – Portugal, 12.

<sup>110</sup> *IBA Arbitration Country Guide* – Scotland, 11.

<sup>111</sup> *IBA Arbitration Country Guide* – Senegal, 7.

<sup>112</sup> *IBA Arbitration Country Guide* – Singapore, 11.

<sup>113</sup> *IBA Arbitration Country Guide* – South Africa, 9.

<sup>114</sup> *IBA Arbitration Country Guide* – South Korea, 8.

<sup>115</sup> *IBA Arbitration Country Guide* – Spain, 13.

### 3 Countries with Generally No Reliance on the IBA Guidelines

Third, one may identify countries with no specific rules or codes of conduct concerning conflicts of interest for arbitrators and generally no reliance on the IBA Guidelines. Pursuant to the country-specific reports prepared by the Arbitration Committee of the IBA in which the Association specifically analysed the practice of States in connection with the IBA Guidelines, Argentina,<sup>116</sup> Egypt,<sup>117</sup> the Czech Republic,<sup>118</sup> El Salvador,<sup>119</sup> France,<sup>120</sup> New Zealand,<sup>121</sup> Saudi Arabia,<sup>122</sup> Thailand,<sup>123</sup> Turkey,<sup>124</sup> Ukraine,<sup>125</sup> the United Arab Emirates,<sup>126</sup> the United States<sup>127</sup> and Venezuela<sup>128</sup> do not generally apply or rarely apply the IBA Guidelines in their corresponding jurisprudence.

## VII An Outlook on Hungarian Practice

In the following section, the article will provide the reader with a glimpse into how the IBA Guidelines are reflected on in Hungarian arbitral and judicial practice. The lack of independence or impartiality is a ground for challenging arbitrators under the arbitration procedure set out in the Hungarian Arbitration Act. If the arbitrator does not accept the challenge, or if one of the parties believe that the arbitral process or the outcome of the arbitration was influenced by certain conflicts of interests, such a claim can be brought before a civil court. Accordingly, the IBA Guidelines was referenced in several court cases concerning the annulment of arbitral awards.

In case Gfv. 30.141/2010/24, the Supreme Court has deemed the IBA Guidelines to be an internationally accepted document in the field of arbitrator impartiality. The case concerned an arbitration between two companies regarding their sale and purchase agreements for certain real estate, and the request for annulment submitted against the arbitral award of the Hungarian Chamber of Commerce and Industry, and the second instance court decision confirming the award. The claimant, when arguing for the partial and dependent conduct

<sup>116</sup> *IBA Arbitration Country Guide* – Argentina, 11.

<sup>117</sup> *IBA Arbitration Country Guide* – Egypt, 9.

<sup>118</sup> *IBA Arbitration Country Guide* – Czech Republic, 9.

<sup>119</sup> *IBA Arbitration Country Guide* – El Salvador, 8.

<sup>120</sup> *IBA Arbitration Country Guide* – France, 9.

<sup>121</sup> *IBA Arbitration Country Guide* – New Zealand, 12.

<sup>122</sup> *IBA Arbitration Country Guide* – Saudi Arabia, 14.

<sup>123</sup> *IBA Arbitration Country Guide* – Thailand, 9.

<sup>124</sup> *IBA Arbitration Country Guide* – Turkey, 11.

<sup>125</sup> *IBA Arbitration Country Guide* – Ukraine, 11.

<sup>126</sup> *IBA Arbitration Country Guide* – United Arab Emirates, 12.

<sup>127</sup> *IBA Arbitration Country Guide* – United States, 9.

<sup>128</sup> *IBA Arbitration Country Guide* – Venezuela, 10.

of the judges in the arbitral proceedings as a basis for annulment, argued that Hungarian court practice has adopted and followed the practice of the IBA.<sup>129</sup> When addressing the claimant's submission, the Supreme Court stated that the IBA Guidelines assist courts in deciding on which connections arbitrators must disclose, and although the IBA Guidelines is not a legislative act, they serve as guidance for judges to decide on arbitrators' obligation of disclosure.<sup>130</sup> In its reasoning, the Supreme Court did not reject the lower courts' and the claimant's reliance on the IBA Guidelines and did not object to its applicability; it only contested how lower courts applied its relevant provisions.<sup>131</sup>

This decision was later reaffirmed in case *Gfv. 30.299/2012/12* of the new Supreme Court of Hungary (the Curia). The case likewise concerned a request for annulment on the basis of the arbitrators' impartiality and independence. When addressing whether membership of the same Bar Association is a fact to be disclosed, the Curia stated that although the IBA Guidelines do not contain legislative provisions, as a document based on international arbitration practice, it may help courts in deciding whether the appointed arbitrator should have disclosed a particular relationship to the parties.<sup>132</sup> Consequently, if the arbitrators in a particular case considered that, although they are members of the same Bar Association, they are not in a close or dependent relationship with the parties' legal representatives and the nature of their relationship does not affect their independence and impartiality, such a distant relationship need not be disclosed.<sup>133</sup>

BH 2013.100., a judicial decision of principle status adjudicated upon by the Curia in 2013, has provided similar conclusions. The case concerned an arbitration regarding the claimant's request for the repayment of a certain instalment of the purchase price under the sale and purchase contract between the parties, and the respondents' request for annulment of the judicial decision annulling the arbitral award. Similarly to the previous case, the case turned on arguments regarding the partiality and dependence of one of the arbitrators on the bases of his membership of the same Bar Association as one of the legal representatives and in the Hungarian Academy of Sciences as one of the respondents. Despite flagging the non-binding nature of the IBA Guidelines, a Hungarian court once again stressed their importance and influential role, and applied their provisions when dealing with a request for annulment. As the Curia stated, the IBA Guidelines are intended to assist arbitrators in particular in deciding when to decline an arbitrator appointment, and which of their relationships with the parties they should disclose.<sup>134</sup> It may also assist courts in assessing whether a failure to disclose a relationship is contrary to the requirements of a fair hearing.<sup>135</sup>

<sup>129</sup> Supreme Court of Hungary *Gfv. 30.141/2010/24*, 8.

<sup>130</sup> Supreme Court of Hungary *Gfv. 30.141/2010/24*, 10.

<sup>131</sup> Supreme Court of Hungary *Gfv. 30.141/2010/24*, 11.

<sup>132</sup> Curia of Hungary, *Gfv. 30.299/2012/12*, 10.

<sup>133</sup> Curia of Hungary, *Gfv. 30.299/2012/12*, 10.

<sup>134</sup> BH 2013.100., 1, 4.

<sup>135</sup> BH 2013.100., 1, 4.

The Guidelines were further invoked in case Pfv. 20.757/2017/7, where the Curia as a court of review adjudicated the claimants' claim against the Metropolitan Court of Budapest for compensation for damages caused by judicial proceedings. The claimants alleged that the Metropolitan Court failed to correct the shortcomings of the arbitral tribunal regarding the unlawful conduct of arbitrators. Lower courts extensively argued with references to the Guidelines, and notably did so without mentioning the legal character of the document. The Curia has nevertheless affirmed such arguments and upheld the decision in force.

Echoing the above decisions, and applying the IBA Guidelines when deciding on obligations of disclosure, and issues of independence and impartiality, Hungarian courts have consistently made reference to the document in their further decisions on arbitral annulment requests and relating claims.<sup>136</sup> The fact that courts applied the guidance of the IBA despite the recurring explicit reference to the non-binding nature of the Guidelines shows the stark importance of soft law instruments as a special, distinct and constant source of influence in the field of international arbitration. Nevertheless, it likewise shows the ambiguous and paradoxical status of these soft law instruments as Hungarian courts – and as shown above, international arbitral tribunals – apply them despite (and right after) noting their unenforceable and non-binding nature.

## VIII Conclusion

As we have seen, the field of international arbitration evolved greatly in the past years, which resulted – among other things – in the accelerated growth and increased significance of soft law instruments. Although this article mainly focused on procedural soft law instruments, it is worth mentioning that soft law today also occupies several other rapidly developing fields, such as environmental law and sustainable development.

Although the value and contribution of these tools are indisputable, their application seems to blur the line between binding and non-binding norms in international law. As for procedural soft law instruments, such documents created by non-state actors are generally aimed at filling the void left by sovereign states for the parties to agree upon. However, in many instances, the void remains unfilled by the parties themselves in a concrete case, and the application of the soft law rule occurs without a normative obligation being initiated by the parties. This results in normative confusion regarding the status of these instruments, and questions the process and line between soft and hard rules of arbitration and international law.

This article aimed, firstly, at highlighting these legitimacy concerns, namely certain confusions about the normativity of soft law instruments, the flexibility of the arbitration

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<sup>136</sup> Gfv. 30.099/2011/7., Gfv. 30.016/2012/10., Gfv. 30.021/2012/3., Gfv. 30.262/2013/5.

regime, risks of the judicialisation of arbitration and contradictions between soft law instruments and institutional rules. Secondly, the article proceeded to identify the concerns in a specific field, that of the impartiality and independence of arbitrators. Based on the findings in the second part of the present article, it can be concluded that the IBA Guidelines are frequently applied and a very useful tool for identifying potential conflicts of interest. Nevertheless, even when referenced by tribunals, their normative status and the exact basis for their reference remains unclear.

Pursuant to the international outlook in Part VI above, the reader can become familiar with the three categories in which the reception of the IBA Guidelines within certain states can be distinguished. We can see that even if there are only a few countries explicitly basing their arbitral regulations on the Guidelines or whose arbitral institutions build upon these principles, and there are certain States whose reliance on them is absent, the majority of States at least adopts and follows them in practice as guidance for the application of rules on impartiality and independence in their national legislation. One of such states is Hungary, whose judicial stance on the IBA Guidelines was introduced in Part VII. However, it must also be borne in mind that the application of the IBA Guidelines is dependent on certain limitations, and contributes to the inconsistencies and legitimacy concerns echoed in legal scholarship regarding international arbitration.

Accordingly, the negative concerns, most importantly concerns regarding the legitimacy of the arbitral process, must be addressed. Without such legitimacy, the parties may lose confidence in the arbitral system, and the intended efficiency and certainty of the process will decline due to an increase in challenges to arbitrators and awards. Additionally, as pointed out by *Vera Korzun* in her article on soft law in the investment law context, ‘a threat of conversion of soft law into hard law [...] may deprive states a choice in designing legal agreements’.<sup>137</sup>

Addressing these concerns, discussions by the IBA regarding the international status of the Guidelines are recommended so that a more consistent and unified approach is taken as regards the level of normativity represented by the standards in light of the above-mentioned extensive international practice for their application. Such discussions should pay particular attention to providing judges and arbitrators with more guidance as to the effective but also mindful application of the Guidelines and other soft law instruments, addressing the paradoxical practice of applying such rules in parallel with pointing to their non-binding nature.

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<sup>137</sup> Vera Korzun, ‘Enforcing Soft Law in International Investment Arbitration’ (2023) 56 (1) *Vanderbilt Journal of Transnational Law* 63.