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IBA Guidelines On Party Representation In International Arbitration

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There are many uncertainties in relation to the proper behavior of counsel in arbitration, in particular, in terms of avoiding conflicts of interest, identifying minimum ethical standards, and the overriding question of tribunal control. These uncertainties arise for two main reasons. The first is the lack of consensus as to whether arbitrators have powers of control over counsel. The second is the uncertainty as to the content of any standards, given the significant disparity between legal families in terms of their domestic norms. The International Bar Association has sought to deal with these important issues through its recent adoption of IBA Guidelines on Party Representation in International Arbitration (“the Guidelines”), adopted by Council resolution on 25 May this year.

The Preamble to the Guidelines refers to “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”. Notions of integrity and honesty and concern for activities “designed” to obstruct justice, demonstrate that the key concern is with *intentionally* improper behavior, a concept difficult to identify in legal adjudication, particularly by arbitrators at interim stages of proceedings, although the guidelines themselves seek to articulate specific norms that would apply automatically and which would not require separate analysis of intent.

To become binding norms, the Guidelines would need to be accepted, in whole or in part, by the parties. Such acceptance can occur at the outset, or later, perhaps at the preliminary stage of arbitration at the suggestion of the tribunal. Even if the Guidelines have been expressly agreed to, the Preamble makes the point that they are not intended to replace mandatory rules or agreed arbitral rules or vest arbitral tribunals with powers otherwise reserved to professional bodies. While it makes sense to say they do not override arbitral rules, both the Guidelines and such rules can be modified by consent and parties can hence choose to make the Guidelines prevail. The parties should thus clarify the relationship between any potentially differing norms. They would not normally have the power to override mandatory rules, although the very nature of such norms is contentious.

If the parties themselves have neither agreed to the Guidelines nor expressly excluded them, the question is then whether the tribunal itself could rely upon them, which raises a debate as to whether a tribunal has power in that regard, absent agreement from the parties.

The Guidelines are primarily concerned with the behavior of party representatives and not the parties themselves, although the Commentary to Guidelines 1-3, states that “an obligation or duty bearing on a Party Representative is an obligation or duty of the represented Party, who may ultimately bear the consequences of the misconduct of its Representative.” The term “party representative” is also drafted reasonable broadly to include a Party’s employee acting other than in the capacity of a witness or expert. The inclusion of employees would typically involve in house counsel, but readers should also note limiting connectors in the Guidelines referring to appearance for specified tasks, namely, submissions and representations, “in” arbitration and “to” a tribunal. A consultant or other behind the scenes lawyer, working for or with the person actually appearing, thus raises a definitional question as to coverage. If such a person acted improperly with the knowledge of the official counsel, the latter would presumably be liable for such agency behavior. It might have been preferable for the definition to speak of representatives who also *aid* in submissions and the like. Of course broad drafting can lead to over-inclusion.

Guideline 4 requires notification as a Party Representative at the earliest opportunity and promptly as to any change.

Guideline 5 addresses the *Rompetrol* and *Hrvatska* scenarios, where an independent tribunal is first appointed but new counsel is brought in that has some relationship with an arbitrator. The Guideline emphatically comes out in favor of the already appointed tribunal and tribunal control, albeit with the not unimportant caveat that the Guidelines do not purport to assert power that does not otherwise exist. The Guideline states:

“5. 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 objects after proper disclosure.”
(emphasis added)

Guideline 6 provides for broad sanctions, including exclusion of the Representative. The reference to “would” create a conflict in Guideline 5, might be problematic as it does not square fully with the terminology of the standard in the IBA Guidelines on Conflicts which alludes to an objective standard of a reasonable observer merely having justifiable doubts. Another concern in integrating the Party Representation Guidelines with the Conflicts Guidelines is in relation to the reference to waiver via party agreement or non-objection. On its face, this is inconsistent with the non-waivable red category from the Conflicts Guidelines. On the other hand, the Commentary to Guidelines 4-6 states that in assessing any conflict, the Arbitral Tribunal may rely on the IBA Guidelines on Conflicts, so it would appear that

consistency is contemplated.

It should be noted that there is no express reference in Guideline 5 to calling for the views of the Party Representative before making a decision, but a prudent tribunal may wish to do so.

Guideline 7 proscribes *ex parte* communications with the tribunal “concerning the arbitration” save by agreement. Guideline 8 provides limited and exhaustive exceptions for 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* provisions such as the UNCITRAL Model Law 2006 preliminary order provisions and also where the other party does not take part in proceedings.

Guideline 9 proscribes “knowingly false” submissions of fact to a tribunal by a Party Representative. There are burden and standard of proof questions that underpin such a test, for example; how is the timing of knowledge shown; what adverse inferences are permitted; and how would one deal with reckless indifference to truth or conscious strategies to hide the truth from oneself?

Guideline 10 states that if a Party Representative learns that he or she has made a false statement of fact, the Party Representative “should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission”. The Commentary states that this also applies to a new Party Representative that discovers a falsehood by a predecessor.

The reference to confidentiality and privilege, while naturally relevant, should not be allowed to be a significant barrier. If an erroneous fact could be accidentally communicated in the face of confidentiality and privilege obligations at the outset, it does not seem correct to bar correction via such norms. If the client tried to bar use of the true information under client privilege notions, leaving aside the complex question of which law of privilege applies in arbitration, it would be rare for any legal system to allow privilege to condone the continuance of a misrepresentation to an adjudicator.

Guideline 11 states non-exhaustively that a Party Representative should not “submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so.”

Remedial actions, which may depend upon the circumstances, and which are said to be subject to countervailing considerations of confidentiality and privilege, should be prompt and may include advising the person to testify truthfully; taking reasonable steps to deter the person from submitting false evidence; urging the person to correct or withdraw the false evidence; correcting or withdrawing the false evidence; or withdrawing as Party Representative if the circumstances so warrant.

It is noticeable that the Guidelines only refer to false submission as to facts not law. Indeed the Commentary 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.”

That proposition is non-contentious but it begs a number of questions. What can a Party Representative ethically do with a legal contention that is thought to be unreasonable or plain misleading? What about legal systems that see proof of applicable law as a question of fact? Can counsel be selective as to the authorities that are cited? What if an expert witness as to applicable substantive law is making false or knowingly simplistic statements as to the nature, meaning and relevance of that law, to the knowledge of the Party Representative? The lack of express mention of these concerns should not be seen as indirectly condoning any or all of these actions.

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. The Guideline makes clear that *potential* relevance to the arbitration takes precedence over a corporate document retention policy that would otherwise destroy or delete material. The Commentary also makes it clear that this is a broader standard 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 is reasonably reached that they could never be material.

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”. Stating a test based on an implied intent to harass or cause unnecessary delay will be particularly difficult to apply when considering those legal families that are used to the broadest production obligations. One legal family’s harassment is another’s asserted basis of the search for truth!

Guideline 15 indicates 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. The Commentary elaborates on some of the steps that might need to be taken, including notifying key people and putting systems in place and refers to a “reasonable and proportionate system for collection”. There are many unanswered sub-questions in determining what is reasonable and proportionate. Should it be proportional to the amount in dispute or the relevance of the issue in the mind of the Party Representative or should all material information be assiduously sought?

Guideline 18 requires a Party Representative to so indentify him or herself, the party represented and the reason information is sought, before seeking to elicit it. Guideline 19 states that a Party Representative should make the 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 in the preparation of Witness Statements and Experts in the preparation of Expert Reports”.

Once again there are many nuances in such activities. All would agree that counsel should not tell a witness what they must say, but who should do a draft? What is permitted behavior by a Party Representative when recommending changes? What if a Party Representative asks a witness to remove material or not be too elaborate on embarrassing details? The Guidelines simply say in Guideline 21 that the Party Representative “should seek to ensure that a Witness Statement reflects the Witness’s own account of relevant facts, events and circumstances..”

Guideline 23 states that a Party Representative “should not invite or encourage a Witness to give false evidence.” Guideline 22 states that a Party Representative “should seek to ensure that an Expert Report reflects the Expert’s own analysis and opinion.” Subject to these obligations, Guideline 24 states that a Party Representative may interact with Witnesses and Experts in order to discuss and prepare their prospective testimony. The Commentary elaborates on appropriate norms of behavior and allows for “practice questions and answers in assisting a witness to prepare as long as this does “not alter the genuineness of the Witness or Expert evidence...”

To some, there will be little value in ethical guidance, in the absence of meaningful sanctions. The general power is stated in Guideline 26. The Commentary makes clear that the Party Representative should be notified and heard before any sanction is determined. The remedies as appropriate may be to:

- “(a) admonish the Party Representative;
- (b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;
- (c) consider the Party Representative’s Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative’s Misconduct leads the Tribunal to a different apportionment of costs;
- (d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings”

It is vital to note that “misconduct” is defined broadly to mean, not only “a breach of the present Guidelines...,” but also, “any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative”.

Where costs are referred to, there are obvious nuances depending on whether costs are awardable, whether the principle of loser pays applies or whether procedural behavior is seen as a relevant factor instead of or as well as the outcome on the merits. The Guidelines do not purport to make the Party Representative personally liable for such costs, although in many cases the client’s right to compensation could flow under implied contract terms.

The final remedy is general, neither expressly allowing for, nor denying the power of a tribunal to exclude the offending counsel, which will be the most contentious option. The better view is that such power potentially exists, although there may be many cases where this would be inadvisable, such as improper conduct of a Government

Attorney-General in an investment dispute.

Finally, Guideline 27 seeks to outline what the Commentary states to be a non-exhaustive and non-binding list of factors to consider in determining upon remedial action, including, “the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award; ..the potential impact of a ruling regarding Misconduct on the rights of the Parties; ..the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings; .. the good faith of the Party Representative; ..relevant considerations of privilege and confidentiality; ..and the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct.

The Commentary to Guidelines 27-8 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”.

It would be impossible to draft such Guidelines without some ambiguity and without the need to gloss over some key differences in view. Nevertheless, the new Guidelines add much in the way of useful guidance as to the actions that either can be or should not be taken by Party Representatives. Like the rest of the IBA’s work in the arbitration field, the norms will need to be well understood by practitioners who can expect them to have significant and growing influence.

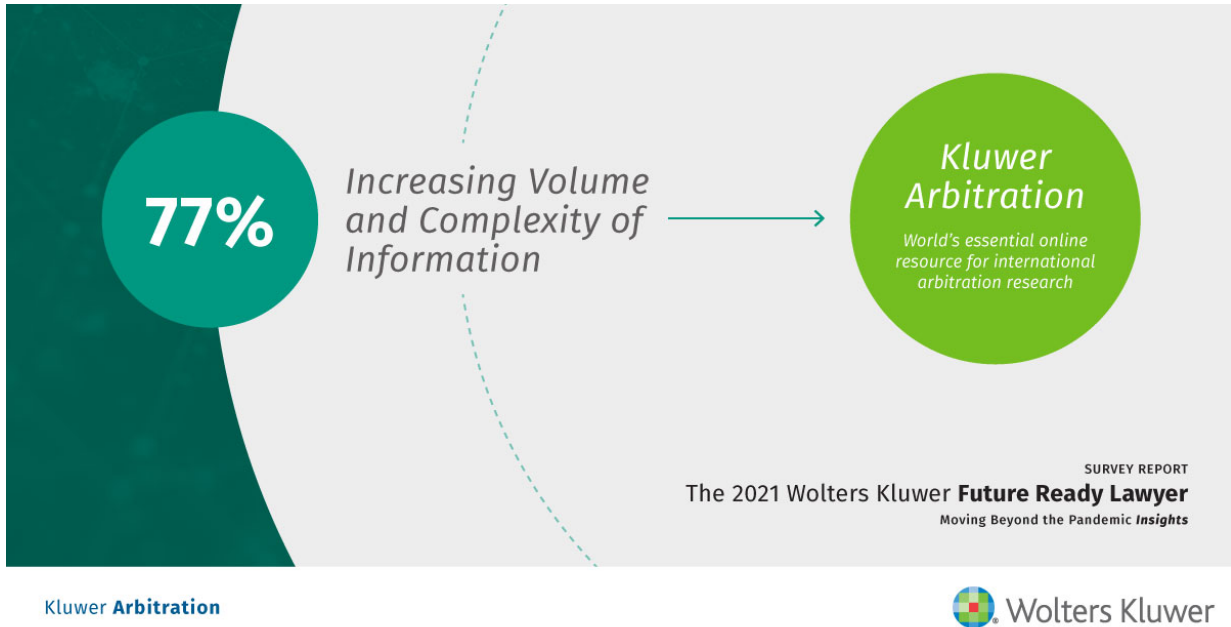
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