Ethics in International Arbitration

The 2013 IBA Guidelines on Party Representation in International Arbitration

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Outline:

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2. 2010 Survey by IBA Task Force on Counsel Ethics in International Arbitration

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The Problem of Differing Ethical Standards

Uncertainty: What law should govern the conduct of counsel in international arbitration?

“To the question: What are the professional rules applicable to an Indian lawyer in a Hong Kong arbitration between a Bahraini claimant and a Japanese defendant represented by New York lawyers, the answer is no more obvious than it would be in London, Paris, Geneva and Stockholm. There is no clear answer ...

The Problem of Differing Ethical Standards

Inequality between Arbitrating Parties

• Not uncommon for parties to engage counsel (and also co-counsels) from multiple jurisdictions, and/or to have their arbitrations governed by the laws of another jurisdiction, and/or to have physical hearings in yet another jurisdiction.

• Where a lawyer subject to higher standards of ethical conduct is constrained in a particular way and his opponent is not, this can translate into a material disadvantage to the client, potentially offending the fundamental principle in arbitration of equal treatment of the parties (e.g. Article 18 of the UNCITRAL Model Law: “The parties shall be treated with equality…”).
The Problem of Differing Ethical Standards

*Inequality between Arbitrating Parties*

Some examples of areas where differing ethical standards can result in inequality:

1. Preparation of witnesses for oral evidence
2. Disclosure of documents
3. Communication with witnesses
2010 Survey by IBA Task Force on Counsel Ethics in International Arbitration

Background

• In 2008, the IBA Arbitration Committee established the Task Force on Counsel Ethics in International Arbitration (the “Task Force”).

• The mandate of the Task Force was to focus on issues of counsel conduct and party representation in international arbitration that are subject to, and informed by, diverse and potentially conflicting rules and norms.

• As an initial inquiry, the Task Force undertook to determine whether such differing norms and practices may undermine the fundamental fairness and integrity of international arbitral proceedings and whether international guidelines on party representation in international arbitration may assist parties, counsel and arbitrators.
2010 Survey by IBA Task Force on Counsel Ethics in International Arbitration

• In 2010, the Task Force commissioned a survey to examine these issues (the “Survey”).

• The Survey found that there was “a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration”.

• Respondents to the Survey expressed strong support for the development of international guidelines for party representation.
“The range of rules and norms applicable to the representation of parties in international arbitration may include those of the party representative’s home jurisdiction, the arbitral seat, and the place where hearings physically take place. The Survey revealed a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration. The potential for confusion may be aggravated when individual counsel working collectively, either within a firm or through a cocounsel relationship, are themselves admitted to practise in multiple jurisdictions that have conflicting rules and norms.”

- Preamble to IBA Guidelines on Party Representation in International Arbitration (25 May 2013)
The IBA Guidelines on Party Representation

On 25 May 2013, the IBA issued the IBA Guidelines on Party Representation in International Arbitration.

“The IBA Guidelines on Party Representation in International Arbitration (the ‘Guidelines’) are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.”

- Preamble to IBA Guidelines on Party Representation in International Arbitration (25 May 2013)
The IBA Guidelines on Party Representation

When the Guidelines would apply

The Guidelines are contractual in nature. They will therefore only apply where:

• The Parties agree to adopt them in whole or in part; or

• The Tribunal decides to apply them (having determined that it has authority to do so).
The IBA Guidelines on Party Representation

Overview of Guidelines

The Guidelines are divided into 7 parts, consisting of 27 guidelines, with comments providing explanations about them:

1. Application of the Guidelines (Guidelines 1 to 3)
2. Party Representation (Guidelines 4 to 6)
3. Communications with Arbitrators (Guidelines 7 to 8)
4. Submissions to the Arbitral Tribunal (Guidelines 9 to 11)
5. Information Exchange and Disclosure (Guidelines 12 to 17)
6. Witness and Experts (Guidelines 18 to 25)
7. Remedies for Misconduct (Guidelines 26 to 27)
The IBA Guidelines on Party Representation

Definition of “Party Representative”

Summary:
• “Party Representative” is defined reasonably broadly as “any person, including a Party’s employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert ...”

Comment:
• Unclear whether it would include a consultant or a behind-the-scenes lawyer, working for or together with the person actually appearing on behalf of a Party.
The IBA Guidelines on Party Representation

Application of the Guidelines (Guidelines 1 to 3)

Summary:
• Parties may adopt the Guidelines, in whole or in part, in their arbitration agreement or subsequently at any time. Arbitral tribunals may also apply the Guidelines in their discretion, if they determine they have the authority to rule on matters of party representation (Guideline 1).

• The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either counsel’s primary duty of loyalty to his party or his paramount obligation to present his party’s case (Guideline 3).

Comment:
• Compare the initial reaction to, and then the widespread acceptance of, the IBA Rules on the Taking of Evidence in International Arbitration.
The IBA Guidelines on Party Representation

Party Representation (Guidelines 4 to 6)

Summary:

• 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 object after proper disclosure (Guideline 5).

• If Guideline 5 is breached, the Arbitral Tribunal may take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of new counsel from participating in all or part of the arbitral proceedings (Guideline 6).
The IBA Guidelines on Party Representation

Party Representation (Guidelines 4 to 6)

Comments:

• Does not displace the existing IBA Rules on Conflicts of Interest in International Arbitration, which relate to arbitrators.

• Rules in many common law jurisdictions are probably stricter.

• Query: Would these Guidelines would be invoked where e.g. a party’s counsel engages the services of a Queen’s Counsel after the tribunal has been constituted and where that QC is from the same chambers as a member of the tribunal?

• Absent these Guidelines, although not expressly provided for, the remedy is presumably to apply to the tribunal to exclude the newly appointed counsel.
The IBA Guidelines on Party Representation
Communications with Arbitrators (Guidelines 7 to 8)

Summary:
• Guideline 7 prohibits *ex parte* communication between a Party Representative and an arbitrator concerning the arbitration unless the parties have agreed otherwise.
• Guideline 8 provides limited and exhaustive exceptions for the selection of a party appointed arbitrator and chairperson. Such communications are to be limited to discussions of “expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest”.
• The Commentary also notes exceptions if the parties have agreed to urgent *ex parte* proceedings, or where the other party does not take part in proceedings.
The IBA Guidelines on Party Representation

Submissions to the Arbitral Tribunal (Guidelines 9 to 11)

Summary:

• Party Representatives “should not make any knowingly false submissions of fact to the Arbitral Tribunal” (Guideline 9).

• Where the Party Representative learns that he or she has made a false submission, the Party Representative “should, subject to countervailing considerations of confidentiality and privilege, promptly correct that submission” (Guideline 10).

• Guideline 11 addresses a situation where a Party Representative submits evidence that he or she knows or later discovers to be false. Guideline 11 also provides a non-exhaustive list of remedial measures that Party Representatives “may” take in such a situation.
The IBA Guidelines on Party Representation

Submissions to the Arbitral Tribunal (Guidelines 9 to 11)

Comments:

• While Guideline 9 forbids “knowingly false” submissions of fact to a tribunal by Party Representatives, it is unclear what tests apply to determine the burden and standard of proof.

• While Guideline 10 requires a Party Representative to correct a false submission “subject to countervailing considerations of confidentiality and privilege”, it does not seem right to bar such correction due to confidentiality and privilege obligations. It would be rare for any legal system to allow privilege to condone the continuance of a misrepresentation to an adjudicator.
The IBA Guidelines on Party Representation
Submissions to the Arbitral Tribunal (Guidelines 9 to 11)

Comments (continued):
• Guidelines 9 to 11 only address false submissions as to fact, not law. The Commentary also states that “a Party Representative may argue any construction of a law, a contract, a treaty or any authority that he or she believes is reasonable”. This leaves some questions unanswered, such as whether counsel can be selective as to the authorities that are cited, or what a Party Representative should do if he or she knows that an expert witness as to applicable substantive law is making misleading statements as to the nature, meaning or relevance of a particular law.
The IBA Guidelines on Party Representation

*Information Exchange and Disclosure (Guidelines 12 to 17)*

**Summary:**

- Guideline 12 states that when the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve Documents (a widely defined term which includes electronic data of any kind) that would otherwise be deleted.

- Guideline 13 states that a Party Representative should not request or oppose production "for an improper purpose, such as to harass or cause unnecessary delay”.

- Guideline 15 states that the party should be advised to take reasonable steps to search and produce all non-privileged documents and that the Party Representative should take reasonable steps to assist.
Comments:

• The Commentary makes clear that the standard required is broader than the “relevant and material” test that the IBA Rules of Evidence applies to production obligations. This is because at the outset, it might not be clear exactly what is material and potentially relevant, so documents should be preserved until a view can reasonably be reached that they could not be material.

• Since the “need” to preserve documents is postulated not only when document production has been agreed or ordered but even when the arbitration is “likely to involve” such a step, the Guidelines appear to expand the scope of the obligations of the parties themselves and introduce an obligation of document preservation (or “litigation hold”).
The IBA Guidelines on Party Representation
Information Exchange and Disclosure (Guidelines 12 to 17)

Comments (continued):
• The Commentary elaborates on some of the “reasonable steps” which the Party Representative should advise and assist the party to take, including notifying key people and putting in place a “reasonable and proportionate system for collecting and reviewing Documents”. However, it is unclear what test should be applied to determine what is “reasonable and proportionate”, e.g. whether it should be proportional to the amount in dispute or the relevance of the issues in the mind of the Party Representative or otherwise.
The IBA Guidelines on Party Representation

Witnesses and Experts (Guidelines 18 to 25)

Summary:

• Guidelines 18 to 25 provide a framework for the interactions between Party Representatives and witnesses and experts.

• Guideline 18 requires a Party Representative to identify himself or herself, the party he or she represents, and the reason for which the information is sought, before seeking to elicit it from a potential witness or expert.

• Guideline 19 requires a Party Representative to make any potential witness or expert aware that they may inform or instruct their own counsel and may discontinue the communication.

• Guideline 20 states that a Party Representative may assist witnesses and experts in the preparation of witness statements and expert reports.
Summary (continued):

• Guidelines 21 and 22 state that the Party Representative “should seek to ensure that a Witness Statement reflects the Witness’s own account of relevant facts, events and circumstances”, and that “an Expert Report reflects the Expert’s own analysis and opinion”.

• Guideline 23 states that a Party Representative “should not invite or encourage a Witness to give false evidence”.

• Guideline 24 permits a Party Representative to interact with witnesses and experts to discuss and prepare their prospective testimony. The Commentary elaborates on appropriate norms of behaviour and allows for “practise questions and answers” in assisting a witness to prepare as long as this does “not alter the genuineness of the Witness or Expert evidence”.

The IBA Guidelines on Party Representation

Witnesses and Experts (Guidelines 18 to 25)

Comments:

• The differing standards of what constitutes permissible witness preparation is controversial, even between common law jurisdictions. For example, in the United States interviewing of witnesses is permitted and is in fact commonplace, but this is not the case in other jurisdictions. This can lead to inequalities in the proceedings.

• The Commentary states that if a Party Representative is subject to a higher standard than that prescribed in the Guidelines, he or she may address the situation with the other side and/or the tribunal. The Guidelines however do not expressly provide for a power of the tribunal to order that the higher standard should apply so as to maintain the integrity and fairness of the proceedings.
The IBA Guidelines on Party Representation
Witnesses and Experts (Guidelines 18 to 25)

Comments (continued):

• There are many nuances involved in assisting witnesses and experts to prepare their statements and reports. While it is clear that counsel should not tell a witness what they must say, it is less clear whether it is permissible for counsel to prepare the drafts or recommend changes. This is not also addressed in the Guidelines.
The IBA Guidelines on Party Representation

Remedies for Misconduct (Guidelines 26 to 27)

Summary:

• Guideline 26 grants the tribunal a wide discretion when considering how to deal with misconduct for breach of any of the Guidelines. Potential outcomes include: (1) admonishing the Party Representative; (2) drawing adverse inferences when assessing the evidence and legal submissions; (3) apportioning the costs of the arbitration differently; and, more broadly (4) taking steps to “preserve the fairness and integrity of the proceedings”.

• Guideline 27 sets out a list of non-exhaustive and non-binding factors for the tribunal to consider in determining the appropriate remedial action for misconduct, including: (1) “the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award”; (2) “the potential impact of a ruling regarding Misconduct on the rights of the Parties”; (3) “the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings”; (4) “the good faith of the Party Representative”; (5) “relevant considerations of privilege and confidentiality”; and (6) “the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct”.

SINGAPORE INTERNATIONAL ARBITRATION ACADEMY
The IBA Guidelines on Party Representation

Remedies for Misconduct (Guidelines 26 to 27)

Summary (continued):

• The Commentary suggests that the “Arbitral Tribunal should seek to apply the most proportionate remedy or combination of remedies in light of the” factors articulated above and refers to the process as “an overarching balancing exercise to be conducted in addressing matters of Misconduct by a Party Representative in order to ensure that the arbitration proceeds in a fair and appropriate manner”.

Comments:

• Each of these remedies is essentially directed at the arbitrating parties, not at their representatives, and the Guidelines make clear that it is ultimately the represented party which bears the consequences of its representative’s misconduct.

• Query: Should a counsel’s bad conduct be visited upon his or her client?
Practical Limitations / Shortcomings

• The Guidelines are only binding if both parties agree. Although the Guidelines also provide that the arbitral tribunal may also apply the Guidelines in their discretion, few arbitral tribunals will actually dare to impose such standards against the parties’ will.

• The Guidelines do not displace otherwise applicable mandatory laws or rules or legal representatives' duties as imposed by national organisations and laws.

• The Guidelines do not address cases where higher ethical rules apply to legal representatives than those set out in the Guidelines.

• In the event of breach, the tribunal has limited power to penalise a party’s representative. The focus of the remedies available is essentially directed at the arbitrating parties, not at their representatives.
Concluding Remarks

Despite the limitations/shortcomings highlighted, the Guidelines are, in my view, still highly useful:

• The Guidelines cover certain situations which other rules have left open. For example, now, if a tribunal has already been constituted, counsel with a conflict with a member of the tribunal may not accept representation.

• The Guidelines provide a reference point for parties of the minimum standard required and the foundation for tribunals to give directions and orders, hence promoting a level playing field between the parties.

• The Guidelines provide persuasive guidance by which to assess the conduct of practitioners. For example, if an award is challenged on the basis of alleged deficiencies in a practitioner’s conduct, the Court may refer to the Guidelines. In most cases, if the behaviour in question falls within the Guidelines, it will not support a challenge, hence promoting the enforcement of awards.

• The Guidelines give the parties and the tribunal an opportunity to address the issue at the start of proceedings and, by doing so, enhance the parties’ confidence in the international arbitration process.