

Ethics In International Arbitration

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The need for ethical rules in arbitration has been the subject of extensive debate.[1] Counsel in international arbitrations are not regulated by an international bar; their individual national bar association establishes their code of conduct. A lawyer from a civil law country may have significantly different obligations concerning preservation of evidence than a lawyer practicing in a common law jurisdiction. Even among common law jurisdictions, the differences in preparing witnesses for cross-examination may be significant. Furthermore, counsel in international arbitration “may be subject to diverse and potentially conflicting bodies of domestic rules and norms. 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.”[2]



Monique Sasson

If counsel are bound only by their respective individual bar standards, international arbitration constitutes an “ethical no-man’s land.”[3] Unequal standards “may undermine the fundamental fairness and integrity of international arbitral proceedings,”[4] and could encourage clients to choose lawyers from a jurisdiction with “lower” standards.

Although the debate about possible solutions is now a staple of arbitration colloquia, as early as 1992 Professor Jan Paulsson[5] suggested standards of conduct for counsel in international arbitration. Following on from Cyrus Benson’s[6] call in 2009 for transparency in arbitration and his proposed checklist of ethical obligations to follow in international arbitration, Doak Bishop and Margrete Stevens[7] outlined a comprehensive code of ethics in their keynote address at the 2010 ICCA Congress in Rio de Janeiro.

In 2013, the International Bar Association (IBA) adopted its “Guidelines on Party Representation in International Arbitration.”[8]

The IBA guidelines, according to the preamble, “are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. They are also not intended to vest arbitral tribunals with powers otherwise reserved to bars or other professional bodies.” Parties to an international arbitration case may agree to exclude or include the application of the guidelines, or may carve out certain provisions of the guidelines or add provisions. The idea, therefore, is not to impinge on international arbitration’s procedural flexibility; rather, it is to assist the parties by providing them a tool to resolve a

potential conflict of rules governing the professional conduct of counsel.

It is difficult to see experienced arbitration practitioners from any jurisdiction having genuine concerns about the individual provisions of the guidelines. However, since application of the guidelines is effectively voluntary and depends upon agreement by both sides, and since a few provisions may be viewed as controversial even in experienced arbitration quarters, it is not yet clear whether the guidelines will become a standard feature of international arbitration in the way that the 2010 IBA "Rules on the Taking of Evidence in International Arbitration" have clearly been established as part of arbitral "best practice." Still, even if the guidelines themselves are not typically adopted, they have already been very influential in keeping the ethics debate at the forefront of discussions regarding improvement of arbitral procedures and in prompting a number of major arbitral institutions to adopt professional conduct rules as part of their arbitration rules.

In summary, the IBA guidelines address the following issues:

Party Representation

Guidelines 4-6 recommend that party representatives identify themselves at their earliest opportunity and that a party discloses to the tribunal changes in representation in a timely fashion. Furthermore, the guidelines state that once an arbitral tribunal has been constituted, a counsel "should" not agree to represent a party when there is a relationship between the counsel and an arbitrator from which a conflict of interest may arise. In the event that the counsel nonetheless decides to represent the party, the arbitral tribunal must adopt "measures appropriate to safeguard the integrity of the proceeding," including the exclusion of the new [p]arty [r]epresentative from participating in all or part of the arbitral proceedings." This power conferred upon the tribunal is a matter of greater controversy.

Party representatives should not engage in any ex parte communications unless one of the three exceptions listed in guideline 8 applies:

1. Communications between counsel and a party-nominated arbitrator to determine the potential nominee's expertise, experience, availability and potential conflict of interest;
2. Communications between counsel and party-nominated arbitrator concerning the selection of the chairman of the tribunal;
3. If all parties agree, communications between counsel and chairman of the tribunal to determine the chairman's expertise, experience, availability and potential conflict of interest.

Guideline 8 clarifies that these communications may contain a "general description of the dispute," counsels "should not seek the views" of the prospective arbitrator/chairman.

Submissions to the Tribunal

Guidelines 9-11 concern submissions to the tribunal made as party representative's submission or as witness/expert evidence. The guidelines state that a "party representative"[9] should not make a "knowingly false submission of fact" to the tribunal. If the party representative learns later that false submissions of fact were made, the party representative should disclose this, taking into account issues of confidentiality and privilege. A crucial element to underline here is that the obligation to tell the truth

is “confined” to statement of facts.

Moreover, a party representative should not knowingly submit witness or expert evidence that is “false.” Again, in case of a subsequent discovery of the falsity of witness or expert evidence, party representatives should disclose such falsity to the tribunal taking into account issues of confidentiality or privilege. In particular, in these circumstances, party representatives “may:” 1) advise the witness or the expert to testify truthfully; 2) deter the witness or the expert from submitting false evidence and urge correction of it; 3) correct or withdraw false evidence; 4) withdraw as party representative, if necessary.

Document Production

Guidelines 12-17 deal with document production and the need to preserve documents, “so far as reasonably possible.” The party representative should explain to her client the necessity of production and the consequences of failing to produce; the party representative should also assist the client to ensure that a reasonable search of the relevant documents is undertaken, and that all non-privileged documents are produced. A party representative should not suppress or conceal documents or advise a party to do so. Although counsel from some legal cultures may be reluctant to accept the application of the document production guidelines, they should nonetheless appreciate that they are not in a national court proceedings and that acting in an international arbitration carries responsibilities that may not be a routine part of their litigation practice.

Witnesses and Experts

The IBA guidelines clarify that when counsel deal with a witness or expert, the counsel must identify themselves and the party they represent and the reasons for which the information is sought. Counsel should also clarify that the witness has the right to inform and/or instruct her own counsel.

Counsel may assist drafting witness statements and expert reports, but should ensure that the witness statement reflects the witness’s own account of the facts, and the expert report contains the expert’s own analysis and opinion. Counsel may discuss and prepare witnesses’ and experts’ prospective testimonies. Counsel should not encourage a witness to give false evidence.

The IBA guidelines set out potential sanctions for counsel misconduct. A counsel may be admonished; the tribunal may draw appropriate inferences in assessing the evidence and take into account the breach when the tribunal apportions costs. The tribunal may also take any other appropriate measure to preserve the integrity and fairness of the proceeding. The imposition of sanctions must take into account the enforceability of the award, the rights of the parties, the gravity of the breach and the impact on the proceeding, the good faith of the party representative, privilege, confidentiality and knowledge of the party represented by the counsel breaching the guidelines.

As noted above, certain principles adopted in the IBA guidelines have been incorporated in the arbitration rules of some major international arbitral institutions.

The 2014 LCIA rules, for example, have added a provision concerning party representation. LCIA Article 18 provides, inter alia, that once the arbitral tribunal is constituted, any changes to the party representatives shall be notified promptly, and the arbitral tribunal has to approve such a change. The arbitral tribunal may withhold approval if the change would affect the composition of the tribunal or the enforceability of the award on the grounds of a possible conflict. The tribunal will decide whether to approve the change by considering the following factors: (a) a party has the right to choose its own

counsel, (b) the stage of the arbitration, and (c) the likely wasted costs or loss resulting from such a change. A violation of this provision may result in the following sanctions against the legal representative: a written reprimand, or a written caution as to future conduct in the proceeding or any other measures necessary for the tribunal to act fairly and impartially and to avoid unnecessary delays. The parties must ensure that their legal representatives act in accordance with the conduct guidelines contained in the annex to the LCIA rules.

The annex to the 2014 LCIA rules clarifies that Article 18 does not intend to derogate from the arbitration agreement or undermine any legal representative's primary duty of loyalty to the party she represents. The annex also does not derogate from any mandatory laws or rules of laws or professional standards of conduct applicable to the legal representative.

Moreover, the annex also states that the legal representative 1) should not engage in activities aimed to obstruct the arbitration or jeopardize the finality of the award; 2) should not knowingly make false statements to the tribunal of the LCIA; 3) should not knowingly procure or assist in the preparation or rely on false evidence; 4) should not knowingly assist or conceal a document to be produced to the tribunal; and 5) should not engage in ex parte communications with any member of the tribunal. Any ex parte contact should be disclosed to all the parties and all the members of the tribunal and the LCIA registrar.

AAA and the AAA's International Centre for Dispute Resolution have to date only issued a general statement regarding standards of conduct for parties and representatives, but AAA-ICDR are expected in the very near future to adopt a professional conduct code as part of their arbitration rules. At present, the general statement of standards require parties and their counsel to treat the individuals involved in proceedings in a courteous, respectful and civil manner, avoid any form of unlawful discrimination or engage in harassing, threatening or intimidating conduct toward AAA employees or the arbitrators. The standards also require that the witnesses and the parties adopt appropriate conduct during the proceeding, and all parties are required to refrain from using inappropriate language. The sanction for failure to adhere to these standards is that the institutions may decline to further administer a particular case.

It seems clear from the above that the soundest way to avoid arbitration from being an "ethical no-man's land" is to encourage parties and their counsel to adopt the IBA guidelines in individual cases and, for example, to incorporate the guidelines in the initial procedural order in the arbitration. The professional conduct standards adopted by the LCIA in its new rules are also an example that should be followed by other institutions in order to protect the integrity and fairness of arbitral proceedings. In addition to streamlining time and cost of proceedings, participants in the arbitral process have a responsibility to ensure that counsel are following a reasonably uniform set of professional conduct standards.

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[1] For a helpful summary of the literature on this subject, see Edna Sussman, “Can Counsel Ethics Beat Guerrilla Tactics?: Background and Impact of the New IBA Guidelines on Party Representation in International Arbitration,” in NYSBA, *New York Dispute Resolution Lawyer*, Fall 2013, Vol. 6, No 2, p. 47. See also Gunther J. Horvath and Stephan Wilske, editors, *Guerrilla Tactics in International Arbitration*, Kluwer Law International, 2013.

[2] International Bar Association, *Guidelines on Party Representation in International Arbitration*, Preamble.

[3] Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012. See also Laurel S. Terry, et al., *Transnational Legal Practice*, 42 *Int’l Lawyer* 833 (2008).

[4] IBA, *Guidelines on Party Representation in International Arbitration*, Preamble.

[5] Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 *Am. Rev. Int’l Arb.* 214 (1992).

[6] Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 *Disp. Resol. Int’l* 78 (Mar. 2009).

[7] Doak Bishop & Margrete Stevens, *ICCA Congress 2010, International Code of Ethics for Lawyers*, available at http://www.arbitration-icca.org/media/0/12763302939400/stevens_bishop_draft_code_of_ethics_in_ia.pdf; the code accompanied their keynote address on the subject, available at http://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf.

[8] Available on the International Bar Association’s website:
http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

[9] Party representatives are defined in the IBA Guidelines 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, and whether or not legally qualified or admitted to a Domestic Bar.”
