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REVIEW

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The IBA Guidelines on Party Representation in International Arbitration: A Plea for Caution

Domitille BAIZEAU*

ABSTRACT

The present article seeks to critically review the IBA Guidelines on Party Representations in International Arbitration in their attempt to address the vast and complex topic of counsel's ethics. The author's plea for caution turns on two main concerns. First is the mixing of the issues, inequality of arms, on the one hand, and counsel's unethical conduct per se, on the other. Second is the way in which the Guidelines address them, by (a) seeking to define a uniform set of standards or level playing field that is in some worrying respects very much a North American level playing field; and (b) entrusting the arbitral tribunal with the power to sanction counsel in case of non-compliance, a role for which tribunals are not equipped and which may jeopardize their primary function, that of resolving a particular dispute between particular parties represented by particular counsel in a particular legal environment. The article also discusses the approach adopted by the LCIA in its revised 2014 Arbitration Rules and the current draft of the ICDR Code of Conduct for a Party and its Representative.

The present article is largely based on an oral address that I delivered in Brussels in June 2014 before the General Assembly of the Belgian Centre for Arbitration and Mediation (CEPANI), not long after the IBA Guidelines on Party Representation in International Arbitration (the “Guidelines”) had been adopted. I have sought to add references and ideas so as to reflect the ongoing debate and discussions held with fellow practitioners, including during the IBA Annual Conference in Vienna in October 2015, first, when preparing for the panel discussion on “Martial arts ethics: the offensive and defensive use of the rules of professional conduct”—jointly organised by the Professional Ethics Committee, the Litigation Committee, the Arbitration Committee, and the Judges’ Forum of the IBA in which I had the honour of participating—and, secondly, when having the

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privilege to review and discuss with several practitioners the current draft of the AAA/ICDR “Code of Conduct for a Party and its Representative.”

1 INTRODUCTION

Counsel ethics is not only a topical subject, it is a vast subject. Many articles have been written on the subject in recent years, and I have not read them all. Many conferences have been organised on the topic when the Guidelines were adopted, and I have not been to all. It is also a complex and delicate topic, one which raises many often intertwined issues and one which calls for many nuances. The purpose of this address is not to cover them all but simply to share some real concerns about the Guidelines and hopefully provide some food for further critical thought.

The International Bar Association (IBA) realised several years ago the importance of the subject and through these new Guidelines has, usefully, sought to address certain aspects of it. And for this the IBA must be praised. I know several of the twenty-three members of the IBA Taskforce on Counsel Conduct. I have immense respect for all of them, and they are all experienced and outstanding international practitioners. The work they have undertaken in the last few years in addition to their busy practices 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 deference that I do so.

Many of the issues I highlight here are not new; they have been raised already by others, including by the Board of the Swiss Arbitration Association (ASA) of which I am a member (and it is also in this capacity that I gave my address in Brussels in June 2014), and specifically by the ASA President Elliott Geisinger and by my partner Michael Schneider,¹ as well as by practitioners outside Switzerland and outside the civil law world, including in England and Hong Kong,² as recently

¹ Michael E. Schneider, *President's Message: Yet another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation*, 31 ASA BULLETIN 497-501 (2013); Elliott Geisinger, *President's Message: Counsel Ethics in International Arbitration – Could One Take Steps Further?*, 32 ASA Bulletin 453-57 (2014); Elliott Geisinger, “Soft Law” and Hard Questions: ASA’s Initiative in the Debate on Counsel Ethics in International Arbitration, in SENSE AND NON-SENSE OF GUIDELINES, RULES AND OTHER PARAREGULATORY TEXTS IN INTERNATIONAL ARBITRATION 17-32 (ASA Special Ser. No. 37, 2015); Felix Dasser, *A Critical Analysis of the IBA Guidelines on Party Representation*, 33-62, available at http://www.homburger.ch/fileadmin/publications/CAPP_2015_01.PDF

² See, e.g. Paul Key & Jessica Wells, *Ethical Standards for Counsel in International Arbitration: The Debate Continues*, ICCA Newsletter 1, 8-9 (2013); contra William W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 ARB. INT’L 409 (2014); Cyrus Benson, *The IBA Guidelines on Party Representation: An Important Step in Overcoming the Taboo of Ethics in International Arbitration*, LES CAHIERS DE L’ARBITRAGE (2014).

demonstrated by the rather animated debate that took place at the IBA Arbitration Day in Paris in February 2014 and at other conferences since.³

2 WHAT IS THE ISSUE THAT NEEDS SOLVING?

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 hand, the need for flexibility to answer the demands 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.

Some of us may focus 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 v. flexibility) alone do not suffice to accept or reject the Guidelines. The issue is not that simple.

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, “[I]n the abstract, it is too easy to answer ‘no’ to this one. It is not the right question.”⁴

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 the second question is: If there is, *how* should it be addressed?

Is there an issue to be addressed in international arbitration when it comes to counsel’s conduct?

No one can deny (a) the crucial importance of the role of counsel in international arbitration, in particular—although 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.

The need to address counsel conduct in international arbitration has been on the table for many years now. There have been many calls for more ethics in

³ See, e.g., 1st Conference of the Queen Mary University of London’s Institute of Regulations and Ethics (London, Sept. 11, 2014); Swedish Arbitration Association Annual Meeting and Seminar, *Counsel Ethics in International Arbitration* (Stockholm, May 27, 2015).

⁴ Park, *supra* note 2, at 409.

international arbitration and several attempts before the Guidelines at “codes,” “principles,” and “statements,” including by the Council of Bars and Law Societies of Europe (CCBE) and various eminent practitioners. The issue was also addressed at several international conferences, including International Council for Commercial Arbitration (ICCA) Congresses⁵ and the ASA annual conference in January 2010.⁶

When it comes to counsel conduct, two types of criticism emerge:

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 production requests, biased expert reports, or misleading statements of facts or law, to types of conduct that would qualify as criminal in most jurisdictions, such as deliberate submission of forged documents or false testimony.

Whether differences in practice 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 the second set of concerns, *i.e.*, the real or perceived increase in breaches of now common ethical standards, including from new entrants in the field of international arbitration.

My impression, from the events I have attended 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 national bar rules. For them, spelling out in some “official” way at least the very *minimum* established ethical standards is a useful step.

Some more experienced practitioners—among them the drafters of the revised London Court of International Arbitration (LCIA) Arbitration Rules 2014, including VV Veeder QC, who addressed this topic at the *Goeff Lecture* in 2010—believe that, over the years, even among experienced players, things have deteriorated. According to them, counsel are increasingly taking ethical liberties that they should not be taking, and this risks compromising the integrity of the

⁵ See Sundaresh Menon, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, Opening Plenary Session, ICCA Congress 2012, Singapore; Doak Bishop & Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, in *ARBITRATION ADVOCACY IN CHANGING TIMES* 391-407 (ICCA Congress Series No. 15, Rio de Janeiro, 2010) (Jan van den Berg ed., 2011); V.V. Veeder, in *ARBITRATION ADVOCACY IN CHANGING TIMES* 431-451 (ICCA Congress Series No. 15, Rio de Janeiro, 2010) (Jan van den Berg ed., 2011).

⁶ *Advocacy in International Commercial Arbitration*, ASA Conference (2010).

entire process.⁷ There is also growing external distrust of the arbitral process, in particular of investor-state arbitration.

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.⁸ However, it was the fear for an unworkable uniform approach across Europe that compelled so many renowned European practitioners at the time, and ASA, to object to the project, which was then abandoned.

So yes, something arguably needs to be done about unethical conduct, or the risk of expanding unethical conduct, but are the Guidelines the right solution?

3 ARE THE GUIDELINES THE RIGHT SOLUTION?

The IBA Guidelines seek to accomplish 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* and not only the parties when the Guidelines are not complied with.

Both aspects raise concerns.

First concern: Which/whose standards should be contained in any guidelines or code of conduct applying in international arbitration?

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

Most of the Guidelines set out basic principles or standards that are unobjectionable; they are in line with established common practice and should be a matter of course. This is true in particular for the following: “A Party Representative should not make any knowingly false submission of fact to the arbitral tribunal” (Guideline 9), “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.⁹

Other Guidelines spell out propositions that are possibly less obvious for all lawyers in *all* jurisdictions worldwide, but appear sensible and now, at least arguably, as reflecting established international arbitral practice. Guidelines 4 to 6

⁷ Veeder, *supra* note 5, at 441.

⁸ Draft of Council of Bars and Law Societies of Europe (CCBE) Ethical Guidelines for Lawyers Serving in Arbitration Proceedings (on file with author).

⁹ This basic but fundamental principle was indeed reflected in the CCBE Draft Code, Clause 4.4.

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 into this category. Guidelines 4 to 6 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 as counsel just before and just for the hearing. That decision and the tribunal's inherent powers to render it were widely uncontested.¹⁰

Difficult to contest are Guidelines 7 and 8, which prohibit *ex parte* communication with the arbitral tribunal, save when identifying a prospective arbitrator or presiding arbitrator. This fundamental principle for the integrity of the arbitral process was also reflected in the CCBE Draft Code. Guidelines 20–21 fall into the same category. They provide in essence that counsel may talk to witnesses and experts who will testify during the proceedings, and may assist in the preparation of their witness statements and reports. Again, these principles reflect well-established *international* practice even if certain regional differences persist in this area at the domestic level.

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. 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?

There are two areas in the Guidelines that highlight the issue: documentary evidence and testimony evidence.

Documentary evidence is dealt with in Guidelines 12–17 on “exchange of information and disclosure.” Document production often gives rise to much debate in international arbitration, and some of the principles set out in the Guidelines are obviously good in that they promote cost efficiency of the process (in particular the plea against unreasonable requests for documents). They are in line with IBA rules already widely adopted in international arbitral practice, *i.e.*, the IBA Rules on the Taking of Evidence in International Arbitration adopted in their latest version in 2010.

In this area, however, it is undisputedly delicate to determine *standard* practices and define *a single* level playing field. This difficulty is illustrated by the very

¹⁰ See, e.g., Jean-Christophe Honlet, *The IBA Guidelines on Party Representation in International Arbitration*, 30 J. INT'L ARB. 703 (2013); Toby Landau & J. Romesh Weeramantry, *A Pause for Thought, International Arbitration: The Coming of an Age?* 519 (ICCA Congress Ser. No. 17, Singapore, 2012) (Jan van den Berg ed., 2013); Alexis Mourre & Eduardo Zuleta, *The IBA Guidelines on Party Representation in International Arbitration*, 17 DISP. RES. INT'L 137 (2013); W. J. Rowley, *Guerrilla Tactics and Developing Issues*, in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* 25 (Günther J. Horvath & Stephan Wilke eds., 2013); Bishop & Stevens, *supra* note 5, at 401 *et seq.*

solution adopted in the Guidelines, which seeks to spell out counsel's obligation with regards to the preservation and production of documents in international arbitration. For North American lawyers, these guidelines may be perceived as a necessary tool to avoid being put at a major disadvantage. However, for continental European lawyers or for lawyers from the Arab world trained in the civil law tradition, 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, well beyond the scope of the IBA Rules on the Taking of Evidence.

Guideline 12 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. Verbatim, Guideline 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.)

The commentary to the Guidelines on document disclosure states that these Guidelines "may not be necessary . . . where document production is not done or is minimal." This suggestion, however, is rather difficult to reconcile with the actual wording of Guideline 12.

The following example illustrates the difficulty that arises: it may seem wholly unfair to a U.S. party to have to preserve and produce documents when its Swiss or Egyptian adversaries would have no obligation to do so. However, reversely, is it fair to place obligations in this regard on the non-U.S. party whose entire internal communication and document management practice will likely be based on the expectation and premise that a very broad category of internal documents are and will remain confidential and cannot be disclosed in legal proceedings?

Ethical rules for lawyers do not exist in a vacuum. The difficulty with Guideline 12 is that it creates an obligation that is totally foreign to certain legal—and by extension, certain corporate—systems. It ignores the *business* level playing field that it should reflect. There are hundreds of mid-size companies in the world involved in international arbitration as the only realistic dispute resolution alternative to court litigation. These companies do not have and cannot be expected to have internal procedures and controls in place when it comes to, for instance, internal communications once a dispute is looming. The very concept of privilege, which in common law jurisdictions can attach such communications, may be entirely unknown. Under these circumstances, is it appropriate to require *counsel* for the non-U.S. party to direct their client to hold documents for fear of

sanction from arbitrators and of compromising their career in the field? As much as document disclosure is deeply rooted in my first legal background (New Zealand), I do not believe so.

Turning to *testimony evidence*, Guidelines 20 and 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.”

Although possibly 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 as means to secure a level playing field. But what about preparing witnesses for a hearing? I have heard this as an example of area of “abuse” by counsel in international arbitration. On the subject, 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, however, goes much further: Counsel “may assist a Witness in preparing their testimony in direct and cross examination, *including through practise questions and answers*” (emphasis added). What does this mean? Does it mean that North American style witness coaching (which remains prohibited even under the English bar rules) is now universally acceptable and accepted?

This (slightly buried) guideline 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? Again, this is not a concern that has been raised only by civil continental European lawyers.¹¹

To conclude on this first concern, the issue with attempting harmonisation is at least twofold. First, to the extent that rules and practices concerning lawyers’ conduct exist but differ from one jurisdiction to another, any attempt at standardisation will necessarily be 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. Secondly, standard rules as the ones in the Guidelines are based on assumptions and principles taken from *different* legal systems, such that they can be viewed as a helpful compromise, but also as a *disconnected* assembly of different concepts from different worlds. As such, they do not necessarily form a coherent whole for everyone.¹²

¹¹ See, e.g., Iain Quirk, *Ethical Standards: The Ethical Preparation of Witnesses*, 3 ICCA NEWSLETTER 8 (2013).

¹² 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, *supra* note 10, presented at the 2012 ICCA Congress in Singapore.

On the content of the standards, the approach taken by the drafters of the revised 2014 LCIA Arbitration Rules and their Annex (General Guidelines for the Parties' Legal Representatives) seems more attractive. The focus of the Annex is indeed on minimum ethical standards, not on harmonisation. The conduct proscribed in points 2 to 6 of the Annex amounts to criminal offences in most jurisdictions, save perhaps number 6 on *ex parte* communications with arbitrators, which, as noted above, reflects the paramount need for fairness, impartiality, and equal right to be heard to maintain the integrity of the process. In addition, Articles 18.3 and 18.4 of the new LCIA Rules deal separately with the *Hrvatska Elektroprivreda v. Slovenia* scenario mentioned earlier. In other words, the new LCIA Rules do not seek to address and regulate as many issues as the IBA Guidelines and, in this respect, they have therefore not given rise to as much controversy.¹³

Where the LCIA Rules (but luckily not the ICDR Code of Conduct) are aligned with the IBA Guidelines and, in my view, remain problematic is that they place on the arbitral tribunal the duty and power to *sanction counsel* for non-compliance with these standards.¹⁴

Second concern: Should it be the arbitral tribunal's role to sanction counsel's conduct?

If you accept, as I do, that spelling out or acknowledging the existence of general or minimum standards of conduct expected of counsel in international arbitration is a welcome, or at least a reasonable development, the next question that naturally arises is, how do you ensure compliance with these standards? This question, however, should be answered in the context of the arbitral process, where the underlying goal is to preserve the fairness and integrity of *the proceedings*. It is with this goal in mind that one should ask who should be able to sanction whom for what.

¹³ By some contrast, the ICDR is currently working on a "Code of Conduct for a Party and its Representative," the draft of which was presented by Mark Appel (ICDR Senior Vice President) during the 2015 IBA Annual Conference in Vienna. In its current form, the draft code unfortunately contains a) the equivalent to Guideline 12 and b) a provision far less restrictive than the Guidelines on document production: "A Party and its Representative shall avoid unnecessary delay and expense in relation to the disclosure of evidence by only requesting the production of documents that are reasonably believed to exist and to be relevant and material to the outcome of the case." (Article 5.1 of the current draft), when Guideline 13 prohibits "any Request to Produce, or any objection to a Request to Produce, for an improper purpose, such as harass or cause unnecessary delay."

¹⁴ This approach, as matters stand, has not been followed by the ICDR. The ICDR "Code of Conduct" does not provide any "remedies and sanctions" and the articles of the Code are not considered as "procedural rules." It provides instead that "the Tribunal may however make reference to this Code when applying procedural rules addressing cases of misconduct" and encourages counsel and the tribunal to discuss early in the proceedings possible conflicts between the duties and obligations in the Code and those of counsel arising out of other rules, professional codes, statutes, or other regulatory requirements.

The Guidelines vest these powers (subject to applicable mandatory laws and rules) in the arbitral tribunal, against the party representative, *i.e.*, counsel. One must wonder whether this is necessary and desirable.

First, is it necessary to vest the arbitral tribunal with the power to sanction a party's counsel? 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 proceedings¹⁵ by taking measures that will protect the other party who is victim of some form of misconduct. This can include rejection of evidence, adverse inferences, or even costs sanctions. Arbitrators' reluctance to make adequate use of such powers, including for fear of a challenge (of themselves or the award), is due to arbitration practice and arbitrators' awareness rather than a lack of rules. Perhaps arbitration institutions should do more in this regard, including by encouraging the training of arbitrators.

Arbitrator powers are not always easy to exercise. The misbehaving party may have no assets, or adverse inference may jeopardize the award. However, the Guidelines do not provide a solution for *these* issues. To safeguard the award and the arbitrators, the requirement will always remain to establish that the *right* measure has been taken—or not taken—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.¹⁶

This is also true if one seeks to achieve equality of arms. The focus should be on the *procedure*, and the playing field for particular parties in a particular dispute represented by particular counsel should be defined early. Most modern arbitration rules and laws vest broad powers in tribunals to organise the proceedings. New guidelines are thus not required.

In sum, vesting arbitral tribunals with the power to sanction counsel appears unnecessary. It also is undesirable for two reasons.

First, the new set of "remedies" or sanctions in the Guidelines (Guideline 26)¹⁷ may provide the basis for a new species of guerrilla tactics, a welcome incentive to all 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 great tool in the hands of those very parties/counsel who are the target of the Guidelines. Who knows whether this risk will materialise; but it is certainly not

¹⁵ See, *e.g.*, LCIA Rules, art. 14.2 (1998); LCIA Rules, art. 14.4 (2014); UNCITRAL Arbitration Rules, art. 17.1 (2010); BCDR-AAA Arbitration Rules, art. 16.1 (2009); CRCICA Arbitration Rules, art. 17.1 (2011).

¹⁶ Geisinger, *Soft Law*, *supra* note 1, at 19.

¹⁷ And indeed in the LCIA Rules 2014, art. 18.6.

unreasonable to believe that it may. Secondly, this type of authority places on arbitral tribunals responsibilities and requires them to make decisions on issues alien to the arbitrator's role, and which, if mixed with it, may impact on its integrity of the process.¹⁸ This is all the more a concern since the "Remedies for Misconduct" in Guideline 26 reach worryingly beyond "*breaches*" of the Guidelines to "any other conduct that the arbitral tribunal determines to be contrary to the duties of a Party Representative" (see definition of "Misconduct").

Most lawyers' conduct is regulated by (domestic) professional bodies, which generally also apply sanctions when regulations are breached. In a number of jurisdictions, the separation between such bodies and the courts before which counsel appear is considered a key feature of the proper administration of justice.¹⁹ 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. This may even open the door to a challenge of the award.

Jurisdictions that allow a judge hearing a dispute on the merits to also sanction counsel or refer counsel to the relevant professional body²⁰ are not the appropriate analogy for arbitration proceedings. Arbitrators are appointed by the parties or the arbitration institution to resolve a particular dispute; they have neither the same legitimacy nor the total lack of vested interest that professional judges have *vis-a-vis* counsel that is required for these types of decisions.

The lack of separation of the two functions is particularly problematic with respect to provisions in the Guidelines concerning the relationship between counsel and his or her client, which requires the arbitral tribunal to investigate this relationship (for instance examining whether counsel has informed or advised the client with respect to document disclosure) and to determine the extent of the client's involvement in counsel's misconduct in order to decide the appropriate remedy as set out in Guideline 27(f).

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 would operate in practice is neither explained nor easy to comprehend.

As mentioned earlier, the 2014 LCIA Arbitration Rules take a similar approach by providing that the arbitral tribunal may sanction counsel, although

¹⁸ Elliott Geisinger, Michael E. Schneider & Felix Dasser, *IBA Guidelines on Party Representation in International Arbitration: Comments and Recommendations by the Board of the Swiss Arbitration Association (ASA)*, ¶¶ 1.3–1.4 (Apr. 4, 2014) (on Behalf of the Board of the Swiss Arbitration Association).

¹⁹ This is the case in Switzerland; see Geisinger, *Soft Law*, *supra* note 1, at 23.

²⁰ As in most common law jurisdictions.

there are two significant differences with the approach taken in the Guidelines. First, the LCIA Rules are *arbitration rules*, *i.e.*, the parties consented to them prior to the dispute, and they may thus be seen as having more legitimacy. Secondly, as mentioned above, the “General Guidelines” contained in the Annex to the 2014 LCIA Arbitration Rules 2014 are largely a reminder to counsel of the prohibition of conduct that consist essentially of criminal offences. In other words, there is no real attempt to create uniform rules in delicate areas, such as document disclosure and witness examination.

The general—and in my view fundamental—problem is whether it is the tribunal’s role to investigate not only if a party has submitted a false statement of fact but also whether its counsel knew about it and to sanction counsel accordingly. This is an aspect of the revised 2014 LCIA Arbitration Rules that created some debate at the Tylney Hall Symposium in May 2014 when the then draft of the new rules was discussed.

4 THE GUIDELINES ARE ONLY “GUIDELINES,” SO NO HARM DONE?

One of the considerations put forward many times in support of the Guidelines is that they are only “guidelines,” *i.e.*, they are not binding, and the parties are free to adopt them. Is this the answer? I do not believe so.

IBA proponents themselves often refer to IBA guidelines and rules as “soft law.” 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 the legal authority the Guidelines have. This may be particularly the case for younger practitioners or practitioners from emerging arbitration jurisdictions.

We are now in the hands of the arbitrators, as good or as bad they may be. The Guidelines themselves grant the arbitral tribunal broad discretion to apply them, even in the absence of all of the parties’ consent. Guideline 1 indeed 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).

It is correct that “the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules” and do not vest in arbitrators powers if reserved to bars or other professional bodies. This is set out in the preamble and in 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 in a particular case because, *e.g.*, counsel is outside his or her jurisdiction. This was in fact one of the “selling points” for the Guidelines.

That the IBA Guidelines are only guidelines therefore hardly provides much comfort.

5 CONCLUSION

To conclude, there is some force in the argument that the Guidelines are a step in the right direction, even if imperfect. They have the merits of seeking to address the topic of counsel conduct and counsel ethics in international arbitration, and they may have more legitimacy than, for example, isolated publications.

It is undeniable that the work of the IBA Arbitration Committee has also in the past greatly facilitated the practice of international arbitration. The IBA Rules on the Taking of Evidence are a very good example. The Rules are an extremely useful tool for both counsel and arbitrators. In their second, more ambitious version issued fifteen years ago, they first proved controversial on both sides of the Atlantic and both sides of the Channel, but it is fair to say that the compromise they represent has now gained very wide acceptance.

I am not certain that the same outcome is desirable with respect to the new Guidelines on Party Representation. Some practitioners, including active members of the IBA Arbitration Committee, have already suggested that this was only a first attempt, that they may have gone too far and that improvements are required. But how easy will it be for the next version of the A6 booklet to pull back on its attempt to harmonise the delicate areas discussed above? It may be best to hope that the Guidelines will remain unused and fall into oblivion, gradually replaced by core ethical standards incorporated in arbitration rules.²¹

The question, however, remains as to who, if not the arbitral tribunal, should police *counsel's* compliance with these core 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?

This entity could be the arbitration institution administering the case. This would not necessarily remove entirely the risk of 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

²¹ The IBA Subcommittee on IBA Arbitration Guidelines and Rules is monitoring a survey on the use or non-use of IBA arbitration “soft law products,” which will result in a report, which may serve as a basis for future revision. For a list of IBA subcommittees and their work, see http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Subcommittees.aspx (last visited Oct. 30, 2015). From the preliminary findings of the Survey there appears to be popular resistance against the very notion of guidelines relating to counsel conduct; see Sebastian Perry, *Should the IBA Name and Shame Slow Arbitrators?*, GLOBAL ARB. REV. (Oct. 7, 2015).

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.

A further step could also be taken. The entity vested with such authority, subject to the applicable mandatory laws and professional disciplinary rules, could also be a new international body backed by arbitration institutions. This scenario would require significant changes in the arbitration rules and in the workings of arbitral institutions, and would face significant legal and practical challenges. This idea, which eventually failed to materialise, was closely considered in 2011, after the CCBE's aborted attempt to regulate the profession, in particular through the International Federation of Commercial Arbitration Institutions. This does not mean that it was the wrong idea; the timing may have been wrong. It is now part of a project currently investigated by ASA in coordination with other arbitration institutions and associations.²² Time will tell whether it is a viable solution or whether it may be better to encourage arbitrators to use their inherent powers to maintain the integrity of the process to sanction improper conduct in the context of the arbitral proceedings.

By way of final remarks, I will return to where I started: counsel conduct and ethics in international arbitration *is* a very complex and delicate subject. There is no simple ready-made solution that can be applied at all times to all counsel in all cases. For this reason alone it is essential that the debate continue, with all the users, counsel, and arbitrators. We must not 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, and pursue the discussion helpfully started by the IBA.

Those who have expressed concerns about the IBA Guidelines are not simply a group of irresponsible, unrealistic, or unworldly lawyers favouring at all costs a “*laissez faire*” approach. I certainly do not consider myself as falling into this category. The debate is not simply between the pro- and anti-regulation positions 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 to explore *other* avenues for self-regulation.

²² Geisinger, *President's Message*, *supra* note 1, at 454.