Kluwer Arbitration Blog

Results of the Survey on the Use of Soft Law Instruments in International Arbitration

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Between February and March 2014, the Survey on the Use of Soft Law Instruments in International Arbitration was open for responses here at Kluwer Arbitration Blog. The users were asked to report on their real-live encounters with the following instruments and notions: IBA Rules on the Taking of Evidence, IBA Guidelines on Conflicts of Interest, IBA Guidelines on Party Representation, UNIDROIT Principles for International Commercial Contracts, *Lex Mercatoria* including similar expressions, and CIArb Guidelines and Protocols. The question was whether the respondents had invoked, used or applied one of those concepts or instruments when acting as lawyers or arbitrators in international proceedings.

The Survey received 63 responses. The respondents defined the geographical area of their experience as follows: Africa – 6.6%, Middle East – 11.5%, Asia – 21.3%, Eastern Europe -23%, North America (EE.UU. and Canada) – 26.2%, Latin America – 36.1%, and Western Europe – 44.3%. The majority of the respondents (71.5%) are under 40 years old. 17.4% are between 41 and 60 years old, and 11.1% are over 60. The demographic situation of the respondents probably mirrors the interests in Soft Law instruments as well as the Kluwer Arbitration Blog audience.

The Survey shows that the IBA Rules on the Taking of Evidence is the most relevant instrument for international arbitration *praxis*. Indeed, 12.7% of the respondents always apply or invoke these Rules and 60.3% do so regularly, while 22.2% have applied them occasionally and only 4.8% report having never applied them.

The IBA Guidelines on Conflicts of Interest turns out to be the second-popular instrument: 7.9% always apply them and 36.5% do so regularly. Another 36.5% have applied or invoked them occasionally and 19% have never done so.

Accordingly to these results, the Rules seem to enjoy a much higher acceptance (80% use them always or regularly) than the Guidelines (44.4% use them always or regularly). The thesis can be advanced that the Rules, even if marked by certain legal tradition and values, aim at leveling the ground from a procedural stance. This is perceived by the users as a technical issue; easier to cope with from the standpoint of different legal cultures. The scope of the Guidelines, on the other hand, touches mainly upon ethical and cultural aspects making it harder for them to achieve the same level of global acceptance. The different regional outcomes discussed below might support this preliminary thesis.

The most recent IBA product, the IBA Guidelines on Party Representation in International Arbitration, shows an important potential. Indeed, somehow surprisingly, 3.2% of the respondents report they always use those Guidelines, 11.1% do so regularly, and 36.5% do so occasionally. Conversely, 49.2% deny ever having used them. Even though the new Guidelines are just about to celebrate their first birthday, they have been applied or invoked with a varying frequency by 51.8% of the respondents. This confirms that they are targeting a niche where Soft Law inputs are highly welcome.

The outcome for the UNDROIT Principles and *Lex Mercatoria* is notoriously similar, which may suggest that they are used interchangeable. The responses for the UNIDROIT Principles are: 6.3% always use them, 12.7% do so regularly, 46% use them occasionally, and 34.9% have never used them. The responses for *Lex Mercatoria* and similar notions come close: 3.2% always use them, 15.9% do so regularly, 49.2% use them occasionally, and 31.7% have never used them. To sum up, around 50% of the respondents have used both instruments occasionally, around 20% use them always or regularly and around 30% have never used them.

CIArb Guidelines and Protocols are applied with much lower frequency: 3.2% always apply them, 4.8% do so regularly, 25.4% do so occasionally, and 66.7% have never applied them.

Turning to the different regional outcomes, Eastern Europe appears to be particularly open-minded towards *Lex Mercatoria* (50% – regularly; 25% – occasionally and 25% -never) and the UNIDROIT Principles (25% – always, 25% – regularly and 50% – occasionally). However, in Western Europe the enthusiasm with both vanishes: *Lex Mercatoria* appears with 8.3% as regularly applied, 33.3% apply it occasionally and 58.3% have never done it. The UNDIROIT Principles show 8.3% regular application, 41.5% occasional application, while 50% have never applied them.

This intra-European variance could be explained, perhaps, by the fact that the Eastern European countries underwent intense legal reforms more recently. During their efforts to create a modern private law, UNDROIT Principles were usually taken into consideration.

In North America, *Lex Mercatoria* is used slightly more than the UNIDROIT Principles, though their popularity is rather low. *Lex Mercatoria* is used regularly in 21.4% of the cases, occasionally in 64.3% and never in 14.3%. On the other hand, the use of the Principles is limited to ‘occasionally’ in 71.4% of the cases or ‘never’ in the remaining 28.6%.

North America is an important user of the IBA Rules on the Taking of Evidence: 7.1% says they always use them, 78.6% – regularly, and 14.3% do so occasionally. A similar picture emerges from the IBA Guidelines on Conflicts of Interest: 7.1% says they always use them, 64.3% – regularly and 28.6% do so occasionally. Comparatively this is the region with the highest level of acceptance of these last Guidelines.

In Western Europe the adherence to the IBA Rules on the Taking of Evidence is even higher: 8.3% always use them, 83.3% use them regularly and 8.3% use them occasionally. The IBA Guidelines on Conflicts of Interest are used regularly in 33.3%, occasionally in 41.7% and never in 25% of the cases.

The responses from Eastern Europe show a lower acceptance of the IBA instruments: the Rules on the Taking of Evidence are reported to be used regularly – 50%, occasionally – 25% and never – 25% as well. However, the IBA Guidelines on Conflicts of Interest get close to the Western European levels of acceptance: 25% always use them, 50% does so occasionally and 25% have

never used them.

The experiences in Latin America are highly fractioned. It is the only region where all instruments are said to ‘always’ be applied, at least to some small percentage. Additionally, it is the only region where all of the instruments are reported to ‘never’ be applied. As a result, all of the instruments are mostly used ‘occasionally’. Latin American respondents favor the UNIDROIT Principles with 23.1% always applying them, 7.7% – regularly, 38.5% – occasionally, and 30.8% – never. The IBA Rules on Evidence are widely accepted as well with 15.4% always applying them, 46.2% – regularly, 30.8% – occasionally and 7.7% – never.

While European respondents mostly affirm that they never or just occasionally use the new IBA Guidelines on Representation, 14% of North American respondents contend using them regularly, while 7.7% of Latin American respondents affirm always using them and the same percentage does so regularly.

The number of responses from other regions is comparatively low and does not allow making preliminary conclusions. Still, it is interesting to highlight that in the Middle East, 50% of the respondents say they always use *Lex Mercatoria* and the other half does it occasionally. In Asia, the experience with the IBA Guidelines of Conflicts of Interest is noteworthy. They are reported to always be used in 8.3% of the cases and regularly in 41.7%, 16.7% use them occasionally and 33.3% has never done so. This means 50% of the respondents use these Guidelines with high level of frequency, above the global average.

In summary, the Survey data allow for at least three theses. First, Soft Law instruments are clearly present in the landscape of international arbitration. Second, the most relevant Soft Law instrument is the IBA Rules on the Taking of Evidence. Third, different regions show significantly diverse patterns of acceptance of all those instruments. These dissimilarities seem to correlate with different legal traditions and different styles to conduct arbitration. Further research will follow.

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