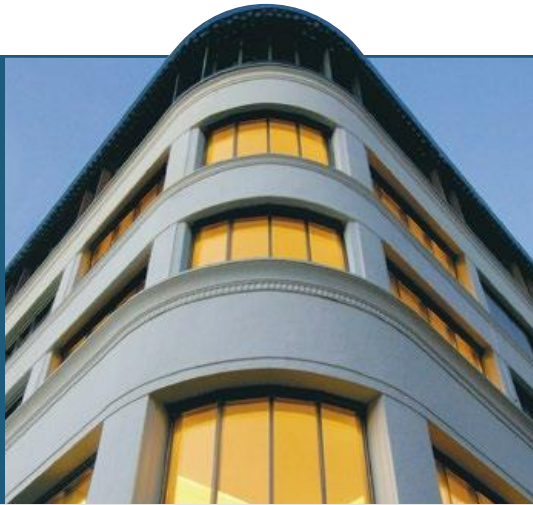


LALIVE



Ethical Rules and Duties for Party Representatives in International Arbitration

The IBA Guidelines on Party Representation in Practice

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33rd Annual SIA-ICC Symposium of Arbitrators on “Ethics in International Arbitration: Arbitrators, Counsel, Experts, Witnesses, Parties & Funders”

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- (1) Have the IBA Guidelines on Party Representation in International Arbitration **made any difference** in counsel's conduct before international tribunals?
- (2) Are there any **practical issues** in applying the IBA Guidelines?

Are there any **areas that can be improved** in the future?

1. Have the Guidelines made a difference?

Difficult to measure

- **2015 Queen Mary / W&C Survey** on Improvements and Innovations in Int'l Arbitration
 - 76% of 750 respondents had not seen the Guidelines “used” in practice (24% had, but 61% aware of them)
 - But 28% perceived the Guidelines as “effective”
 - Little information on meaning of “used” or “effective”.

1. Have the Guidelines made a difference?

- **IBA Report on all Rules and Guidelines (2015/2016)**
 - 845 “meaningful responses” (40% in Europe)
 - 1358 “arbitration involving issues of counsel conduct – more in common law jurisdictions
 - Reference to the Guidelines in 16 % of them
 - But no definition of “issues of counsel conduct”
 - Most respondents skipped the question on the relevance of the Guidelines to the issues that arose

1. Have the Guidelines made a difference?

My informal questionnaire

- 180 practitioners, about ½ civil law / common law (Europe, US, Asia)
- 9 institutions: ICC, LCIA, SCC, PCA, ICSID, SCAI, DIS, SIAC, HKIAC
- 5 Questions, since mid-2013:
 - More (1) reference to the Guidelines at the outset ; (2) use of them during the proceedings?
 - More (3) unethical behaviour by counsel (or allegations) and related motions; (4) ethical behaviour by counsel?
 - (5) None of the above?

1. Have the Guidelines made a difference?

- Answers from institutions (all but SIAC and ICC)*
 - They do not keep a specific record (incl. ICC)
 - Although they have noticed **no or rare (a) references to / use of the Guidelines** and **(b) change in conduct**
 - **Except the PCA:** increase in use by parties and tribunals but not often referred to at the outset
 - Specific case of **LCIA:** Article 18.4 challenges (conflict arising out of party representative) but no other motions

* Addressed by another speaker. The ICC has noticed more ref. to Guidelines in ToR as this is encouraged in the ICC 6 Note but no real increase in their use

1. Have the Guidelines made a difference?

- Answers from arbitration practitioners:*

	Total		Civil law		Common law	
Recipients of the questions	181	100%	93	51%	88	49%
No of Respondents	84	46%	48	57%	36	43%
No change at all (Answer No. 5)	64	76%	40	63%	24	38%
Perceived positive impact of Guidelines	13	15%	5	38%	8	62%
Increase in unethical conduct of counsel	3	4%	1	33%	2	67%

* Percentages rounded

1. Have the Guidelines made a difference?

- ... so five years on:
 - Status quo **or** more awareness/positive impact because of debate around the Guidelines and new LCIA Rules?
 - Question of time before the Guidelines are routinely applied **or** practical issues that need fixing **or** both?
- Possible problematic areas for improvement
 1. Content of certain guidelines
 2. Remedy - sanction on counsel

2. Practical issues and possible solutions (1)

(1) Achieving an equal playing field?

- Failure to reconcile U.S. “best practices” with different rights and obligations in other jurisdictions resulting from entire different legal systems in the taking of evidence
- Two problematic guidelines
 - Document disclosure: duty to preserve documents (Guideline 12 – “litigation hold”)
 - Preparation / coaching of witnesses (Guideline 24 and commentary)

2. Practical issues and possible solutions (1)

- Achieving an equal playing field: possible solutions
 - Remove U.S. centric guidelines and commentaries?
 - Include specific steps for Tribunal to take at the outset of proceedings to explore how to level the playing field

2. Practical issues and possible solutions (2)

(2) Ensuring the integrity of the process?

- In case of misconduct, focus should be only on the process / the parties, not counsel
- Ambiguity on impact of Guidelines vs mandatory bar rules
- Tribunals not equipped to investigate party/party representative relationship and conduct
- Tribunals better equipped to decide the dispute, control the process and sanction parties so do not benefit from misconduct

2. Practical issues and possible solutions (2)

- Ensuring the integrity of the process: possible solutions
 - Remove possibility of sanction against counsel ⇒ would focus on the parties
 - If sanctions on counsel are maintained, address more specifically issues arising out of client-attorney privilege or mandatory bar rules (if any) and local disciplinary procedures
 - Include as an annex information on local mandatory bar rules in different jurisdictions

Conclusion: further work beyond the Guidelines

- Cooperate with national bar councils for increased uniformity of rules in international arbitration
- Ensure training/backing of arbitrators in use of existing powers to police the proceedings and improve equality of arms – key role for institutions
- Continue the debate to increase awareness

Thank you

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