SOFT LAW – IBA GUIDELINES

Columbia Law School's Global Law and Business Seminar

Patricia Saiz
Arbitrator
Member of the ICC Court
Professor at ESADE Law School

© 2023 – Patricia Saiz. All rights reserved.

Taking of Evidence

1

Conflicts of Interest

2

Party Representation

3

© 2023 – Patricia Saiz. All rights reserved.

Taking of Evidence

01

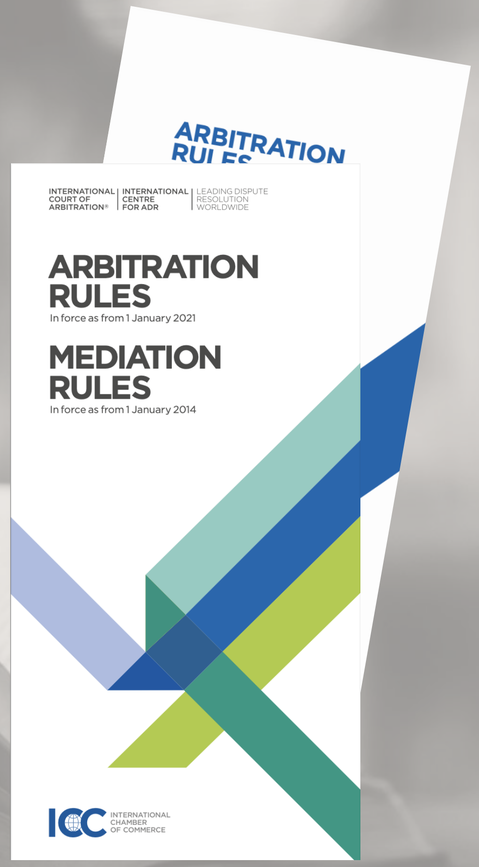
© 2023 – Patricia Saiz. All rights reserved.

Evidence

Establishing the facts of the case:

- Documentary Evidence
- Testimony of Witnesses of Facts
- Opinions of Experts Witnesses
- Inspection of the subject-matter of the dispute

© 2023 – Patricia Saiz. All rights reserved.



ICC Rules 2021, Article 25

ARTICLE 25

Establishing the Facts of the Case

1 The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

2 The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

3 The arbitral tribunal, after consulting the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.

4 At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.

5 The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

© 2023 – Patricia Saiz. All rights reserved.

But in an arbitration…

© 2023 – Patricia Saiz. All rights reserved.

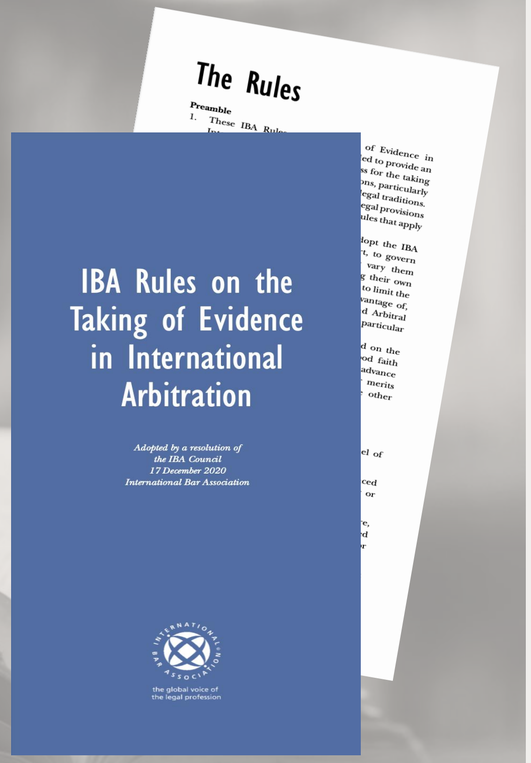
Main difference: amount of evidence **not in her possession** that a party can obtain in order to prove her claim

© 2023 – Patricia Saiz. All rights reserved.

https://www.youtube.com/watch?v=9YhNMKNBsfE&t=5s

2020 IBA Rules on Taking of Evidence

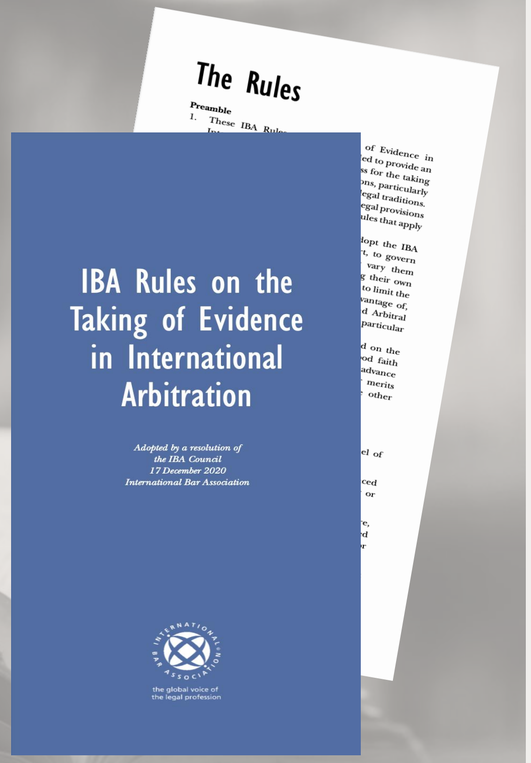
© 2023 – Patricia Saiz. All rights reserved.



2020 IBA Rules on the Taking of Evidence

- Non-binding rules to provide "*efficient, economic and fair process*" for the taking of evidence (Preamble)
- Issued in 1999, amended in 2010 and in 2020
- Commercial & investor-state arbitration
- Reflect procedures in different legal systems ➔ useful when the parties come from different legal cultures

© 2023 – Patricia Saiz. All rights reserved.



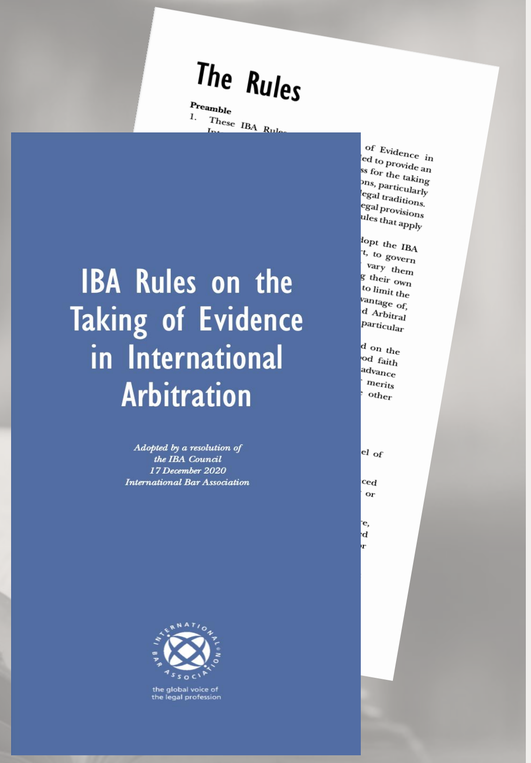
2020 IBA Rules on the Taking of Evidence

- **When do the Rules apply?**
  - Parties may agree to its use
  - The Arbitral Tribunal may order it
  - May also be used as a reference

© 2023 – Patricia Saiz. All rights reserved.

Document Production Requests

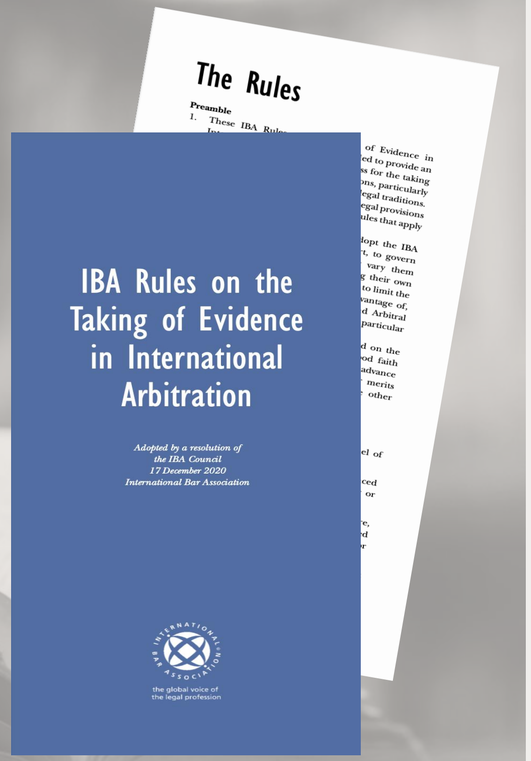
© 2023 – Patricia Saiz. All rights reserved.



Document Production Requests

- Becoming a norm
- Even if the rules do not explicitly provide for DP, tribunal has power to establish the facts by “all appropriate means”
- Tribunals often incorporate the **IBA Rules on the taking of evidence** as a guiding point in PO1

© 2023 – Patricia Saiz. All rights reserved.

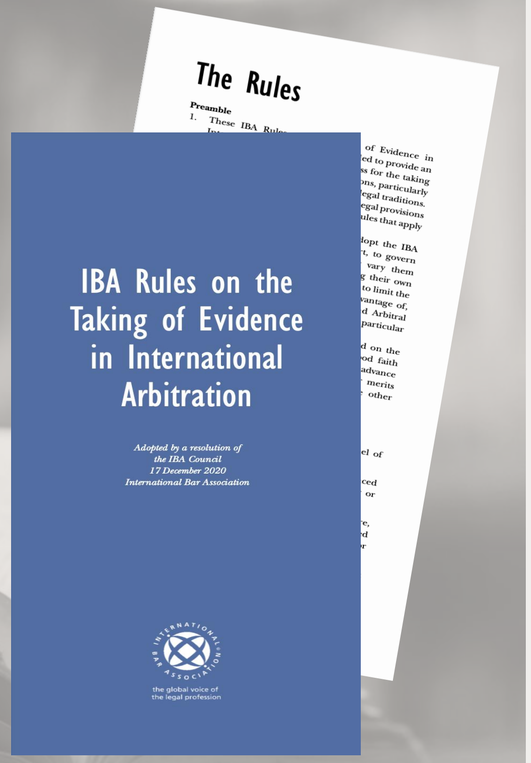


Document Production Requests

Article 3 Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:
   (a) *(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;
   (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
   (c) *(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.

© 2023 – Patricia Saiz. All rights reserved.



Grounds for refusing Document Production

ARTICLE 9 – ADMISSIBILITY AND ASSESSMENT OF EVIDENCE

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. 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, in whole or in part, for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable; (see Article 9.4 below);

(c) unreasonable burden to produce the requested evidence;

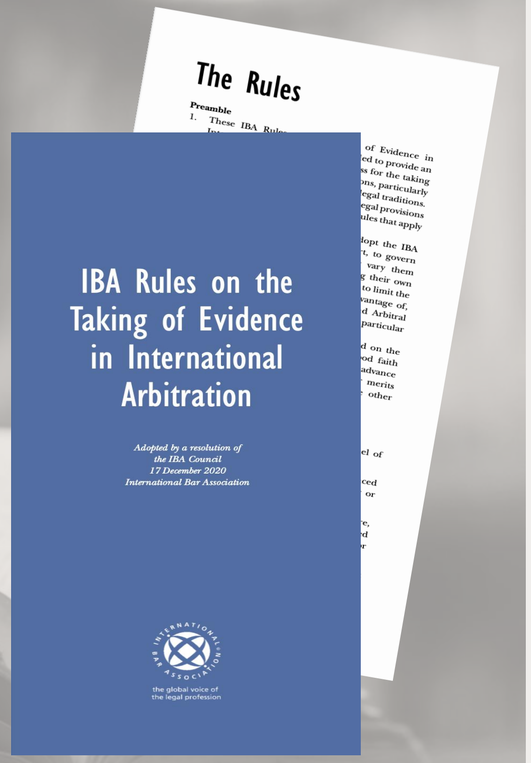
(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;

(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

© 2023 – Patricia Saiz. All rights reserved.



"The tribunal shall determine **admissibility, relevance, materiality and weight of evidence**." (IBA, Article 9(1))

Tribunal granted "**substantial measure of discretion**" regarding the production of evidence.

© 2023 – Patricia Saiz. All rights reserved.

Schedule

Document Production		
DPS Request	Both Parties	July 3, 2017
DPS Response	Both Parties	July 23, 2017
Production of non-contested Documents	Both Parties	August 1, 2017
DPS Response to Objections	Both Parties	August 1, 2017
Submission of DPS to Tribunal	Both Parties	September 5, 2017
Decision on DPS	Tribunal	September 25, 2017
Production of contested Documents and Affidavits	Both Parties	October 16, 2017

© 2023 – Patricia Saiz. All rights reserved.

Various tools

REDFERN SCHEDULE (SIMPLE)

1	2	3	4	5	6
No.	Documents or Category of Documents Requested	Reason for Request Relevance and Materiality According to Requesting Party	Responses / Objections by Responding Party	Reply to Objection to Produce	Tribunal's Decisions
1	**Scheduling**				
2	Commissioning Schedules	Commissioning schedules show commissioning scheduled Owner did not have other plant and Owner supplied equipment online in time for Contractor's commissioning	Agree to produce commissioning schedules for Plants 26 & 28 only;		
3					
4	**Manpower Information**				
5	Manpower Information and attempts to recruit manpower	Owner's attempts to hire manpower for other facilities constructed concurrently at site caused Contractor's labour shortages for specialty labour, causing delays and productivity losses	Refused. Contractor represented in Contract it had access to skilled labour force and Owner relied on this in awarding it the contract.		

SCE - Privilege Log (4/29/15)

In Response to Administrative Law Judges' Ruling, Investigation 12-10-013

Rpt#	Control#	Date	Record Type	Subject/Filename/Title [1]
1	001_0.7.1538.1434234	04/08/13	Mail	Confidential - First Draft
2	001_0.7.1538.1434234.1	04/08/13	Attch	Draft – CONFIDENTIAL – Attorney/client privileged, Subject to CPUC settlement Rules – 12.6
3	001_0.7.1538.1434267	04/08/13	Mail	*Confidential: Re: Re: Confidential - First Draft
4	CTRL1736453	04/09/13	Paper	[Title redacted; addresses settlement]
5	001_0.7.1476.1329394	04/09/13	Mail	CPUC Cost Recovery - PRIVILEGED AND CONFIDENTIAL
6	001_0.7.1476.1329394.2	04/09/13	Attch	[Title redacted; addresses settlement]
7	001_0.7.1538.1433790	04/12/13	Mail	SEP Mark-Up - Confidential [document re settlement]

© 2023 – Patricia Saiz. All rights reserved.

BUT: You can’t force me to produce …

- What are the consequences of failure to comply with document disclosure ruling?
- Tribunals **do not have the same power** as courts to issue sanctions
  - ✓ Treat future evidence with degree of skepticism
  - ✓ Adverse inferences
  - ✓ Costs

© 2023 – Patricia Saiz. All rights reserved.

Adverse Inferences

- May the content of the inference be inferred from the non-produced document?
- Binary vs. non-binary
- Indirect or circumstantial evidence – burden of proof?
- Due process

© 2023 – Patricia Saiz. All rights reserved.

Document Production Procedural Order

© 2023 – Patricia Saiz. All rights reserved.

“Guerrilla tactics”

Parties to act in “*good faith*” (IBA Rules Preamble)

“Guerrilla tactics”: designed to delay and obstruct proceedings

- Fishing expeditions
- Response to RFP by producing thousands of documents

© 2023 – Patricia Saiz. All rights reserved.

Scene from Dark Waters movie.

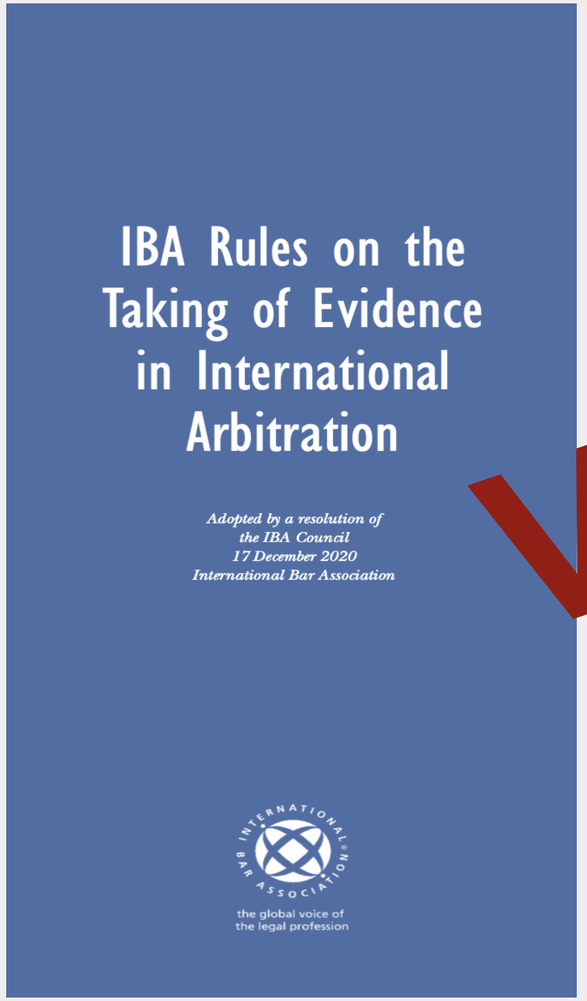
Scene from Dark Waters movie.

Adverse inferences example

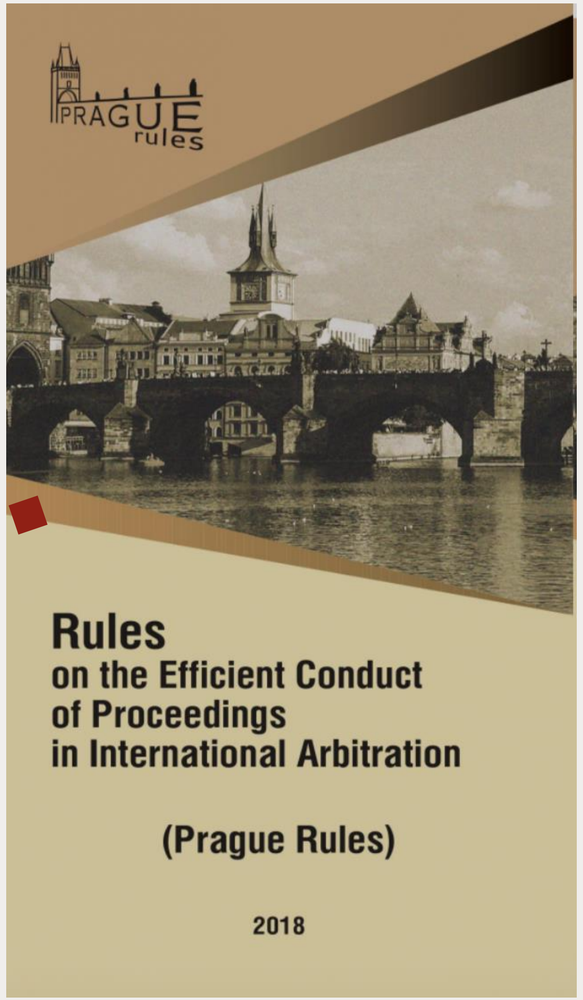
- C purchased ten shipments of raw materials from R.
- For each shipment, R produces analysis reports as to the quality of the material, which establish that the material complies with the contractual specifications.
- C then receives complaints from its customers and starts testing R's raw materials.
- Tests performed on seven shipments show that the quality of the material is far below the contractual standard and, accordingly, that the reports provided by R are inaccurate. Other evidence raises a suspicion that R might have conspired with the laboratory to produce forged reports.
- The AT orders R to produce the documents underlying the analysis reports and documents relating to the origin of the raw material.
- R refuses to produce them.

WHAT ADVERSE INFERENCE MAY THE TRIBUNAL DRAW?

© 2023 – Patricia Saiz. All rights reserved.



VS.



© 2023 – Patricia Saiz. All rights reserved.

Conflicts of Interest

02

© 2023 – Patricia Saiz. All rights reserved.

How much should arbitrators disclose before / after their appointment?

© 2023 – Patricia Saiz. All rights reserved.

Arbitrators are not Martians

"But the fact of an alleged connection between a party and an arbitrator in and of itself is not sufficient to establish a fact that would establish a manifest lack of that arbitrator's impartiality and independence. Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions. It has been asserted by some scholars that there are only "six degrees of separation" between one person and any other person on earth. The theory of six degrees of separation holds that if a person is one step or "degree" away from each person he or she knows and two steps or two degrees away from each person known by one of the people he or she knows, then everyone is an average of six steps or six degrees away from each person on the globe".

Suez v. *Argentina* (ICSID Case No. ARB/03/17), Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2018, para. 32.*https://www.italaw.com/sites/default/files/case-documents/ita0812.pdf*

© 2023 – Patricia Saiz. All rights reserved.

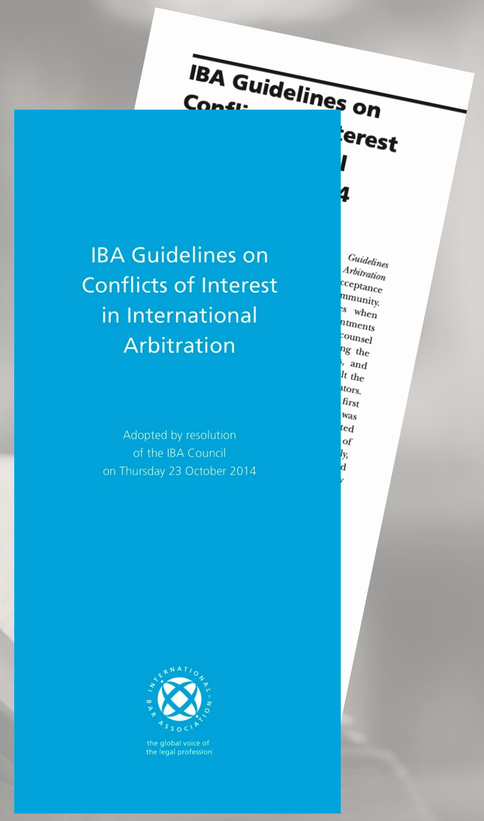
Disclosure: tension between preserving the award/right to fair hearing vs. promoting arbitrator challenges

- Disclosure does not mean the arbitrator is NOT independent or impartial
- Reduces risk of subsequent challenges (waiver): flushes objections at early stage
- Continuing duty
- Declaration in writing is advisable, for example ICC form
- Limited guidelines (e.g., by ICC, most institutions do not provide any)

© 2023 – Patricia Saiz. All rights reserved.

2014 IBA Guidelines on Conflicts of Interest in International Arbitration

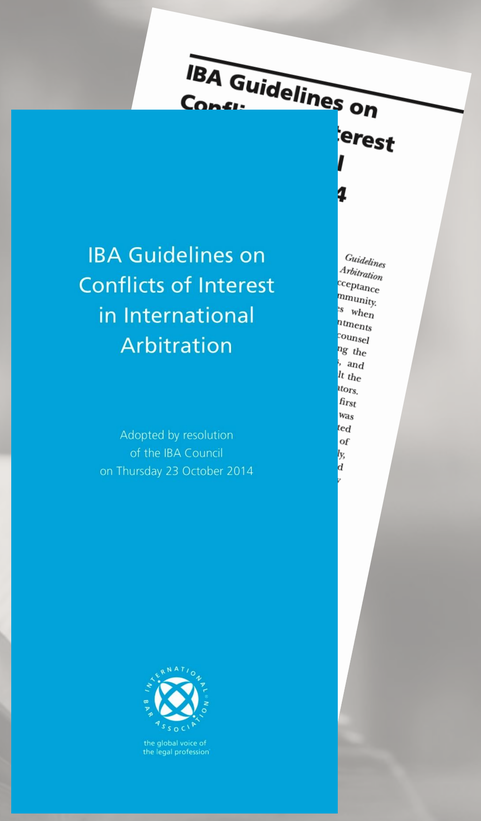
© 2023 – Patricia Saiz. All rights reserved.



2014 IBA Guidelines on Conflicts of Interest in International Arbitration

- Consulted by parties, counsel in assessing impartiality and independence of arbitrators
- Consulted by arbitrators for purposes of making disclosures
- Consulted by arbitral institutions and courts in considering challenges to arbitrators

© 2023 – Patricia Saiz. All rights reserved.



2014 IBA Guidelines on Conflicts of Interest in International Arbitration

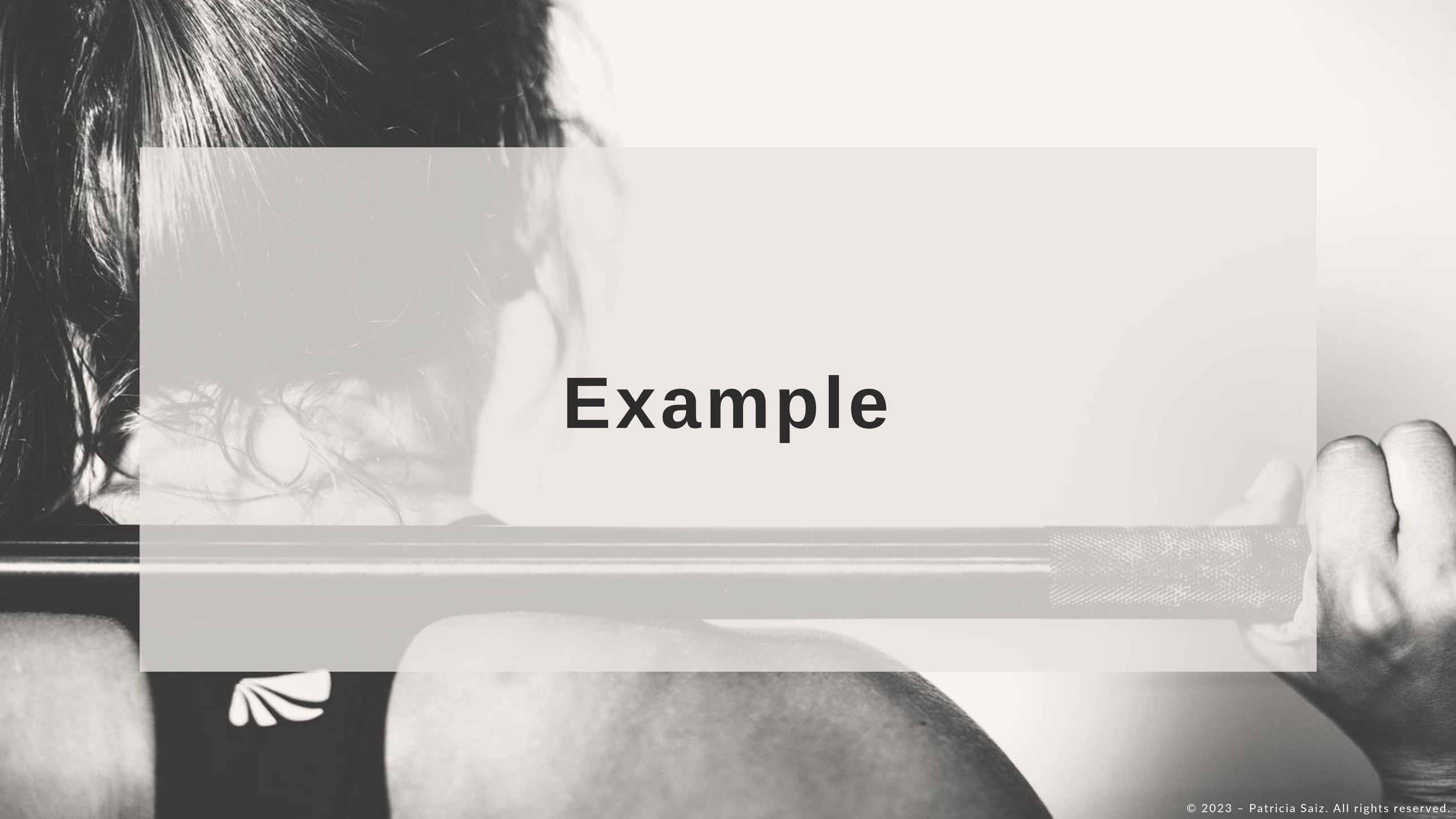
General Principle: “Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.”

Disclosure does not imply disqualification: different standards

- Disclosure: “if facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator´s impartiality or independence”

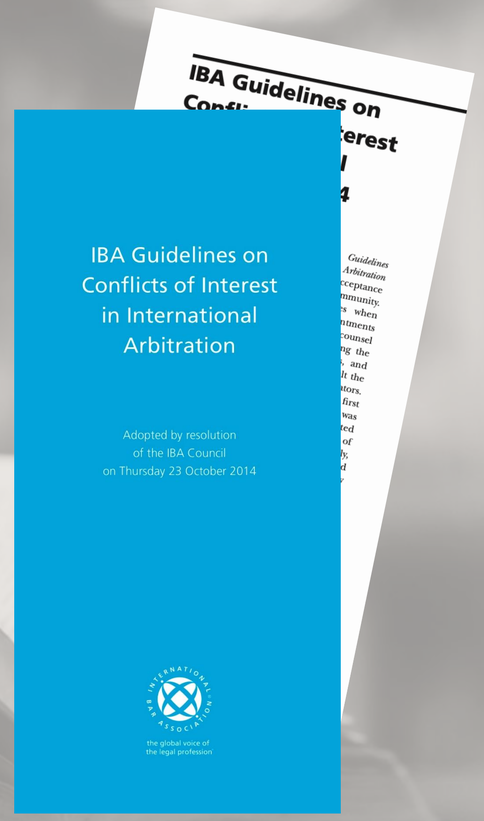
- Disqualification: only if 1) “the arbitrator has doubts as to his or her ability to be impartial” or 2) “from the point of view of a reasonable third person […] facts and circumstances [exist which] would give rise to justifiable doubts as to the arbitrator´s impartiality or Independence.”

© 2023 – Patricia Saiz. All rights reserved.



Example

© 2023 – Patricia Saiz. All rights reserved.

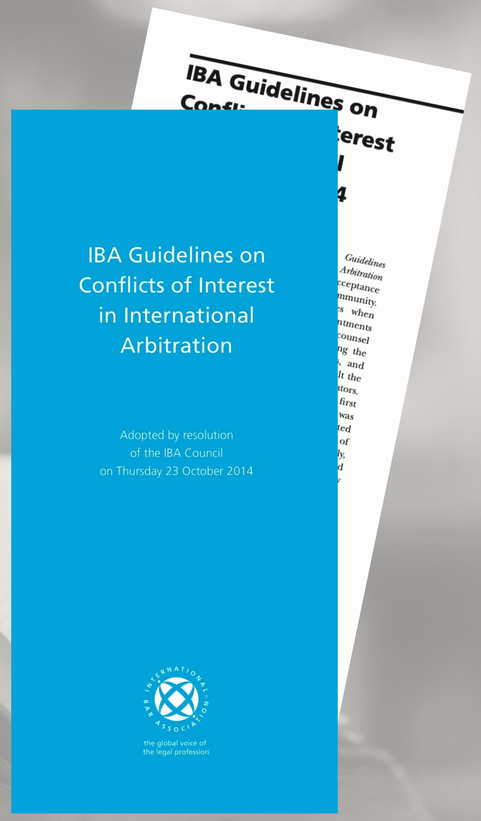


2014 IBA Guidelines on Conflicts of Interest in International Arbitration

IBA guidelines on conflict of interest group facts into 4 categories:

- **Non-Waivable red**: judge in his or her own cause, may not be waived, necessarily “gives rise to justifiable doubts in the view of a reasonable third person” – DISQUALIFICATION
- **Waivable red**: may be accepted by express agreement of the parties – DISQUALIFICATION BUT MAY BE WAIVED (EXPRESS), SO DISCLOSURE IS KEY
- **Orange**: justifiable doubts, duty to disclose, deemed waiver – DISCLOSURE IS KEY TO FLUSH OUT OBJECTIONS, DOES NOT IMPLY DISQUALIFICATION
- **Green**: no appearance nor actual conflict, no duty to disclose – NO DISQUALIFICATION, NO DISCLOSURE

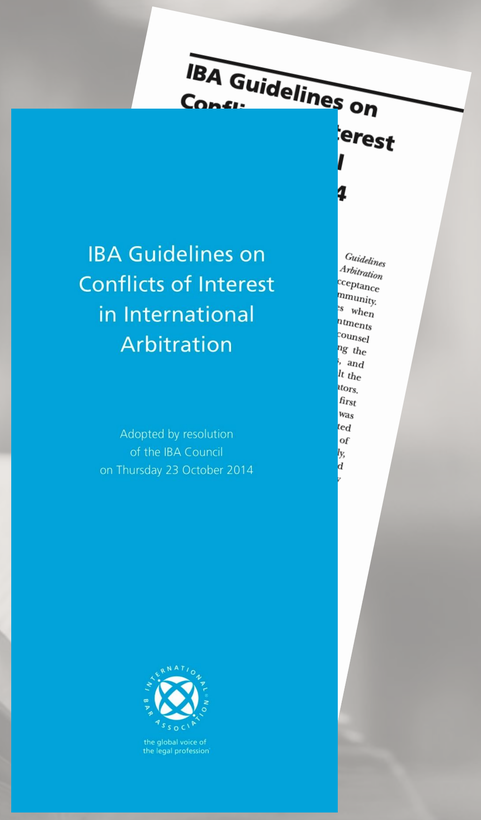
© 2023 – Patricia Saiz. All rights reserved.



2014 IBA Guidelines on Conflicts of Interest in International Arbitration

- **Non-Waivable Red**
  - **Point 1.2**: “The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.”
  - **Point 1.4**: “The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.”
- **Waivable Red**
  - **Point 2.1.1**: “The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.”
  - **Point 2.1.2**: “The arbitrator had a prior involvement in the dispute.”

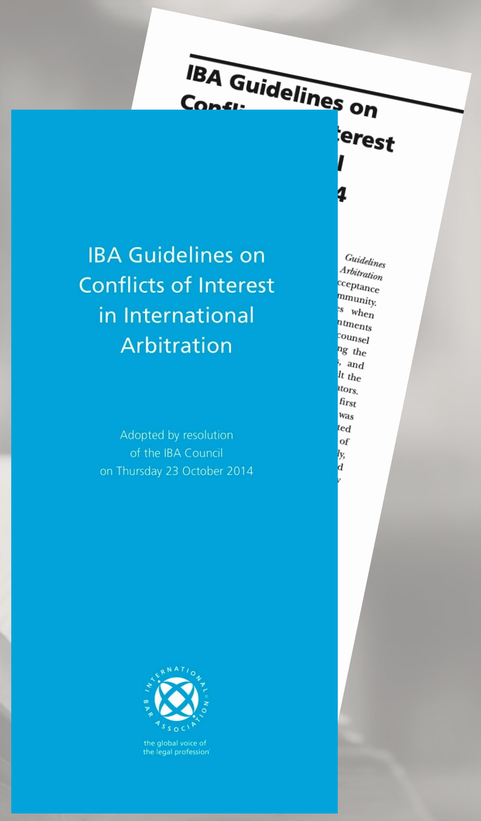
© 2023 – Patricia Saiz. All rights reserved.



2014 IBA Guidelines on Conflicts of Interest in International Arbitration

- **Orange**
  - **Point 3.1.2:** “The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.”
  - **Point 3.1.3:** “The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.”
  - **Point 3.3.6:** “A close personal friendship exists between an arbitrator and a counsel of a party.”
  - **Point 3.3.7:** “Enmity exists between an arbitrator and counsel appearing in the arbitration.”
  - **Point 3.3.8:** “The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.”

© 2023 – Patricia Saiz. All rights reserved.



2014 IBA Guidelines on Conflicts of Interest in International Arbitration

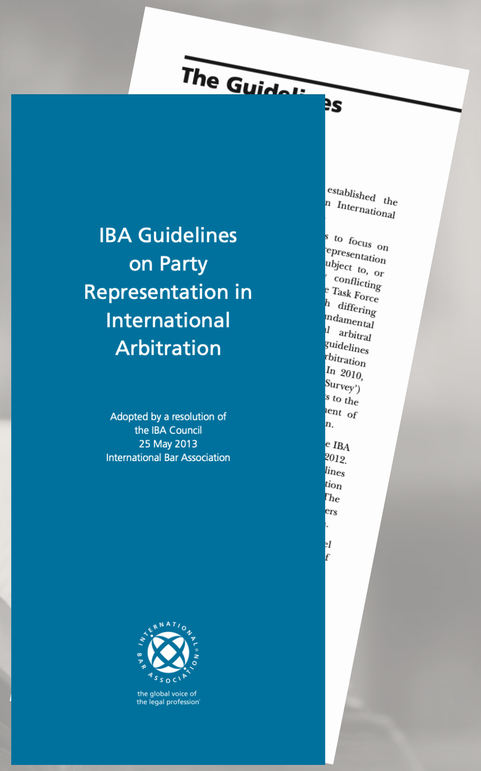
- **Green**
  - **Point 4.2.1:** “A firm, in association or in alliance with the arbitrator’s law firm, but that does not share significant fees or other revenues with the arbitrator’s law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.”

© 2023 – Patricia Saiz. All rights reserved.

Party Representation

03

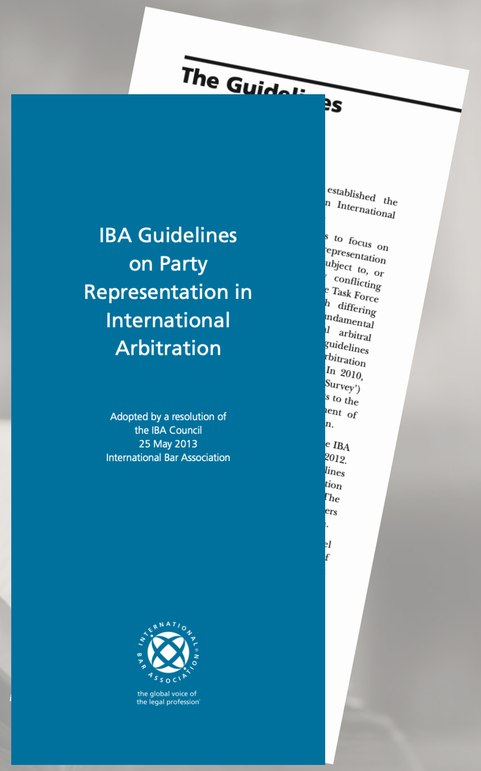
© 2023 – Patricia Saiz. All rights reserved.



2013 IBA Guidelines on Party Representation in International Arbitration

- **When do the Guidelines apply?**
  - Parties may agree to its use
  - The Arbitral Tribunal may apply them
  - May also be used as a reference

© 2023 – Patricia Saiz. All rights reserved.

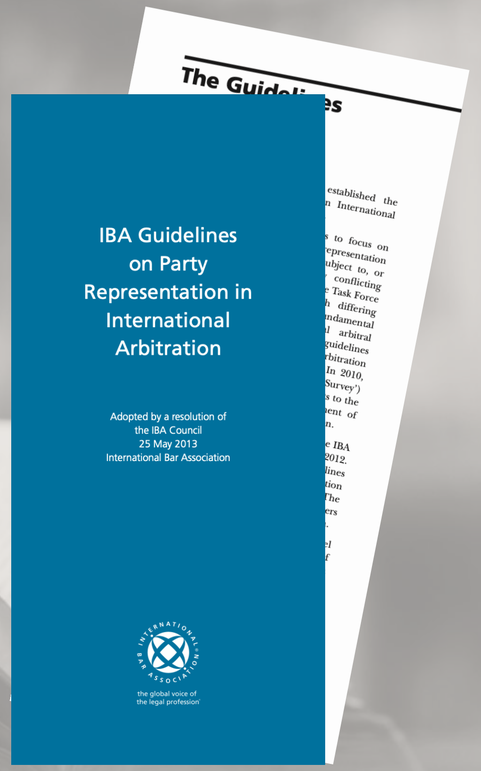


2013 IBA Guidelines on Party Representation in International Arbitration

- Party representation

> 5. *Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.*
>
> 6. *The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings.*

© 2023 – Patricia Saiz. All rights reserved.



2013 IBA Guidelines on Party Representation in International Arbitration

- Communications with Arbitrators

7. *Unless agreed otherwise by the Parties, and subject to the exceptions below, a Party Representative should not engage in any Ex Parte Communications with an Arbitrator concerning the arbitration.*

8. *It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:*

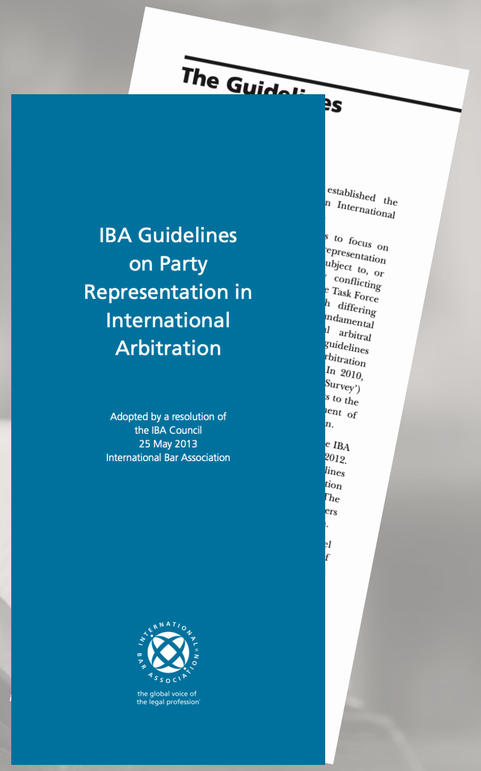
   (a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

   (b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.

   (c) A Party Representative may, if the Parties are in agreement that such a communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

   (d) While communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute.

© 2023 – Patricia Saiz. All rights reserved.



2013 IBA Guidelines on Party Representation in International Arbitration

- Submissions to the Tribunal

9. A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.

10. In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.

11. A Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Depending upon the circumstances, and subject to countervailing considerations of confidentiality and privilege, the Party Representative should promptly take remedial measures, which may include one or more of the following:

(a) advise the Witness or Expert to testify truthfully;

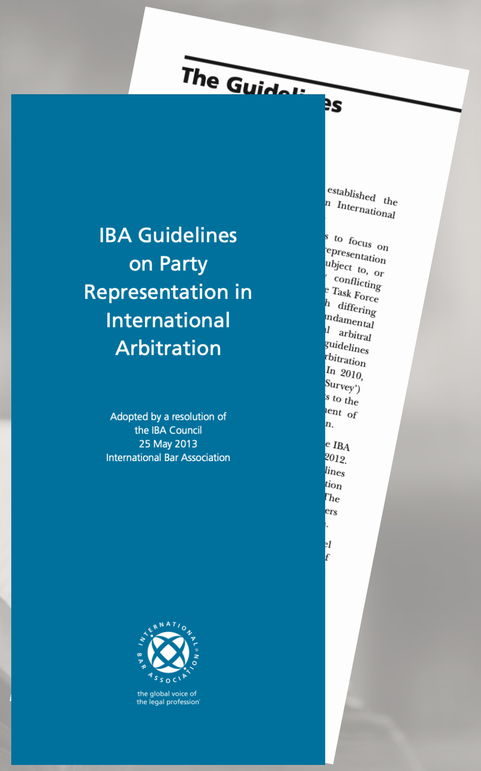
(b) take reasonable steps to deter the Witness or Expert from submitting false evidence;

(c) urge the Witness or Expert to correct or withdraw the false evidence;

(d) correct or withdraw the false evidence;

(e) withdraw as Party Representative if the circumstances so warrant.

© 2023 – Patricia Saiz. All rights reserved.



2013 IBA Guidelines on Party Representation in International Arbitration

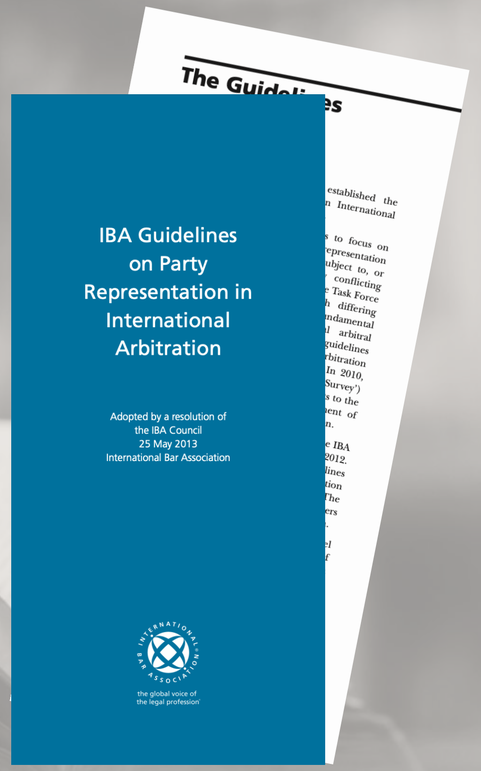
- Information Exchange and Disclosure

13. A Party Representative should not make any Request to Produce, or any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay.

14. A Party Representative should explain to the Party whom he or she represents the necessity of producing, and potential consequences of failing to produce, any Document that the Party or Parties have undertaken, or been ordered, to produce.

16. A Party Representative should not suppress or conceal, or advise a Party to suppress or conceal, Documents that have been requested by another Party or that the Party whom he or she represents has undertaken, or been ordered, to produce.

© 2023 – Patricia Saiz. All rights reserved.



2013 IBA Guidelines on Party Representation in International Arbitration

- Witnesses and Experts

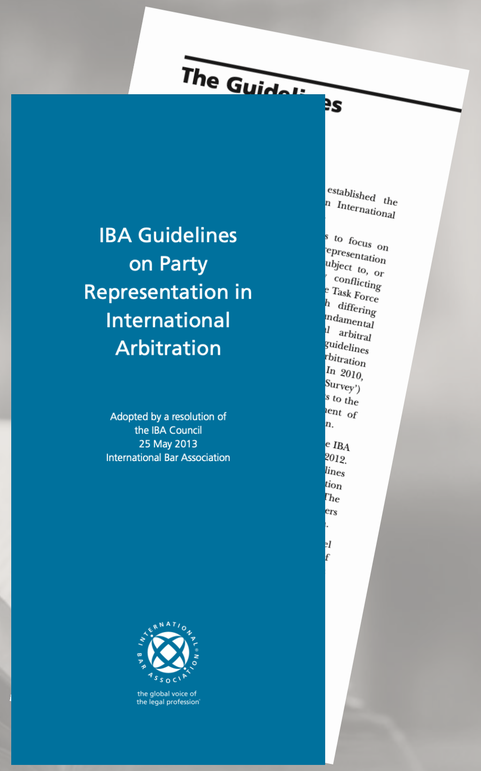
20. A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.

21. A Party Representative should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances.

22. A Party Representative should seek to ensure that an Expert Report reflects the Expert's own analysis and opinion.

23. A Party Representative should not invite or encourage a Witness to give false evidence.

© 2023 – Patricia Saiz. All rights reserved.



2013 IBA Guidelines on Party Representation in International Arbitration

- Remedies for Misconduct

26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may:

(a) admonish the Party Representative;

(b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;

(c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;

(d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.

© 2023 – Patricia Saiz. All rights reserved.

patricia.saiz@esade.edu

Patricia Saiz

www.saizarbitration.com

THANK YOU!

© 2023 – Patricia Saiz. All rights reserved.