

THE ESSENTIAL GUIDELINES FOR THE PREPARATION
OF GUIDELINES, DIRECTIVES, NOTES, PROTOCOLS
AND OTHER METHODS INTENDED TO HELP
INTERNATIONAL ARBITRATION PRACTITIONERS
TO AVOID THE NEED FOR INDEPENDENT THINKING
AND
TO PROMOTE THE TRANSFORMATION OF ERRORS INTO
“BEST PRACTICES”

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Serge Lazareff is admired as an incarnation of the independent thinker with the courage to state his opinions. A man of the enlightenment, as understood by Kant, who has stepped out of man's self-inflicted intellectual dependency¹ and who fights to preserve the independence of thinking achieved thereby.

When earlier this year the Swiss Arbitration Association (ASA) scheduled its conference on “The sense and non-sense of Para-Regulatory Texts” it announced the subject in its Bulletin, describing the “thicket of continuously growing density” which invades the practice of international arbitration. Serge wrote a note of enthusiastic support for the project, expressing his concern for the survival of independent thinking and creativity in arbitration. His letter concluded:

*« L'arbitrage a longtemps été un art ; il est actuellement un mélange
d'art et de science ; il risque de devenir un exercice bureaucratique. »*

The message in the ASA Bulletin had envisaged the perspective on the “preparation of guidelines for the preparation of guidelines in international arbitration”. I see no better way in which I could contribute to this collection in honour of Serge Lazareff than by developing these thoughts as he had encouraged me to do.

¹ This is my attempt to translate Kant's definition „Aufklärung ist der Ausgang des Menschen aus seiner selbst verschuldeten Unmündigkeit“ in his essay on „Beantwortung der Frage was ist Aufklärung“.

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THE ESSENTIAL GUIDELINES

1. The present Guidelines and their scope of application

The present Guidelines apply to every organisation, institution, association and any other group of people who believe that they know better and who feel compassion for their fellow men (and sometimes women) who do not have the same level of understanding.

If they are sufficiently full of themselves that they believe the rest of the world will listen to them, individuals also may apply the present Guidelines in producing guidelines.

The texts produced by these groups or individuals are of a para-regulatory nature and seek to orient in a more or less emphatic manner the conduct of the players in international arbitration, bordering more or less closely on regulating it. Such texts are described by a variety of terms, such as guidelines, notes, directives, protocols, schedules or even rules. Here the expression "guidelines" is used as a generic term for all of them.

The present Guidelines are drafted specifically for those who produce guidelines in the world of international arbitration; however, much of the guidance contained therein may also apply to other fields of human activities.

Those who set out to grace the world with their guidance are described herein as the Guideline Producers; the addressees are often described as the Inexperienced Arbitrator or the Inexperienced Counsel, as the case may be.

Since they address the activity of guideline production as such, the present Guidelines may be referred to as the Essential Guidelines, the Level One Guidelines or simply as the Super Guidelines.

2. The objectives of guidelines

The principal objective of guidelines is to reduce the scope of independent thinking by their users, and to replace it by what the Guideline Producers believe the users should think or do.

A related objective of guidelines is to assist users in avoiding their own errors. Guidelines replace these errors by those of the Guideline Producers. This provides comfort to the guideline users who will be reassured that they are in good company when making the errors promoted by the Guideline Producers.

The ultimate objective of Guidelines Producers should be to render the guidelines so successful that the errors contained in them are no longer noticed as errors.

Finally, and not less importantly, guidelines serve the objectives of the Guideline Producers as a simple and widely used instrument of self-promotion in which substantive research can be replaced by the generalisation of personal opinions.

3. Who should prepare guidelines?

Guideline Producers normally believe that they know better and that better knowledge and experience is a necessary qualification for Guideline Producers.

There is no standard by which the asserted superior knowledge and experience can be measured. It is sufficient that the Guideline Producer makes an assertion to this effect and the Inexperienced Arbitrator and Counsel believe it.

Sometimes ordinary or average knowledge and experience is accepted as sufficient for the production of guidelines, provided the lack of asserted superior knowledge is compensated by a sufficiently large number of members in the group forming a Guideline Producer. In this context total ignorance is no reason for being excluded from a group of Guideline Producers.

In any event, limited familiarity with the subject matter should not discourage any potential Guideline Producer. The motto should always be: "yes, we can".

Mediocrity of the group forming a Guideline Producer can have as an added advantage that the target of the guidelines may be extended beyond the Inexperienced Arbitrator or Counsel and include ordinary arbitration practitioners. These practitioners may turn to the guidelines in the belief that, had they formed part of the Guideline Producer and spent the time in its meetings, they would have come to the same conclusions as those recommended in the guidelines.

However, in all cases the Guideline Producers or at least those who endorse the guidelines must have some claim to authority. This claim may rely on the number of members of the group having drafted and endorsed the guidelines; such a claim is strengthened if the group can point to a large number of different nationalities or other factors of diversity, without there being a need to demonstrate that this diversity had any influence on the work product.

The claim for authority also may rely on some official function, charter or other form of recognition by a public authority. Another basis for the claim could be the success in other activities and a recognised position in the international arbitration community. Once such a widely recognised position has been achieved, newly produced guidelines will receive much attention, irrespective of their subject matter and usefulness.

4. What subjects are suitable for the preparation of guidelines?

The short answer is: any subject.

Recent practice in the field of guideline production has shown that there is no limit in the choice of subjects on which Guideline Producers can exercise their skills. No matter how remote or how trivial the issues, intelligent Guideline Producers will find some reason why the users require guidance.

Preferably, the subject of the guidelines should have some relation with the practical issues which the Inexperienced Arbitrator or Counsel may face or expect to face. In other words the potential user should have some indication how the proposed guidelines provide assistance in the avoidance of independent thinking.

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Guidelines that promise to keep the Inexperienced Arbitrator or Counsel out of trouble can be expected to be particularly successful.

If the subject of the guidelines is not normally perceived as causing any difficulties, the creative Guideline Producer will awaken awareness with potential users so that the Inexperience Arbitrator and Counsel become concerned and seek guidance.

The fact that a subject has been dealt with already by some guidelines should be no reason for preventing a Guideline Producer from addressing the same subject. Intelligent Guideline Producers know how to distinguish their guidelines from those of other producers.

5. How to draft the guidelines

Guidelines should start by presenting and indeed emphasising the problems with which, in the eyes of the Guideline Producer, the Inexperienced Arbitrator or Counsel should be seriously concerned. It is helpful to present the situation addressed by the guidelines as complex and difficult or otherwise create the impression that, without the guidance, the user runs the risk of making mistakes or even encountering liability.

A useful technique is to refer to requirement arising out of a legal text, such as the law applicable to the arbitration or to the enforcement of the award produced; by highlighting to the users these requirements and the risks that they face when failing to respond to them in all aspects, the desire of the users to shelter behind the guidelines is increased.

Trivialities are an important component of successful guidelines. They give to the user the feeling that he could have produced the same guidance if he simply had taken the time of writing down his thoughts. The sense of recognition which such trivialities create contributes to the acceptance of the guidelines among potential users.

In order to give weight to the guidelines and render the trivialities more impressive, they should be expressed in the form of high sounding principles.

In the same line, it is important that the guidelines affirm that they are "state of the art"; it does not matter whether the Guideline Producer knows what that means.

It is important that fashionable catch words are used. At present such catch words include "predictability", "transparency", "efficiency", "level playing field", "culture" and "global". What matters is that these terms can be found in prominent places in the guidelines; precision in their use and conformity with generally accepted meaning (if any) is not required. The mere use of the term gives to the guidelines the aura of forming part of the general mainstream of modern thinking, an aura which greatly contributes to the willingness of the users to abandon their own independent thinking.

The use of fashionable catch words creates the risk that, once such a term has fallen in desuetude or even discredit, the credibility of the guidelines may be affected. Hence, when this occurs and if, by that time, the guidelines have not

been totally forgotten, they should be revised. Such revision has the added advantage that it provides an occupation and an opportunity for gaining reputation to a successor group of Guideline Producers who can claim credit for the modernisation of the guidelines, restoring them to the state of the art at a higher level.

6. How to promote guidelines

To ensure the widespread use of the guidelines it is not necessary that, immediately upon their promulgation, they be adopted in their entirety by potential users. In an initial phase it is not even necessary that they be used; it is sufficient that the guidelines be talked about and that their existence becomes known, in particular by frequent reference at arbitration conferences, announcements on the internet and, for the more old fashioned Guideline Producers, in their printed publications.

If they have been talked about long and often enough, the chances increase that potential users attribute some wisdom to their content. The time then may come when the guidelines are occasionally consulted and possibly even quoted in actual cases. Progressively the reflex of turning to the guidelines overcomes any residual reflexes of independent thinking.

In most cases little if any effort is needed to lead a potential user to abandon possible reflexes of independent thinking by turning to guidelines prepared by others. The very existence of guidelines relating to a question which a user may have to resolve is a powerful motivation for him (not her) to turn to the guidelines before thinking himself about how to address the issue. The self confidence displayed by the Guideline Producers in the necessity of their advice is decisive; the appropriateness of the guidance proposed, if it is considered at all, comes to play only at a later stage.

The first and most important method for assuring an audience to a new set of guidelines, therefore, is to make it easily accessible. The potential user must be able to find it quickly and before he may succumb to a possible temptation of resolving the issue himself.

The title of the guidelines and their introduction should emphasise that only guidance is provided. Proper drafting techniques as referred to above then persuade the Inexperienced Arbitrator and Counsel that the most comfortable solution is to follow the advice in the guidelines.

If the process of guideline production continues, all aspects of arbitration will be fully covered by guidelines which are accepted as "best practices" and "state of the art". When this happy moment is reached, the international arbitration community need not think any more.

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