

ARBITRATION GUIDELINES WILL HELP DEFEND AGAINST ACCUSATIONS OF BIAS

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Experts say that IBA's new guidelines for conflicts of interest in arbitrations will better enable those accused of impartiality to counteract such challenges

New guidelines relating to conflicts of interest in international arbitration proceedings will enable arbitrators to better defend themselves against accusations of bias or impartiality, attendees at an Iberian Lawyer and Kluwer Law International event at the International Bar Association annual conference in Tokyo heard.

Among the issues raised by participants was whether the IBA's guidelines on international arbitration conflicts would increase the likelihood of challenges or deter them. One participant remarked: "Do the guidelines encourage challenges or are they an antidote against them? You see them used as a sword if someone has not disclosed something they ought to, but more you see them as a defence in tests."

There is a view that the fact that the guidelines have been introduced is a bonus. "The true value of the guidelines is that they are there – the test will be how each jurisdiction interprets the guidelines," one participant remarked. He added that the guidelines would not lead to motions to disqualify counsel. Instead, he said, it is up to the tribunal to properly manage any potential challenges. "This [the guidelines] gives us some power to manage – it's a case of are you going to be able to manage guerrilla conduct? Why are they being deceitful? In all likelihood they are going to lose – would it be better to just suck it up and manage as best you can?"

Another attendee argues that the guidelines could be used as "weapons" to create difficulties with other counsel. However, he added: "The tribunal will have to deal with these excursions."

Few challenges successful

Session moderator Carolyn Lamm, partner and co-chair of international arbitration Americas at White & Case, said conflicts are an "incredibly difficult" issue. "What does cause a lack of independence or impartiality? It suspends and protracts the proceedings – indeed in some cases arbitrators have been challenged twice: Is it simply a tactic or is there legitimacy to the challenge." Lamm added that challenges are often unrelated to the arbitrator's reputation and that they usually emanate from a party's or counsel's desire to do what is best for them in an arbitration. "I don't know if anyone should take away that there is something wrong with the arbitrator – many challenges are made, but very few are successful," she added.

A number of attendees at the event expressed the desire to limit the amount of evidence used in arbitrations because, they argued, much of it was irrelevant. But Lamm said: "There is a real tension here, we're playing with fundamental rules of procedure – at what point does it impact on process? That is, the party's right to make its case."