



THE IBA ARBITRATION GUIDELINES AND RULES SUBCOMMITTEE

Report for **Portugal** on the Use and Utility of the IBA Rules and Guidelines

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This report is submitted pursuant to the Mission Statement issued by the IBA Arbitration Committee in June 2015. It is a contribution to the final worldwide report of the IBA Arbitration Guidelines and Rules Subcommittee (the “**Subcommittee**”).

This contribution assesses the use and utility in **Portugal** of the following sets of Rules and Guidelines (the “**IBA Guidelines and Rules**”):

- the IBA Rules on the Taking of Evidence in International Arbitration (2010);
- the IBA Guidelines on Party Representation in International Arbitration (2013); and
- the IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

This assessment is based on a summary of usage of the IBA Guidelines and Rules as culled from references in publically available jurisprudence and doctrinal texts **(1)**, and local responses to the Subcommittee’s Survey **(2)** in **Portugal**.

1. REFERENCES TO IBA GUIDELINES AND RULES IN JURISPRUDENCE AND DOCTRINAL TEXTS PERTAINING TO PORTUGAL

The following references to the IBA Guidelines and Rules were made in case law **(1.1)**, arbitral practice **(1.2)**, and publications **(1.3)**.

1.1 REFERENCES TO IBA GUIDELINES AND RULES IN CASE LAW

List of Portugal's case law:

- Supremo Tribunal de Justiça, Processo n.º 170751/08.7YIPRT.L1.S1, 12.07.2011
- Tribunal da Relação do Porto, Processo n.º 583/12.2TVPR.T.P1, 03.06.2014
- Tribunal da Relação de Lisboa, Processo n.º 1361/14.0YRLSB.L1-1, 24.03.2015

Analysis:

A thorough analysis of the Portuguese judicial case law made available at the database of the Portuguese Courts of Appeals (five judicial and two administrative), Supreme Court of Justice and Supreme Administrative Court was carried out and it was learned that the three above listed decisions refer the IBA Guidelines on Conflicts of Interest in International Arbitration.

According to the Portuguese Arbitration Law, the impediment of an arbitrator may ground the annulment of the award pursuant to the irregularity of the constitution of the arbitral tribunal. The above listed three decisions acknowledge the IBA Guidelines on Conflicts of Interest in International Arbitration and consider that although they are not binding, they set forth principles regarding arbitrators' impartiality, independence and duty of disclosure and rule extensively and with significant detail the multiple cases of conflicts of interests that may ground objections to arbitrators' appointment to the extent that Portuguese courts may rely upon them on these matters, together with the rules of the Portuguese Law on Voluntary Arbitration, the UNCITRAL Model Law and the deontological rules of the Portuguese Arbitration Association.

1.2 REFERENCES TO IBA GUIDELINES AND RULES IN LOCAL ARBITRAL PRACTICE

The market leader of the Portuguese arbitration centres¹ includes in its criteria for the appointment of arbitrators² a formal reference to the IBA Guidelines on Conflicts of Interest in International Arbitration, setting forth that as a rule the President of the Centre shall not accept the appointment of an arbitrator who falls into a situation described in the Non-Waivable Red List.

This Centre³ informed us that a significant number of decisions as to the existence of a conflict of interest rendered under the auspices of their rules have taken into consideration those guidelines on Conflicts of Interest in International Arbitration. Unfortunately, however, all such decisions are confidential and therefore could not be disclosed to us, even partially.

¹ “Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa”.

² “Critérios para nomeação de árbitros pelo Centro aprovados pelo Conselho do Centro de Arbitragem da Câmara de Comércio e Indústria Portuguesa”.

³ “Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa”.

1.3 REFERENCES TO IBA GUIDELINES AND RULES IN LEGAL PUBLICATIONS

List of publications:

P.M. NÁPOLES, “As Novas Regras da IBA sobre Produção de Prova em Arbitragem Internacional”, 2010 *Revista Internacional de Arbitragem e Conciliação* 105, Vol. 3, pp. 105-116

R. ALVES, “Anotação ao Acórdão *Commonwealth Coatings v. Continental Cas. Co.*”, in (eds.) *100 Anos de Arbitragem - os casos essenciais comentados* (2015) 61, pp. 71-87

J.M. JÚDICE, D. CALADO, “Independencia e Imparcialidad del Árbitro: Algunos Aspectos Polémicos, Mediante una Visión Ibérica”, 2015 *Arbitraje - Revista de arbitraje comercial y de inversiones* 749, Vol. 8 (3), pp. 753, 757-758

M.F. GOUVEIA, *Curso de Resolução Alternativa de Litígios* (3rd ed. 2014), pp. 107, 205-206, 251-254

A.P. MIRANDA / P.S. UVA, “As Diretrizes da IBA sobre Conflitos de Interesses na Arbitragem Internacional: 10 Anos Depois”, in (eds.) *Estudos de Direito da Arbitragem em Homenagem a Mário Raposo* (2015) 21, pp. 21-31

A.P. MIRANDA, “Investir em Virtude: o Dever de Revelação do Árbitro”, 2013 *Revista Internacional de Arbitragem e Conciliação* 9, Vol. 6, pp. 16-18

A.M. CORDEIRO, *Tratado da Arbitragem. Comentário à Lei 63/2011, de 14 de Dezembro* (2015), pp. 153-165

B. REIS, “Reflexões Práticas sobre a Ética na Arbitragem: Perspetiva de Árbitro”, 2013 VI Congresso do Centro de Arbitragem Comercial - *Intervenções* 75, Vol. 6, pp. 84-86

Analysis:

The IBA Guidelines and Rules have been considered by Portuguese scholars and in legal publications. However, there are not yet many specific studies or significant references to them.

Among these studies, the IBA Guidelines on Conflicts of Interest in International Arbitration are, clearly, the ones that are more discussed.

The tone of these publications is more informative and not critical.

2. RESPONSES TO THE SUBCOMMITTEE'S 2015 SURVEY

2.1 SUMMARY OF THE RESPONSES TO THE SURVEY

- In **Portugal**, the Survey received 19 responses.
- Out of the 249 arbitrations accounted for by respondents, 89 of those arbitrations in some way referenced one of the IBA Guidelines and Rules.
- Respondents appear to most often consult the IBA Guidelines on Conflict of Interest, followed by the IBA Rules on the Taking of Evidence. The IBA Guidelines on Party Representation in International Arbitration are the ones less consulted.

2.1.1 The IBA Rules on the Taking of Evidence in International Arbitration

- The IBA Rules on the Taking of Evidence in International Arbitration were referred to in 29 arbitrations. In 13 arbitrations the IBA Rules were stated in terms of reference or in first procedural order. In 14 arbitrations the IBA Rules were consulted and followed.
- All the arbitrations that referred to the Rules on the Taking of Evidence were commercial arbitrations.

2.1.2 The IBA Guidelines on Party Representation in International Arbitration

- The IBA Guidelines on Party Representation in International Arbitration were referred to in 4 arbitrations, mostly for consultation purposes.

2.1.3 The IBA Guidelines on Conflicts of Interest in International Arbitration

- The IBA Guidelines on Conflicts of Interest in International Arbitration were referred to in 51 arbitrations and were followed in 49 decisions. In the remaining 2 decisions, the arbitral institution, the tribunal or the court were neutral. That is to say, these IBA Guidelines have never been declined.

2.2 ANALYSIS OF THE RESPONSES TO THE SURVEY

- The IBA Guidelines and Rules are clearly acknowledged in Portuguese jurisdiction and are largely consulted and many times followed when an issue therein addressed to arises.
- Most of Respondents who answered to the question whether the IBA Arbitration Committee should revise the IBA Guidelines and Rules stated it should not. Those Respondents had knowledge of more than half the total number of arbitrations over the past five years in Portugal.
- One Respondent stated the IBA Guidelines on Conflicts of Interest in International Arbitration should be revised to identify clearly in which cases there is a conflict of interest.

ANNEX I – BIBLIOGRAPHY

IBA GUIDELINES ON CONFLICTS OF INTEREST

• Judicial Case law

- Supremo Tribunal de Justiça, Processo n.º 170751/08.7YIPRT.L1.S1, 12.07.2011, made available at <http://www.dgsi.pt/jstjf.nsf/954f0ce6ad9dd8b980256b5f003fa814/7b883192d7b22be380257b900033ed1e?OpenDocument>
- Tribunal da Relação do Porto, Processo n.º 583/12.2TVPR.T.P1, 03.06.2014, made available at <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/55fc83b4d067572280257d47003b6b91?OpenDocument>
- Tribunal da Relação de Lisboa, Processo n.º 1361/14.0YRLSB.L1-1, 24.03.2015, made available at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/d7f471fde47d350980257e2a004b026c?OpenDocument>

• Arbitral Awards

- Not made available due to confidentiality issues.

• Publications

- R. ALVES, “Anotação ao Acórdão Commonwealth Coatings v. Continental Cas. Co.”, in (eds.) *100 Anos de Arbitragem - os casos essenciais comentados* (2015) 61, pp. 71-87
- J.M. JÚDICE, D. CALADO, “Independencia e Imparcialidad del Árbitro: Algunos Aspectos Polémicos, Mediante una Visión Ibérica”, 2015 *Arbitraje - Revista de arbitraje comercial y de inversiones* 749, Vol. 8 (3), pp. 753, 757-758
- M.F. GOUVEIA, *Curso de Resolução Alternativa de Litígios* (3rd ed. 2014), pp. 107, 205-206
- A.P. MIRANDA / P.S. UVA, “As Diretrizes da IBA sobre Conflitos de Interesses na Arbitragem Internacional: 10 Anos Depois”, in (eds.) *Estudos de Direito da Arbitragem em Homenagem a Mário Raposo* (2015) 21, pp. 21-31
- A.P. MIRANDA, “Investir em Virtude: o Dever de Revelação do Árbitro”, 2013 *Revista Internacional de Arbitragem e Conciliação* 9, Vol. 6, pp. 16-18
- A.M. CORDEIRO, *Tratado da Arbitragem. Comentário à Lei 63/2011, de 14 de Dezembro* (2015), pp. 153-165
- B. REIS, “Reflexões Práticas sobre a Ética na Arbitragem: Perspetiva de Árbitro”, 2013 VI Congresso do Centro de Arbitragem Comercial - *Intervenções* 75, Vol. 6, pp. 84-86

IBA RULES ON THE TAKING OF EVIDENCE
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- **Judicial Case law**

- No public award or decision rendered by Portuguese courts has ever referenced the IBA Rules of the Taking of Evidence.

- **Arbitral Awards**

- Not made available.

- **Publications**

- P.M. NÁPOLES, “As Novas Regras da IBA sobre Produção de Prova em Arbitragem Internacional”, 2010 Revista Internacional de Arbitragem e Conciliação 105, Vol. 3, pp. 105-116
- M.F. GOUVEIA, *Curso de Resolução Alternativa de Litígios* (3rd ed. 2014), pp. 251-254

IBA GUIDELINES ON PARTY REPRESENTATION

- **Judicial Case law**
 - No public award or decision rendered by Portuguese courts has ever referenced the IBA Guidelines on Party Representation.
- **Arbitral Awards**
 - Not made available.
- **Publications**
 - No publication was identified with respect to the IBA Guidelines on Party Representation.