

Subcommittee on IBA Arbitration Guidelines and Rules Report – 5 Key Takeaways

The Report illustrates wide-spread use of IBA soft law instruments; provides snapshot of international arbitral practice and regional trends.

The Subcommittee on IBA Guidelines and Rules recently released the results of a two-year study, which included a survey with 845 meaningful responses and 55 country reports from all six global regions (the Report). The Report highlights the positive reception and wide-spread use of three practice guidelines and rules: the (i) IBA Rules on the Taking of Evidence in International Arbitration, 2010 (the Rules on Evidence); (ii) IBA Guidelines on Conflicts of Interest in International Arbitration, 2014 (the Conflicts of Interest Guidelines); and (iii) IBA Guidelines on Party Representation in International Arbitration, 2013 (the Party Representation Guidelines) (collectively, the Rules and Guidelines).

The Report

Survey responses and country reports were received from all regions: Europe, Latin America, Asia-Pacific, North America, the Middle East and Africa. Participants in the survey were counsel, arbitrators, case administrators, arbitration users and members of academia. Consequently, the Report is truly a snapshot of arbitral practice at an international level, and notes trends in regional arbitration markets of varying levels of sophistication.

The full Report is available for download at the [IBA Arbitration Committee's home page](#).

Fernando Mantilla-Serrano, Global Co-chair of Latham's International Arbitration Practice, serves as Chair of the Subcommittee on IBA Arbitration Guidelines and Rules. Associates Nora Fredstie and Diego Romero serve as Secretaries of the Subcommittee.

Key Takeaways

The Report first outlines how each of the Rules and Guidelines have been received in arbitral practice, case law and publications. Second, the Report provides a comprehensive analysis of the survey results, on which it bases a series of recommendations for the future. For its analysis, the Report draws on the 55 country reports received. The five key takeaways from the Report are:

1. The IBA Rules and Guidelines are well-received by the international arbitration community.

57% of arbitrations relied on the Conflicts of Interest Guidelines, 48% of arbitrations relied on the Rules on Evidence and 16% of arbitrations relied on the Party Representation Guidelines. These percentages are high given that the Rules and Guidelines will only be referred to when the issues the Rules address

arise in the relevant arbitration. Although the Rules and Guidelines are not binding, most decision-makers will refer to them in their decisions. This underlines the need for specialized practitioners who are intimately familiar with the Rules and Guidelines.

2. Most survey participants thought the Rules and Guidelines should remain unchanged.

While amendments to the Rules and Guidelines could be considered, there is no pressing need for the amendments at present.

3. The Rules and Guidelines are widely used and accepted.

This is evidence of successful self-regulation in international arbitration.

4. Most survey participants see no need for changes to the Rules on Evidence, although the rules on how and when to produce documents and provide them to the opposing party attracted several comments and suggested modifications.

Several common law lawyers considered the Rules on Evidence too civil law-oriented and thus too narrow, while civil law lawyers considered them too common law-orientated and thus too broad. The disagreement demonstrates that the Rules on Evidence may have indeed found a middle ground. However, this also illustrates the importance, when choosing an arbitrator, of the arbitrator's background, which may influence his or her interpretation of, and reliance on, the Rules on Evidence.

5. Most survey participants preferred that the Conflicts of Interest Guidelines remain unchanged; however, the guidelines concerning disqualification of an arbitrator on the basis of conflicts of interest garnered several comments and suggestions.

The Report highlights that the Conflicts of Interest Guidelines should continue to have an international approach with no exceptions for smaller jurisdictions or industries. However, the Report notes that the IBA may consider removing the automatic disqualification of arbitrators in specific circumstances (the so-called "red list") if all the parties, having been fully informed of the situation, consent to the arbitrator. In other words, the parties should be able to waive a conflict of interest in order to protect party autonomy. This ability to waive could also alleviate the problem of conflicts in smaller jurisdictions. If later revisions adopt this suggestion, a party should consider carefully whether consenting to an arbitrator who has a conflict of interest is in that party's best interest. Such a decision is case-specific, so parties should consult with counsel to strategically evaluate.

The Report addresses several other possible amendments, which could be considered for later revisions of the Rules and Guidelines, revisions the Report recommends should take place every 10 years.

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