

LALIVE

IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION: DO WE NEED THEM? A SWISS PERSPECTIVE

Address to the CEPANI (Belgian Centre for Arbitration and Mediation)

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- 1 Today I will address you on a topic you will all be familiar with, a topic that some of you have perhaps already accepted as an inevitable and welcome addition to the arbitration landscape: **the IBA Guidelines on Party Representation or the Guidelines** (the “Guidelines”).
- 2 Before I do let me start with a few **preliminary remarks**.
- 3 First, counsel’s ethics is a complex and delicate subject and a topical one. Many articles have been written on it recently, and I have not read them all. At least half a dozen conferences have been organised in the last few months on the topic and I have not been to all. It is a topic which raises many often intertwined issues; one which calls for many nuances; and the purpose of my speech today is not to cover them all but simply to share a few concerns with you, and hopefully give you some food for further critical thoughts.
- 4 Second, the IBA already several years ago realised importance of the subject and through these new Guidelines has, usefully, sought to address certain aspects of it. And for this it must be congratulated. I know several of the 23 members of the IBA taskforce on Counsel Conduct; I have immense respect for all of them, they are on any view all experienced and outstanding international practitioners. The work they have undertaken in the last few years along their busy practice certainly deserves applause. My goal is simply, and humbly, to participate in the search for the right solution in this area and, for that purpose, question certain aspects of the Guidelines and the approach they reflect. It is with much deference that I do so today.
- 5 Third, many of the issues I will highlight are not new; they have been raised already by others, not only, by the board of the Swiss Arbitration Association,

ASA, of which I am a member (and it is also in this capacity that I am here today, hence the title of this address), and specifically by my partner Michael Schneider, but also by practitioners outside Switzerland and outside the civil law world, including in England and Hong Kong.

- 6 So, what is the issue?
- 7 When we consider our practice in international arbitration, most of us, whether we sit as arbitrators or act as counsel, or both, are constantly torn between, on the one hand, the need for predictability, transparency and a level playing field (or equality of arms), and, on the other, the need for flexibility so as to answer the needs of a particular dispute, the expectations of particular parties and particular counsel, and in this regard, the need to respect the diversity that is inherent to this *international* area of legal practice.
- 8 Some of us may be more focused on one or the other of those needs, depending on our legal background and, more importantly, our experience. From that perspective alone some of us may instinctively view the Guidelines as a major step forward or as a step backwards. But these considerations (predictability vs flexibility) alone do not suffice to accept or reject the Guidelines. It is not that simple.
- 9 In the same way, as Rusty Park has many times pointed out, the question cannot be put simply in terms of: “do we need more regulation in international arbitration?” He says, and I agree: “in the abstract, it is too easy to answer “no” to this one. It is not the right question.”
- 10 There are in fact two questions. The first one is: what is the issue, or more precisely, is there an issue to be addressed in international arbitration when it comes to counsel’s conduct? And naturally, the second question is: if there is, *how* should it be addressed?
- 11 So on the first question: **is there an issue to be addressed in international arbitration when it comes to counsel’s conduct?**
- 12 No one can deny (a) the crucial importance of the role of counsel in international arbitration, in particular - though not only - because of the shortness of the proceedings and the tribunal’s heavy reliance on counsel, (b) the differences that exist in professional practices and ethics (even in areas where the civil law/

common law divide has largely disappeared), and (c) the challenges that these differences can give rise to in practice, for arbitrators and counsel.

- 13 The need to tackle this issue has been on the table for many years now. There have been many calls for more ethics in international arbitration, several attempts, before the Guidelines, at “codes” “principles” and “statements”, including by the CCBE (Council of Bars and Law Societies of Europe) and various eminent practitioners; the issue was addressed at several international conferences, including ICCA Congresses and including the ASA annual conference in January 2010 already.
- 14 When it comes to counsel’s conduct, there appears to be two types of criticism directed at the current situation:
1. the inequality of arms or absence of a level playing field resulting from these differences in practice and ethics; and
 2. counsel’s increasingly unethical conduct *per se*, ranging from bad faith and guerrilla tactics, such as unreasonable document produce requests, biased expert reports, or misleading statements of facts or law, to types of conduct that would qualify as criminal offences in most jurisdictions, such as deliberate submission of forged documents or false testimony.
- 15 Whether differences in practices and ethics suffice to legitimize a call for uniformity and regulation in this complex area is debatable. Less debatable may be the need to address somehow the second set of concerns: the real or perceived increase in breaches of now common ethical standards.
- 16 My impression, from the events I have been to and the discussions I have had with practitioners, is that the Guidelines have been more naturally perceived as a positive development among the younger practitioners and the practitioners from emerging arbitration jurisdictions, in particular from those where there are no bar rules. For them spelling out somewhere, *officially*, at least the very *minimum*, established ethical standards, is a useful step.
- 17 But it appears also to be the view of some more experienced practitioners, among them the drafters of the revised 2014 LCIA Arbitration Rules, including Johnny Veeder who addressed this topic at the *Goeff Lecture* in 2010, who believe that, over the years, even with existing players, things have gotten worse; counsel are

taking liberties that they should not be taking and this risks compromising the integrity of the entire process. There is also an increasing distrust for the arbitral process coming from the outside, in particular with regard to investor state arbitration.

18 It is this kind of distrust that no doubt prompted the CCBE in 2010-2011 to seek to regulate the conduct of European lawyers involved in international arbitration. However, it was the fear for an unworkable uniformed approach that compelled so many renowned European practitioners at the time, and ASA, to object to the project which was then abandoned.

19 So yes, something most likely needs to be done at least about the increasing or increasing risk of unethical conduct, but, and moving to the next question: **are the Guidelines the right approach?**

20 The IBA Guidelines seek to do two things:

1. Define, to the extent possible a level playing field or uniform set of standards, and
2. Entrust the arbitral tribunal with the powers (absent any other applicable mandatory laws or rules) to sanction *counsel* when these Guidelines are not complied with.

21 I would like to outline some concerns with respect to both aspects.

First concern: which/whose standards should be contained in the Guidelines?

22 The Guidelines do not simply address obvious unethical conduct by party representatives. They seek also to define universal ethical conduct *and* at the same time create a procedural level playing field.

23 Most of the Guidelines set out basic principles or standards that are unobjectionable; they are in line with established common practice and, for some, even a matter of course. This is true in particular for the following: Guideline 9: “A Party Representative should not make any knowingly false submission of fact to the arbitral tribunal” or “submit witness or expert evidence that he or she knows to be false” (Guideline 11), or “encourage witnesses to give

false testimony” (Guideline 23). Basically lawyers should not lie to the arbitral tribunal. (This was reflected in the CCBE draft code, Clause 4.4.)

- 24 Other Guidelines spell out proposition that are possibly less obvious for all lawyers in *all* jurisdictions worldwide, but appear sensible and, more importantly, as reflecting international arbitral practice. Guidelines 4 to 6 on changes in party representation after the constitution of the arbitral tribunal resulting in a conflict of interests with one of the arbitrators arguably fall in this category. These Guidelines arise out of the *Hrvatska Elektroprivreda v Slovenia* ICSID Case in which the tribunal decided to exclude from the proceedings counsel from the same Chambers as one of the arbitrators who was brought into the case just before and just for the hearing; that decision and the existence of inherent powers to render it, went widely uncontested.
- 25 Also hard to contest are Guidelines 7 and 8 prohibiting *ex parte* communication with the arbitral tribunal save when identifying a prospective arbitrator or presiding arbitrator (also reflected in the CCBE draft code), and Guidelines 20-21, which provide in essence that counsel may talk to witnesses and experts and assist in the preparation of their witness statements and reports.
- 26 Other Guidelines, however, are plainly problematic. This is because they are not seeking to spell out minimum, already widely accepted, standards, but pretend that they exist or seek to *promote* them in areas marked by *fundamental* differences in approaches among different legal systems. And this is where the problem lies: when we say the Guidelines are good because they provide a level playing field, *whose* level playing field are we talking about?
- 27 There are two areas in the Guidelines which highlight the issue: documentary evidence and testimony evidence.
- 28 Starting with **documentary evidence**: it arises out Guidelines 12-17, “exchange of information and disclosure”. Document production often gives rise to much debate in international arbitration and some of the principles set out in those Guidelines are obviously good in that they promote the cost efficiency of the process (*e.g.* the plea against unreasonable requests for documents). They are in line with the rules already widely adopted in arbitral practice, the IBA Rules on the Taking of Evidence 2010.

- 29 In this area, however, it is undisputedly delicate to determine *standard* practices and define *a* level playing field. This difficulty is illustrated by the very solution adopted in the Guidelines, which seek to spell out counsel’s obligation with regards to the preservation and production of documents in international arbitration. For a North American lawyer these guidelines may be perceived as a necessary tool to avoid being put at a major disadvantage, but for continental European lawyers for instance, they more likely reflect the import of a procedural aspect that is entirely foreign to them and inappropriately expand their duties and that of their clients, beyond the scope of the IBA Rules on the Taking of Evidence.
- 30 Guideline 12 indeed introduces not only an assumption in favour of broad disclosure of documents, but also an obligation, prior to the step being introduced in the proceedings, to preserve documents for possible later production when the arbitration “is likely to involve” document production. This is also referred to as the “litigation hold” provision. (Specifically, Guidelines 12 provides: “*When the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration.*” Emphasis added.)
- 31 The commentary to the Guidelines on document disclosure do state that these Guidelines “*may not be necessary ... where document production is not done or is minimal*”. But personally, I find this proposition difficult to reconcile with the actual wording of Guideline 12.
- 32 Of course it would seem wholly unfair to *e.g.* a US party to have to preserve and produce documents when its *e.g.* Belgium, Swiss or German adverse party would have no obligation to do so. But, reversely, is it fair to place obligations in this area on the non-US party whose entire internal communication and document management practice may be based on the expectation and premise that a very broad category of internal documents are and will remain confidential and cannot be discoverable in legal proceedings? Does this reflect an existing business level playing field? *A fortiori* is it appropriate to place an obligation on *counsel* for the non-US party, for fear of sanction from arbitrators and a risk of compromising

his or her career in the field? As much as document disclosure is ingrained in my own legal background, New Zealand, I am not certain it is.

- 33 Turning to **testimony evidence**, Guidelines 20-21, as mentioned, confirm that counsel “*may assist witnesses in the preparation of witness statements and experts in the preparation of expert reports*” but that counsel should ensure that the content of the witness statements and expert report reflects “*the witness’s own account of relevant facts*”, and “*the expert’s own analysis and opinion*”.
- 34 Although possibly remaining less obvious in certain civil law jurisdictions, testimony evidence is now the norm in international arbitration and these principles, including the obligation not to interfere with expert evidence, are hardly objectionable when it comes to ensuring a level playing field.
- 35 But what about witness preparation for the hearing? This is also often given as an example of area of “abuse” by counsel in international arbitration. On this, Guideline 24 simply provides that it is appropriate “*to meet or interact with witnesses and experts in order to discuss and prepare their prospective testimony*”. Nothing more. The commentary (p.15) however goes *much further*: counsel “*may assist a Witness in preparing for their testimony in direct and cross examination, including through practise questions and answers*” (emphasis added). What does this mean? That North American style witness coaching (which remains prohibited even under the English bar rules) is now universally acceptable and accepted?
- 36 This may be less of an issue than the litigation hold of Guideline 12 because it does not impose a *new obligation* on counsel, but nonetheless: whose level playing field has been defined here? And, again, I have not heard this only from civil continental European lawyers.
- 37 The issue with attempting harmonization is at least twofold:
- 38 First, to the extent that rules and practices concerning lawyers’ conduct exist but differ from one jurisdiction to another, any attempt at standardisation, is necessarily at the expense of at least some of the existing rules and practices of an existing system. What is “ethical” or “unethical” is the result of different cultures and legal systems, and we certainly cannot have a single guide for *all* counsel in *all* cases.

39 Second, standard rules as the ones in the Guidelines are based on assumptions and principles taken from *different* legal systems, such that they can of course be viewed as a helpful compromise, but also as a *disconnected* assembly of different concepts from different worlds, which do not necessarily form a coherent whole for everyone.

(On this aspect of the debate - the desired content of the “standards” - I refer to, and strongly recommend, the excellent article by Toby Landau and Romesh Weeramantry, *A Pause for Thought*, presented at the 2012 ICCA Congress in Singapore.)

40 On the content of the standards, the approach taken by the drafters of the revised LCIA Arbitration Rules and its Annex (General Guidelines for the Parties’ Legal Representatives) seems more attractive. The focus of these guidelines is indeed on minimum ethical standards, not on harmonization. The conduct proscribed in points 2 to 6 of the LCIA Rules Annex amount to criminal offences in most jurisdictions (save perhaps No 6 on *ex parte* communications). In addition, new rules, Articles 18.3 and 18.4 deal separately with the *Hrvatska Elektroprivreda v Slovenia* scenario mentioned earlier. In other words, the new LCIA Rules do not tackle as many issues as the Guidelines and, on this aspect, they have therefore not given rise to too much controversy.

41 Where the LCIA Rules are aligned with the Guidelines and remain problematic is that they place in the arbitral tribunal the duty and power *to sanction counsel* for non-compliance with these standards. This is the second concern to which I now turn.

Second concern: should it be the arbitral tribunal’s role to sanction counsel’s conduct?

42 If you accept, as I do, that spelling out or acknowledging the existence of general or minimum standards expected of counsel in international arbitration, is a welcome, or at least an inevitable, development, the next question that naturally arises is: how do you ensure compliance with these standards?

43 In the context of the arbitral process, the underlying goal is simply to preserve the fairness and integrity *of the proceedings*. It is therefore with this goal in mind that one should ask the question: who should be able to sanction who for what?

- 44 The Guidelines vest these powers (subject to applicable mandatory laws and rules) in the arbitral tribunal, against the party representative, *i.e.* counsel. Is this necessary? Is this desirable?
- 45 **First, is this necessary?** I am not certain that it is. Under most, if not all, frequently used arbitration rules, arbitrators have, expressly or implicitly, the powers to ensure the “fundamental fairness and integrity” of the proceedings (*e.g.* 14.2 of 1998 LCIA Rules) by taking measures that will protect the other party, victim of some form of misconduct, such as rejection of evidence, adverse inferences, or costs sanction. If arbitrators do not always make adequate use of such powers, including for fear of a challenge (of themselves or the award), this may be essentially a question of arbitration practice and arbitrators’ awareness rather than a lack of rules. This may be an area where more needs to be done by arbitration institutions, including in the training of arbitrators.
- 46 These powers are not always easy to exercise: the party misbehaving may have no assets; the adverse inference may jeopardize the award. However, the Guidelines do not *per se* make things easier. To safeguard the award and the arbitrators, the requirement will always be to establish that the *right* measure has been taken - or not taken - so as to ensure the fairness and integrity *of the process*. In other words, from the perspective of *procedural* fairness and integrity, it makes *no* difference whether the failure of compliance is due to “misconduct” of the party or of counsel. Any redress from the tribunal should therefore focus on the procedure and the party, not counsel.
- 47 This is also true if one seeks to achieve equality of arms: the focus should be on the procedure and defining early the playing field for particular parties in a particular dispute represented by particular counsel. The tribunal’s broad powers under most rules allow them to do so.
- 48 So, no, vesting the powers to sanction counsel in the tribunal does not appear necessary. **Second, is it desirable?** My answer is the same: I do not believe so for two reasons.
- 49 The first reason is that the new set of “remedies”, or rather sanctions, available in the Guidelines (Guideline 26) may provide the basis for a new species of guerrilla tactics, a welcome incentive to all of those who wish to delay the proceedings and/or simply distract opposing counsel and the arbitral tribunal

from the merits of the case. This may become a tool in the hands of those very parties/counsel who are the target of these Guidelines. Who knows whether this risk will materialise; but it is not unreasonable to believe that it may.

- 50 The second reason is that it places on arbitral tribunals responsibilities and require decisions from them on issues which are alien to the arbitrator's role and which, if mixed with it, may impact on its integrity of the process. This is all the more a concern that the "Remedies for Misconduct" in Guideline 26, reach beyond "breaches" of the Guidelines to "*any other conduct that the arbitral tribunal determines to be contrary to the duties of a Party Representative*" (Definition of "Misconduct" on p. 3).
- 51 The conduct of lawyers is normally regulated by their (domestic) professional body, which generally also apply sanctions in case the regulations are breached. In a number of jurisdictions, the separation between such bodies, and the courts before which counsel appear is considered as a key feature of the proper administration of justice. Indeed, the two types of functions are arguably incompatible and it may be difficult for an arbitral tribunal dealing with both, to preserve the confidence of the parties and their counsel in its impartiality. It may even open the door to a challenge of the award.
- 52 Even in jurisdictions where the judge who is hearing the dispute on the merits may also sanction counsel or refer counsel to the relevant professional body, there can be no analogy with the position of arbitrators. Arbitrators are appointed by the parties or the institution to resolve a particular dispute; they have neither the same legitimacy nor the total lack of vested interest *vis-a-vis* counsel that is required for this kind of decisions that professional judges have.
- 53 The lack of separation of the two functions is particularly problematic with respect to those provisions of the Guidelines which concern the relationship between counsel and his or her client, those requiring the arbitral tribunal to investigate this relationship (for instance examining whether counsel has informed or advised the client with respect to document disclosure) or to determine the extent of the client's involvement in counsel's misconduct, as required to decide on the appropriate remedy, as set out in Guideline 27 (f).
- 54 In most jurisdictions, such investigations would be in violation of the lawyer-client privilege and could only be carried out by a professional body or separate

judge. True, Guideline 27(e) requires that “relevant considerations of privilege and confidentiality” be taken into account. But how this should operate in practice is not easy to understand.

- 55 As I mentioned earlier, the 2014 LCIA Arbitration Rules take a similar approach in that they provide that the tribunal may sanction counsel, although there are two significant differences. First the LCIA Rules are *arbitration rules* i.e. the Parties consented to them prior to their dispute and for this reason may be seen as having more legitimacy. Secondly, as mentioned, the “General Guidelines” contained in the LCIA Annex are essentially reminding counsel of conduct that consist essentially in criminal offences – there is no real attempt at creating uniform rules in delicate areas like document disclosure and witness examination.
- 56 But the general problem remains: is it the role of the tribunal to investigate not only if a party has submitted a false statement of fact but also whether its counsel knew about it? This is an aspect of the Rules that created some debate at the Tylney Hall Symposium in May 2014 when the draft of the new rules were discussed.
- 57 Before I conclude on a possible alternative, let me address briefly the argument that **the Guidelines are only “guidelines”** and parties are free not to adopt them, and whether this can be the answer to all criticism. I do not believe so.
- 58 The existence of the Guidelines in an official looking A6 booklet and the high (and deserved) reputation enjoyed by the IBA may lead arbitrators to apply the Guidelines as “best practices”, irrespective of the parties’ consent or views. And irrespective of any legal authority they have. This may be particularly the case for the younger practitioners or practitioners from emerging arbitration jurisdictions.
- 59 We are now in the hands of the arbitrators, as good or as bad they may be. Indeed the Guidelines themselves grant the arbitral tribunal broad discretion to apply them, even in the absence of all of the parties’ consent (Guideline 1 provides that the Guidelines “*shall apply where and to the extent that the parties have so agreed or the arbitral tribunal, after consultation with the parties, wishes to rely upon them.*” Emphasis added.)

- 60 True, that the Guidelines are not intended to displace applicable mandatory laws and professional or disciplinary rules or and do not vest in arbitrators powers if reserved to bars or other professional bodies. This is set out in the preamble (p.2) and in the Guideline 3. They are said to be “contractual”. However, at the very least, they are intended to fill in gaps: for counsel from jurisdictions where no specific disciplinary rules apply or none apply to the issues covered by the Guidelines or none apply in a particular case because e.g. counsel is outside his or her jurisdiction. This was indeed the Guidelines selling point. That they are only guidelines therefore hardly provides any comfort.
- 61 **To conclude**, on the standards first: there is force in the argument that the Guidelines are a step in the right direction, even if not perfect. They at least have the merits of seeking to address the topic and they may have more legitimacy than e.g. isolated publications.
- 62 It certainly cannot be denied that the work of the Arbitration Committee of the IBA has also in the past greatly facilitated the practice of international arbitration. Personally I have found the IBA Rules on the Taking of Evidence for instance a very useful tool, as counsel and as arbitrator. In their second more ambitious version 15 years ago, they were somewhat controversial on both sides of the Atlantic, and both sides of the Channel, but the compromise they represent has now gained wide acceptance.
- 63 I am however not certain that the same outcome is desirable with respect to the new Guidelines on Party Representation. Some practitioners have suggested to me that this was only a first attempt and that the next version would be better. But how easy will it be for the next version of the A6 booklet to pull back on its attempt at harmonisation in the delicate areas I have just discussed?
- 64 Then, the question remains: who, if not the arbitral tribunal, should police *counsel's* compliance with these minimal standards? If a party or counsel has real concerns about another counsel's unethical behaviour, to whom should he or she take these concerns?
- 65 This other entity could be the arbitration institution administering the case. This would not necessarily remove entirely the risk for an increase in procedural motions, but it would limit them and limit their impact on the proceedings themselves. More importantly, it would remove the task of investigating and

deciding on such motions from arbitral tribunals. The entity could be seized either by a party or by the tribunal and it could recommend any sanction.

- 66 A further step could also be taken: the entity vested with such authority – subject always to applicable mandatory laws and professional disciplinary rules - could also be a new international body *carried* by the arbitration institutions. This of course would require significant changes including in arbitration rules and in the workings of arbitral institutions, and would face significant legal and practical hurdles. I understand that the idea was however closely considered in 2011, after the CCBE’s aborted attempt to regulate the profession, in particular through IFCAI, the International Federation of Commercial Arbitration Institutions, but it failed. This does not mean that it was the wrong idea, it may have been simply the wrong time to explore it. It is now a project on which ASA has invited other arbitration institutions and associations to work.
- 67 **By way of final remarks**, I will go back to where I started: this *is* a very complex and delicate area of law. There is no simple ready-made solution. For this reason alone it is essential that the debate should continue, with all the users, counsel and arbitrators. We must not simply wait for the passage of time, but be actors, be firmer as arbitrators, be irreproachable as counsel, allow ourselves to question what we hear as arbitration practitioners, pursue the discussion helpfully started by the IBA,
- 68 Those who have expressed concerns at the Guidelines are not simply a group of irresponsible lawyers favouring at all costs a “*laissez faire*” approach. I certainly do not consider myself as fitting this category. The debate is not simply between the pro- or the anti-regulations either. It is far more complex than that. And it is evolving. The Guidelines should not be the end of the process; but the beginning, a starting point for us to explore *other* avenues for self-regulation.