

## Arbitration Update

# The New IBA Guidelines on Party Representation in International Arbitration

On 25 May 2013, the International Bar Association (**IBA**) released its Guidelines on Party Representation in International Arbitration. The Guidelines aim to address the "high degree of uncertainty" as to what rules apply to the conduct of legal representatives in international arbitration. This uncertainty stems from the myriad of disparate ethical duties that govern legal practitioners who practice from a wide range of varying legal and cultural backgrounds. The lack of uniformity in ethical duties and expectations in international arbitration can result in inequality between parties. The introduction of the Guidelines allow parties to adopt a uniform standard of conduct to govern legal representatives in international arbitrations.

For the Guidelines to apply to an arbitration, they must be adopted by the agreement of the parties. Absent the parties' agreement, the arbitral tribunal may determine that it has authority to rule on matters of party representation and apply the Guidelines, subject to any applicable mandatory law. The Guidelines are intended to supplement, rather than "displace", the applicable arbitration rules, mandatory laws, professional and disciplinary rules concerning party representation.

### Key Guidelines

The key matters addressed in the Guidelines are:

- **Conflicts of interest:** The Guidelines allow an arbitral tribunal to exclude a party representative from acting where there is a conflict of interest between the party representative and an arbitrator. In determining whether a conflict of interest exists, the arbitral tribunal may be informed by the IBA Guidelines on Conflicts of Interest in International Arbitration.
- **No ex-parte communications with arbitrators:** The Guidelines provide a general prohibition on ex-parte communications between a party

representative and an arbitrator, unless the communication is for the purpose of ascertaining whether a potential arbitrator is suitable or able to act as an arbitrator in the dispute.

- **No false submissions or evidence:** The Guidelines subject practitioners to an overarching duty of candour and honesty when making submissions and tendering evidence. Party representatives are prohibited from making false submissions of fact or submitting false evidence. In the event that a witness or expert presents evidence which a party representative discovers is false, the Guidelines require the party representative to take remedial measures, such as correcting false evidence.
- **Duty of disclosure:** The Guidelines require party representatives to advise clients to preserve documents relevant to the arbitration and take reasonable steps to produce all responsive documents. Party representatives are prohibited from suppressing or concealing documents requested by another party or ordered to be produced.
- **Accurate and true evidence:** The Guidelines set out principles relating to the interaction between party representatives and witnesses and experts, and the role of party representatives in preparing witness and expert evidence. They are designed to preserve the integrity of the evidence before the arbitral tribunal. Importantly, while a party representative may assist witnesses in preparing witness statements or experts in preparing expert reports, a party representative has an obligation to seek to ensure that the evidence given by witnesses reflects their own account of the relevant facts, events and circumstances, and that expert reports reflect the experts' own analysis or opinion.

## Remedies for misconduct

The Guidelines set out a number of non-exhaustive remedies that an arbitral tribunal may employ if it forms the view that a party representative has breached the Guidelines or engaged in conduct that is contrary to their duties. A party representative must be given an opportunity to be heard before a sanction for misconduct will be awarded. These remedies include:

- admonishing the party representative;
- drawing inferences in assessing the evidence or legal arguments;
- accounting for the misconduct in apportioning the costs of the arbitration; or
- any other measure to preserve or restore the fairness and integrity of the arbitration.

## To adopt or not to adopt?

Particularly relevant to contracting parties is the question of whether to adopt these Guidelines in an arbitration agreement. On the one hand, the Guidelines promote greater certainty in the conduct of international arbitrations, as they address to some extent the disparity in different legal rules and norms applicable to party representation.

However, on the other hand, there is the fundamental question of whether it is necessary or appropriate to

adopt these Guidelines. A large number of the Guidelines are not materially different from the professional rules and norms of common law jurisdictions, and the Guidelines therefore appear to be of little assistance where the arbitration is or is expected to only involve legal representatives from common law jurisdictions. It may also be possible that the application of these Guidelines would conflict with mandatory rules on legal professional obligations, and as the Guidelines are not intended to supplant applicable mandatory rules, there may be limits to the certainty provided by these Guidelines. It will be important to consider issues such as these before agreeing to adopt the Guidelines in arbitration agreements.

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