CHAPTER 13

Interaction Between the IBA Guidelines on Conflicts of Interest of Arbitrators and the ICC Arbitration Rules

Álvaro López de Argumedo Piñeiro

1. INTRODUCTION

The extraordinary development of international arbitration and its increased complexity have given rise to a significant proliferation of soft law in order to try to guide the conduct of those involved in arbitration proceedings: parties, counsels, arbitrators and institutions. This proliferation has been described by some authors as a *'pathology'*,[1] while others see it as a sign of the maturity of the arbitration community. Whatever the case, the coexistence of multiple soft law regulations does not necessarily imply an obstacle for the development of arbitration. The market (i.e., the arbitration practitioners) is de facto selecting the soft law rules it considers more convenient and, therefore, determining in practice which soft law rules prevail. Furthermore, the most successful soft law rules up to now do not present significant differences in their approach to the different fields they regulate.

Therefore, this proliferation of soft law should not be of concern to the arbitration community and should arguably be interpreted as proof of its continuous dynamism.

Out of the many soft law products in existence, only two have gained broad acceptance (and application) among arbitration circles. These soft law norms are the IBA Rules on the Taking of Evidence and the IBA Guidelines on Conflicts of Interest in International Arbitration (the '**IBA Guidelines**').[2]

1. Alexis Mourre, *Arbitral Institutions and Professional Organizations as Lawmakers*, in Evolution and Adaptation: The Future of International Arbitration, 87-88 (Kalicki and Raouf eds., 2019).
2. *Ibid.* Mourre, *supra* n. 1, 96.

The extensive use of these rules is confirmed in the report on the reception of the IBA Arbitration soft law products prepared in 2016 by the IBA Arbitration Guidelines and Rules Subcommittee (the '**IBA Report**'):[3]

> The data collected shows that the Conflicts of Interest Guidelines have gained broad acceptance and were used often by the international arbitration community. Of the three IBA instruments surveyed, the Conflicts of Interest Guidelines were the most commonly referenced. By way of example, in the 3,201 arbitrations known to the respondents over the past five years in which issues of conflicts of interest arose (at the start of the arbitration), the Guidelines were referenced in 57 per cent of them.

This general acceptance has also been confirmed by the fact that those rules have been taken into account by many judicial courts across Europe and elsewhere when deciding matters covered under these soft law norms.[4]

In addition, there have been some efforts to convert guidelines such as the IBA Guidelines into 'hard' law. An example of this is Article 8.30[5] of the Canada-Europe Trade Agreement (CETA), which states:

> 1. The Members of the Tribunal shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. *They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules* adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.

This general acceptance obviously does not imply that these soft law rules are binding.[6] Only when the parties agree to be bound by a specific set of soft law rules will those rules be legally binding and therefore become 'hard' rules for the parties.

The purpose of this article is to explore the interaction between the IBA Guidelines and the ICC rules (including the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated 1 January 2019 – the '**ICC Note**') and verify whether both texts could be considered complementary in spite of the differences existing between them.

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3. *The IBA Arbitration Guidelines and Rules Subcommittee. Report on the reception of the IBA arbitration soft law products*, 31 (2016). *See also* the overview by Felix Dasser, *'Soft Law' in International Commercial Arbitration,* in Recueil des Cours, Vol. 402 (2019), 503 et seqq. and 518 et seqq.
4. For example, *see* DFSC 4A_506/2007 of 20 March 2008, the High Court of Justice of Madrid Judgment of 28 January 2015 (ECLI:ES:TSJM:2015:1286) and the Austrian Supreme Court Resolution of 19 April 2016 (ECLI:AT:OGH0002:2016:018ONC00003.15H.0419.000).
5. Eric Picanyol, *Due Process and Soft Law in International Arbitration*, Spain Arbitration Review: Revista del Club Español del Arbitraje, 55, Issue 24 (2015).
6. Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, Journal of International Dispute Settlement, Volume 1, Issue 2 (2010); *see also* Felix Dasser, *Soft Law in International Commercial Arbitration – A Critical Approach,* in Austrian Yearbook on International Arbitration, 112 (Klausegger, Klein et al. eds., 2019).

2. THE IBA GUIDELINES ON THE CONFLICT OF INTEREST OF ARBITRATORS AND THE ICC RULES: MAIN FEATURES AND DIFFERENCES

In order to be able to explain the interaction between the IBA Guidelines and the ICC rules (and, in particular, the ICC Note – jointly, the '**ICC Rules**'), it is important to first describe their main features (as regards their legal nature, legitimacy, goals and practical purposes) as well as their main differences.

2.1. Main Features

2.1.1. First: They Have a Different Legal Nature

The IBA Guidelines are soft law precisely because they are not compulsory and will only be binding if the parties so agree. In other words, the IBA Rules are soft law because they are norms 'that cannot be enforced through public force'.[7]

However, the ICC Rules cannot be characterized as soft law given that they are binding upon the parties as soon as they submit their conflicts to the ICC. As has been rightly suggested,[8] those instituted rules 'are deemed [to be] an offer to contract extended by the ICC, which the parties accept when they agree on ICC arbitration, not when they initiate arbitration proceedings'. As such, the ICC Rules should be considered as being contractually binding.[9]

2.1.2. Second: They Have a Different Source of Legitimacy

The legitimacy of the IBA Guidelines arises from the reputation of the IBA, its geographical diversity, the fact that it represents a large proportion of the arbitral community from both the common and the civil law systems, and the ensuing reality that the IBA Guidelines reflect a broad consensus with regard to the different solutions achieved under those two systems.[10] The legitimacy of the IBA Guidelines also comes from the openness and transparency of their drafting, which benefited from the participation of the main stakeholders of the arbitration community.[11]

However, the legitimacy of the ICC Rules derives from the legal authority, tradition and prestige of the institution itself, and ultimately from the fact that once the parties submit to the ICC, these rules do have contractual force.[12]

Ultimately, the ICC Rules represent a pure implementation of the ICC's policies.[13]

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7. *Ibid.* Kaufmann-Kohler, *supra* n. 6, 2.
8. *Ibid.* Kaufmann-Kohler, *supra* n. 6, 11.
9. *Ibid.* Dasser, *supra* n. 6, 112.
10. *Ibid.* Mourre, *supra* n. 1, 108.
11. At the very least, those instruments deemed to qualify as soft law must have: (1) institutional legitimacy, (2) be the result of a transparent procedure, and (3) receive wide acceptance by the arbitral community; *see ibid.* Dasser, *supra* n. 6, 116-118.
12. *Ibid.* Dasser, *supra* n. 6, 112; *ibid.* Kaufmann-Kohler, *supra* n. 6, 11.
13. *Ibid.* Mourre, *supra* n. 1, 99-100.

2.1.3. Third: They also Have Different Goals

The purpose of the IBA Guidelines is 'to enhance confidence in the integrity of international arbitration, and to assist institutions and courts to make consistent, clear and coherent decisions about disqualification'.[14]

In essence, the aim of the IBA Guidelines is to promote and assist disclosure by arbitrators of certain types of information in order to enhance confidence in the integrity of international arbitration and to help institutions and courts to make consistent, clear and coherent decisions about disqualification and, as such, to reinforce overall trust in arbitration.

In contrast, the purpose of the ICC Rules is, in essence, to implement the ICC's policies, one of which is to protect the integrity of ICC arbitral awards (*inter alia*, to protect them from any ethical issue arising from any potential non-disclosure by arbitrators of relevant circumstances that could affect the validity of the award when being examined by a judicial court in a set-aside action).

2.1.4. Fourth: Both Sets of Rules Have Different Practical Purposes

The IBA Guidelines provide guidance to the arbitral community about what arbitrators should disclose and what the parties can request that arbitrators disclose. As the IBA Subcommittee reported:

> the Conflicts of Interest Guidelines have gained broad acceptance and were used often by the international arbitration community. Of the three IBA instruments surveyed, *the Conflicts of Interest Guidelines were the most commonly referenced*. By way of example, in the 3,201 arbitrations known to respondents over the past five years in which issues of conflicts of interest arose (at the start of the arbitration), *the Conflicts of Interest Guidelines were referenced in 57 per cent of them.*
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> …
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> At the global scale, counsel made use of the Conflicts of Interest Guidelines when appointing arbitrators in 67 per cent of all reported cases. Arbitrators also appeared to make frequent use of the Conflicts of Interest Guidelines across all regions.
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> The survey also confirms that the Conflicts of Interest Guidelines were often referenced by the relevant decision maker (arbitral institutions, tribunals, or courts) in reaching a pronouncement on the existence of a conflict of interest. At a global level, the Conflicts of Interest Guidelines were referenced in 67 per cent of decisions resolving issues of conflicts of interest. Perhaps more importantly, in 69 per cent of the decisions that referenced the Conflicts of Interest Guidelines in solving a conflicts of interest issue, the decision maker chose to follow the guidelines.[15]

14. Judith Gill, *The IBA Conflicts Guidelines – Who's using them and how?*, in Dispute Resolution International, 59 (2007).
15. *Ibid.* IBA, *supra* n. 3, 31.

The Federal Swiss Court has stressed the fact that the IBA Guidelines are a working tool to determine when arbitrators are conflicted:

> These guidelines have certainly not force of law … . They nonetheless constitute a valuable working tool ['instrument de travail'], susceptible at contributing to harmonization and unification of standards that are applicable in the area of international arbitration for the regulation of conflicts of interest, which tool [sic] will not fail to exert an influence on the practice of arbitration institutions and courts … .[16]

However, the ICC Rules are hard law per se, and their purpose is to organize and administer basic aspects of the arbitral proceedings submitted to the ICC.

2.2. What Are the Main Differences Between The IBA Guidelines and the ICC Rules with Respect to the Duty of Disclosure by Arbitrators?

We examine below the main differences that can be found between the IBA Guidelines and the ICC Rules with respect to disclosure in order to subsequently analyse how they may be considered complementary in spite of those differences.

2.2.1. Scope

2.2.1.1. IBA Guidelines

In order to determine the scope of disclosure, the IBA Guidelines seek a balance between:[17]

(1) the parties' right to be informed of circumstances that could call into question the impartiality or independence of the arbitrator; and
(2) the right of the parties to choose the arbitrators they prefer.

The IBA Guidelines were the product of a working group of nineteen experts in international arbitration from fourteen countries, and they attempt to strike the delicate balance between the two circumstances mentioned above. In order to achieve that balance, the circumstances which in principle cannot lead to disqualification should not be disclosed, as they lack any relevance for determining the impartiality and independence of the arbitrators. Furthermore, if arbitrators were encouraged to inform the parties of circumstances that could in no way affect their independence or impartiality, this could cause an increase in unfounded challenges, which would be detrimental to arbitration as an institution.

16. Federal Court decision 4A_506/2007 of 20 March 2008, cons. 3.3.2.2; *ibid.* Dasser, *supra* n. 6, 125; Dasser, *supra* n. 3, 523 et seqq.
17. *Ibid.* Gill, *supra* n. 14, 59.

2.2.1.2. ICC Rules

The standard for disclosure under the ICC Rules is far more extensive: it may be summarized in the following terms: 'the broader, the better'. Paragraphs 20 and 21 of the ICC Note are very clear in this respect:

> 'The parties have a legitimate interest in being *fully informed* of all facts and circumstances that may be relevant in their views.' (paragraph 20).
>
> 'Any doubt must be resolved in favour of disclosure.' (paragraph 21).

This approach is inspired by the previously mentioned aim of protecting the integrity of the award and the trust in arbitration overall.

2.2.2. Practical Implementation

The IBA Guidelines go very much into specifics and provide detailed descriptions of situations and circumstances that should (or should not) be disclosed. This is so because they are not intended to be interpreted by a single institution; on the contrary, the idea is that they should be applicable to all kinds of arbitration proceedings, regardless of which institution is in charge of their administration.

As a consequence, the IBA Guidelines try to address as many scenarios as possible (in a list that is intended to be comprehensive though not exhaustive) and provide general principles and explanations about the different situations they address.

All those scenarios are classified following a traffic light system:

- ***Red***: for circumstances that do not allow the appointment of the arbitrator (except for those which can be waived by the parties by means of express consent). These scenarios are numbered 1.X for the non-waivable red list and 2.X for the waivable red list.
- ***Orange***: for situations in which there are justifiable doubts as to whether the arbitrator can act as an impartial and independent arbitrator in the eyes of the parties. As a consequence, the arbitrator has an obligation to disclose those relevant circumstances. These scenarios are numbered 3.X.
- ***Green***: for those situations where no appearance and no actual conflict of interest exist, and there is, therefore, no obligation to disclose. These scenarios are numbered 4.X.

In contrast, and as described in section 2.1.2 above, the ICC Note describes the situations and circumstances that should be disclosed by an arbitrator in a broader manner, thus intensifying the arbitrator's duty of disclosure.

2.2.3. Time Limit for Circumstances Subject to Disclosure

Another important difference between the IBA Guidelines and the ICC Rules is that the latter do not impose a time limit for the circumstances that should be disclosed. In other

words, arbitrators are encouraged to disclose any circumstance that, in the eyes of the parties, could give rise to doubts as regards their independence or impartiality, regardless of the time that circumstance dates from. Further, under the ICC Note, an arbitrator or prospective arbitrator must 'make reasonable enquiries in his or her records, those of his or her law firm and, as the case may be, in other readily available materials'.[18] Arbitrators are therefore encouraged to be comprehensive in their disclosures and to actively ascertain the existence of circumstances subject to disclosure.

However, the IBA Guidelines establish a clear time limit (generally, occurrence or existence within the three years prior to appointment as an arbitrator) for a circumstance to be subject to disclosure. This obviously imposes a more limited duty of disclosure.

It is important to note that the obligation to disclose does not end upon appointment as an arbitrator under the ICC Rules or the IBA Guidelines. In both cases, the obligation is an ongoing one, and it covers new circumstances that could affect their independence or impartiality as well as previously existing circumstances not disclosed for any reason.

3. INTERACTION BETWEEN THE IBA GUIDELINES AND THE ICC RULES

The two sets of provisions are arguably complementary. The ICC Rules set a general rule for arbitrators in favour of a broad standard of disclosure with some specific circumstances that should be considered by arbitrators. Meanwhile, the IBA Guidelines go into more detail and cover different and diverse scenarios, giving the arbitrators and the parties a particular checklist to guide them as to disclosure.[19] These sets of rules, therefore, do not have an opposing relationship.

In fact, as Alexis Mourre has pointed out, 'the ICC Rules are largely inspired by, and consistent with, the IBA Guidelines',[20] although they depart from them in certain instances.

Moreover, the IBA Arbitration Guidelines and Rules Subcommittee mentioned in its 2016 report that:

(1) the IBA Guidelines are commonly invoked by the parties in ICC arbitration proceedings to challenge an arbitrator, as well as by arbitrators to explain their non-disclosures;[21] and
(2) the ICC takes the IBA Guidelines into account when deciding whether to confirm an arbitrator or uphold a challenge, although it is obviously not

18. ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 29.
19. Nathalie Voser and Angelina M. Petti, *The Revised IBA Guidelines on Conflicts of Interest in International Arbitration*, 33 ASA Bulletin, 14 (2015).
20. *Ibid.* Mourre, *supra* n. 1, 99.
21. *Ibid.* IBA, *supra* n. 3, 41.

> bound by the IBA Guidelines and is entirely free to come to its own decisions.[22]

Tables 13.1-13.9 provide an overview of the current correspondence (imperfect, but existing nonetheless) and interaction between the disclosure criteria established in the ICC Note and the relevant sections of the IBA Guidelines.

Table 13.1 On the Arbitrator or His or Her Law Firm Advising One of the Parties

ICC Note[a]	*IBA Guidelines*
The arbitrator or prospective arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates.	**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; **2.3.1**: the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties; and **2.3.7**: the arbitrator regularly advises one of the parties or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

a *The IBA Arbitration Guidelines and Rules Subcommittee. Report on the reception of the IBA arbitration soft law products*, 41 (2016). The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 23, first bullet point.

Under the IBA Guidelines, representation of a party or an affiliate by the arbitrator or the arbitrator's firm implies that the arbitrator cannot accept the appointment or can only accept it with the express consent of the parties (non-waivable red list or waivable red list). But, according to the ICC Note, this circumstance must be disclosed and will in all likelihood lead to the arbitrator not being confirmed.

In fact, as confirmed by Andrea Carlevaris and Rocío Digón:[23]

> The ICC has accepted such challenges when (i) the former counsel of a party joined the arbitrator's law firm; (ii) the arbitrator's new law firm is representing the non-challenging party in two ongoing litigations; or (iii) counsel to a party has nominated the arbitrator five times in twelve years.

22. *Ibid.* IBA, *supra* n. 3, 41.
23. Andrea Carlevaris and Rocío Digón, *Arbitrator Challenges under the ICC Rules and Practice*', ICC Dispute Resolution Bulletin, Issue 1, 33-34 (2016).

Table 13.2 On the Arbitrator or His or Her Law Firm Acting Against One of the Parties

ICC Note[a]	*IBA Guidelines*
The arbitrator or prospective arbitrator or his or her law firm acts or has acted against one of the parties or one of its affiliates.	**3.1.4**: the arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator; and **3.4.1**: the arbitrator's law firm is currently acting adversely to one of the parties or an affiliate of one of the parties.

a ICC Dispute Resolution Bulletin, Issue 1, 33-34 (2016). The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 23, second bullet point.

Here, circumstances that must be disclosed according to the ICC Note fall under the orange list of the IBA Guidelines. As such, they must be disclosed. However, if they affect the arbitrator's firm rather than the actual arbitrator, the latter is not prevented from accepting the appointment as long as the parties do not object. Despite this theoretical possibility, in practice, it remains improbable that the ICC would confirm an arbitrator whose law firm is acting or has recently acted against one of the parties or its affiliates unless both parties accept it.

Table 13.3 On the Business, Commercial, Financial or Personal Relationship Between the Arbitrator or His or Her Law Firm and the Parties

ICC Note[a]	*IBA Guidelines*[b]
The arbitrator or prospective arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates or a personal interest of any nature in the outcome of the dispute.	**1.1**: the arbitrator is a legal representative or employee of an entity that is a party in the arbitration; **1.3**: the arbitrator has a significant, financial or personal interest in one of the parties or the outcome of the case; **2.2.1**: the arbitrator holds shares either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held; **2.2.2**: a close family member of the arbitrator has a significant financial interest in the outcome of the dispute; **2.2.3**: the arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute; **2.3.6**: the arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties; **2.3.8**: the arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party; **2.3.9**: a close family member of the arbitrator has a significant financial or personal interest in one of the parties or an affiliate of one of the parties; **3.4.2**: the arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner; **3.4.3**: a close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board of a party; an entity that has direct economic interest in the award to be rendered in the arbitration; or any person having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert;

ICC Note[a]	*IBA Guidelines*[b]
	3.5.1: the arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed; and **3.5.4**: the arbitrator is a manager, director or member of the supervisory board or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

a ICC Dispute Resolution Bulletin, Issue 1, 33-34 (2016). The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 23, third bullet point.

b For the meaning of the numbering, *see* section 2.2.2.

The short statement included in the ICC Note covers a wide range of circumstances expressly listed in the IBA Guidelines, which are specifically categorised within the red or the orange list. Most are classified as waivable subjects or as merely subject to disclosure. Arbitrators whose circumstances fall within red-list categories under the IBA Guidelines will not normally be appointed in ICC proceedings. With respect to the orange-list categories, ICC decisions will be taken on more of a case-by-case basis.

Table 13.4 On Professional Relationships Between the Arbitrator or His or Her Law Firm and One of the Parties

ICC Note[a]	*IBA Guidelines*
The arbitrator or prospective arbitrator or his or her law firm acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise.	**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; and **2.3.4**: the arbitrator is a manager, director or member of the supervisory board or has a controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

a *Ibid*. The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 29, fourth bullet point.

The ICC criterion is fully aligned with the IBA Guidelines, and therefore, an arbitrator in any of these situations would not be appointed by the ICC unless that appointment was accepted by both parties (again, however, the ICC would take such a decision on a case-by-case basis).

Table 13.5 On the Relationship Between the Arbitrator or His or Her Law Firm and the Dispute Itself

ICC Note[a]	*IBA Guidelines*
The arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute or has expressed a view on the dispute in a manner that might affect his or her impartiality.	**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; **2.1.2**: the arbitrator had prior involvement in the dispute; **2.3.5**: the arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself; and **3.5.2**: the arbitrator has publicly advocated a position on the case, whether in a published paper or speech or otherwise.

a *Ibid*. The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 29, fifth bullet point.

If an arbitrator has previously been involved in the case, he or she will be unable to accept an appointment unless both parties consent or make no objection. Under those circumstances, it would also be unlikely that the ICC confirms an appointment.

Table 13.6 On the Relationship Between Arbitrators and Counsel

ICC Note[a]	*IBA Guidelines*
The arbitrator or prospective arbitrator has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm.	**2.3.2**: the arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties; **2.3.3**: the arbitrator is a lawyer in the same law firm as the counsel to one of the parties; **3.3.1**: the arbitrator and another arbitrator are lawyers in the same law firm; **3.3.2**: the arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers; **3.3.3**: the arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration; **3.3.5**: a close family member of the arbitrator is a partner or employee of the law firm representing one of the parties but is not assisting with the dispute; and **3.3.6**: a close personal friendship exists between an arbitrator and a counsel of a party.

a *Ibid*. The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 29, sixth bullet point.

Again, the generic requirement for disclosure provided by the ICC Note is developed into different specific scenarios in the IBA Guidelines, all of which are included either in the waivable red list or in the orange list. It is once more doubtful that the ICC would confirm the arbitrator under these circumstances, although – once again – this will be decided on a case-by-case basis.

Table 13.7 On Multiple Appointments of the Arbitrator by One of the Parties

ICC Note[a]	*IBA Guidelines*
The arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates.	**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.

a *Ibid*. The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 29, seventh bullet point.

Again, there is close alignment between the circumstances established for disclosure in each case, the main point of difference being the time limit established under the IBA Guidelines. An example of the ICC's less time-constrained approach is provided by Carlevaris and Digón,[24] who confirm that the ICC has accepted a challenge to an arbitrator appointment where the counsel to a party had nominated the arbitrator five times in the previous twelve years.

Table 13.8 On the Relationship Between the Arbitrator and Related Arbitration Proceedings

ICC Note[a]	*IBA Guidelines*
The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case.	**3.1.5**: The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

a *Ibid*. The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 29, eighth bullet point.

The above circumstances are subject to a very similar approach under the IBA Guidelines and the ICC Note. Both sets of provisions consider the proximity between the arbitrator and the specific case as a circumstance that should be disclosed and could eventually lead to the non-confirmation of the arbitrator.

Table 13.9 On Multiple Appointments of the Arbitrator by the Same Counsel

ICC Note[a]	*IBA Guidelines*
The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates or by counsel to one of the parties or the counsel's law firm.	**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.

a *Ibid*. The ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019), para. 29, ninth bullet point.

In this case, the time limit is joined by the number of appointments as points of difference between the two provisions. In any event, both provisions treat the fact that arbitrators have been appointed in the past by the same counsel as a significant circumstance and, therefore, one subject to disclosure.

In conclusion, substantially all of the circumstances that an arbitrator must take into account when deciding what to disclose in ICC arbitration proceedings are already reflected in the IBA Guidelines. The provisions do not match perfectly. Nonetheless,

24. *Ibid.* Carlevaris and Digón, *supra* n. 23, 33-34.

the IBA Guidelines can be interpreted as a more detailed description and specification of the circumstances established in the ICC Note. The texts have a complementary relationship and jointly offer a helpful guide not only for arbitrators and the ICC but also for parties. It is true that the three-year time limit generally provided for in the IBA Guidelines is not reflected in the ICC Note. Nevertheless, practice will probably help to find the right balance between these two different approaches to the same reality.

4. CONCLUSION

There has been a great proliferation of soft law in recent years in order to govern certain aspects of international arbitration (particularly the taking of evidence and conflicts of interest). Rather than causing concern, this proliferation should be seen as proof of the dynamism of the arbitral community.

The IBA Guidelines are one of the most successful and widely applied sets of soft law rules. They are a helpful tool for arbitrators and institutions, as well as for the parties and even judicial courts when considering the difficult issues involving conflicts of interest. Despite the fact that the ICC Note and the IBA Guidelines present some different approaches in certain aspects (e.g., the time limit applicable to the circumstances that should be disclosed), they can work in a highly complementary manner: the ICC Note establishes the general framework for the circumstances that should be disclosed by arbitrators and the IBA Guidelines outline the particular scenarios that develop this general framework and that arbitrators should carefully consider.