LCIA

Arbitration International

Volume 30 Number 3 2014

ISSN 0957 0411

The IBA Guidelines on Party Representation in International Arbitration – Levelling the Playing Field?

by TOM CUMMINS *

ABSTRACT

On 25 May 2013 the International Bar Association Council adopted the IBA Guidelines on Party Representation in International Arbitration. This relatively short document responds to the increasingly frequent pleas made by practitioners for guidance on the ethical standards applicable to party representatives in international arbitration.

The IBA Guidelines have already generated substantial interest within the arbitration community. This article considers the background to the IBA Guidelines, the difficulties which arise in relation to the ethical conduct of counsel in international arbitration, and specific practical issues which face arbitration practitioners such as the application of multiple ethical standards ('double deontology') and the perceived proliferation of so-called guerrilla arbitration tactics. It also reviews previous attempts to codify ethical standards by leading practitioners such as Cyrus Benson and R. Doak Bishop, and compares them to the approach adopted in the IBA Guidelines.

The article closes by considering the new IBA Guidelines in detail, critiquing its provisions, considering what has been omitted and draws tentative conclusions about the likelihood of the IBA Guidelines proving to be a successful addition to the 'soft law' of international arbitration.

On 25 May 2013 the International Bar Association Council adopted the IBA Guidelines on Party Representation in International Arbitration[1] (the 'IBA Guidelines' or the 'Guidelines').

This relatively short document responds to the increasingly frequent pleas made by practitioners for guidance on the ethical standards applicable to party representatives in international arbitration.

---

* Senior Associate and Solicitor – Advocate (Higher Courts Civil Proceedings), Ashurst LLP, London. The author can be contacted at tom.cummins@ashurst.com.

1 IBA Guidelines on Party Representation in International Arbitration, http://www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F (accessed 1 Jul. 2013).

ARBITRATION INTERNATIONAL, Vol. 30, No. 3

This article considers the background to the IBA Guidelines, the concerns which they seek to address, and how they compare with previous attempts to codify ethical standards. By reference to the content of the IBA Guidelines, the article then considers the likelihood that they will be embraced by the arbitral community and achieve their purpose.

I. BACKGROUND TO THE IBA GUIDELINES

(a) The Progress of the IBA Arbitration Committee

In 2008 the IBA Arbitration Committee established a Task Force on Counsel Conduct in international arbitration. The remit of the Task Force was to consider 'issues of counsel conduct and party representation in international arbitration that are subject to, or informed by, diverse and potentially conflicting rules and norms'.[2]

In order to assess perceptions amongst practitioners about ethical conduct, an online survey was commissioned in 2010.[3] The survey, which remained available at the date of this article, was wide-ranging, exploring topics as diverse as conflicts of interest, third party-funding, communication with prospective arbitrators and third parties, witness preparation, disclosure and corruption, money-laundering, forgery and illegality.[4]

As recorded in the preamble to the IBA Guidelines, the survey revealed 'a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration'.[5]

In response to that uncertainty and its implications for the fairness and integrity of international arbitral proceedings, the IBA Guidelines were conceived.

(b) Forerunners of the IBA's Initiative

The topic of ethical conduct of representatives and the rules which govern that conduct has a lineage which long precedes the IBA's initiative. In the early 1970s, when international arbitration was far less evolved, the participation by counsel subject to differing standards of ethical conduct was identified as presenting unique difficulties for international proceedings.[6] In 1992 Jan Paulsson asked 'in cases

2 The IBA Guidelines, preamble, p. 9.

3 IBA Arbitration Committee — Counsel Ethics in International Arbitration Survey, http://www.surveygizmo.com/s3/331908/IBA-Arbitration-Committee-Counsel-Ethics-in-International-Arbitration-Survey (accessed 1 Jul. 2013).

4 A flavour of the difficulties encountered in this area is apparent in one question, and its menu of responses: 'Are you bound by codes, norms or rules on counsel ethics from your home jurisdiction or licensing body when practicing in international arbitration?' To which the potential responses were 'yes', 'no', and 'I do not know and, as a matter of precaution, I generally assume that I am bound by norms or rules of my home jurisdiction or licensing body when I represent parties in international arbitration proceedings.'

5 The IBA Guidelines, preamble, p. 9.

6 Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* 116–117 (Yale U. Press 1971), cited in Edna Sussman and Solomon Ebere, *All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration*, 22 Am. Rev. Intl. Arb. 611, 617 (2012) and R. Doak Bishop and Margrete Stevens, *Advocacy and Ethics in International Arbitration: The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, in *Arbitration Advocacy in Changing Times*, ICCA Congress Series, 2010 Rio vol. 15, 391, 393 (Albert Jan van den Berg ed., Kluwer Law International 2011).

7 Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 Am. Rev. Intl. Arb. 214, 221 (1992).

8 V.V. Veeder, *The 2001 Goff Lecture – The 'Lawyer's Duty to Arbitrate in Good Faith*, 18 Arb. Intl. 431, 431 (2002).

9 *Ibid.*, at 448.

10 Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 Disp. Resol. Intl. 78, 79 (2009).

11 Bishop and Stevens, *supra* n. 6.

12 *Ibid.* at 405.

where counsel come from two different countries where standards are quite inconsistent on a given point, does the client whose lawyer is subject to the lowest standard have an unfair advantage?'. Mr Paulsson went on to raise 'the spectre of 'rogue lawyers' infesting the realm of international arbitration', retained by opportunist arbitrants seeking the advantage afforded by representatives inattentive to professional obligations.[7]

Other practitioners raised similar concerns. In his 2001 Goff Lecture entitled 'The lawyer's Duty to Arbitrate in Good Faith', V.V. Veeder observed: 'lawyers are not musicians or ballet dancers: a lawyer's training, skills and ethics are still essentially rooted in a national legal system, and it is far from clear how and to what extent national professional rules apply abroad to the transnational lawyer in the international arbitration process'.[8] He drew an analogy with previous IBA projects – the IBA Code of Ethics for International Arbitrators and the IBA Rules of Evidence - and proposed 'a voluntary solution – a guide rather than a model law or disciplinary code –and the best way to start is with micro-solutions, rather than a grand project where the usual difficulties could hinder progress for a long time, even then leading perhaps only to moralistic and impractical solutions'.[9]

In 2009, Cyrus Benson drew upon Mr Veeder's call to arms, noting that 'the lack of ethical guidance continues to breed (or at least permit) procedural unfairness in various cases, attack the integrity of the system and invite deterioration in standards of professional conduct'.[10] Mr Benson offered a checklist which sought to identify areas where ethical standards among counsel may differ and suggested resolutions that could be adopted as the parties and Tribunal determined. The approach taken in the checklist is compared to that taken in the IBA Guidelines below.

In 2010, R. Doak Bishop and Margrete Stevens wrote of the 'compelling need for the development of a Code of Ethics in international arbitration'.[11] They called upon a body like the IBA to establish a process for development and refinement of a code of ethics, and expressed the hope that 'the ethics code would in due course be adopted by arbitral institutions and provide a common set of guidelines for all international arbitration disputes, both investment and commercial'.[12] Accompanying this exhortation, Mr Bishop and Ms Stevens published a 28 rule draft code of ethics, to which I return below.

Gary Born has noted that the failure to confront ethical issues 'may well be taken as an inability of the international arbitration community to address issues that lie

at the core of the integrity and legitimacy of international arbitration'.[13] Encouraging debate on counsel ethics Mr Born noted that 'doing so is essential to maintaining the integrity and promise of international arbitration'.

II. SCOPING OUT THE PROBLEM

Why has the ethical landscape in which international arbitration is situated generated so much attention from eminent practitioners? Why was significant energy expended in conceiving draft sets of rules and checklists in the absence of contribution by the IBA or a body of similar standing?

(a) An Ethical No-Man's Land?

The concern arising from ethical issues was conveyed in vivid metaphor by Catherine Rogers in 2002. Professor Rogers wrote of international arbitration dwelling in an 'ethical no-man's land'. She observed that the 'extraterritorial effect of national ethics codes is usually murky [...] there is no supra-national authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far'.[14] Professor Rogers perceived an 'abyss' 'where ethical regulations should be'.

(b) A Problem Unique to International Proceedings

The problem can be put quite simply. Whereas domestic dispute resolution proceedings are conducted by representatives who are subject to the same (or similar) code of ethics and are inured to common social and cultural norms, the international arbitration stage is populated by actors who derive their experience from different backgrounds and are subject to ethical rules which may differ significantly.

As the preamble to the IBA Guidelines states:

> In addition to the potential for uncertainty, rules and norms developed for domestic judicial litigation may be ill-adapted to international arbitral proceedings. Indeed, specialised practises and procedures have been developed in international arbitration to accommodate the legal and cultural differences among participants and the complex, multinational nature of the disputes. Domestic professional conduct rules and norms, by contrast, are developed to apply in specific legal cultures consistent with established national procedures.[15]

Thus, in an arbitration seated in The Hague, representatives of the parties hailing from the United States and from Spain may act in accordance with differing ethical considerations. The party represented by counsel who take a more

[13] Gary Born, Kluwer Arbitration Blog, *A Code of Conduct for Counsel in International Arbitration*, http://kluwerarbitrationblog.com/blog/2010/11/16/a-code-of-conduct-for-counsel-in-international-arbitration/ (16 Nov. 2010).

[14] Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Intl. L. 341 (2001-2002).

[15] IBA Guidelines, preamble, p. 10.

restrictive approach to an element of procedure, such as the preparation of witnesses for testimony, may find itself at a disadvantage.

The position is acute because of the emphasis in international arbitration of ensuring that there is equality between arbitrating parties. This is enshrined in Article 18 of the Model Law where it is prescribed that 'the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case'.[16] How can equality be ensured if the intermediaries between arbitrants and Tribunal, the parties' representatives, are subject to different ethical requirements?

It is customary to speak of ethical divergence undermining that most fundamental principle of adjudication: that the parties are provided with a 'level playing field' on which to contest their claims.

There is a further problem allied to that identified above. Even amongst practitioners subject to the same ethical codes of conduct, there is far from unanimity as to whether such codes apply to international arbitration and, if so, in what circumstances.[17] Thus practitioners from the same jurisdiction might adopt strikingly divergent approaches to ethical considerations in arbitration, despite espousing common values in domestic court proceedings.

Given the increased harmonization of arbitration practice in recent decades and the push for uniformity in the application of arbitral laws, the question of ethical standards has come to look increasingly anomalous. For a discipline which prides itself on the provision of fair, effective and autonomous dispute resolution, this ethical uncertainty has emerged as an embarrassment, and worse, a potential discouragement to the users of arbitration. Although as described earlier, the ethical conundrum is decades old, a spotlight has been shone on it by the same forces which have imposed changes on other aspects of arbitration: the marked increase in the popularity and prominence of international arbitration. Thus, in the words of Gary Born 'the dramatic increase over past decades in the number of international arbitrations, and the expansion of the international arbitration community to include large numbers of new participants, underscores these points: implicit cultural or professional expectations cannot, if they ever could, be relied upon to ensure fair play'.[18]

It is said that international arbitration has evolved from an artisanal, to an industrial phase, and continues to evolve into a more cosmopolitan phase, where practitioners are familiar with transnational laws and practices and as comfortable with their application as they are with those of their own jurisdictions. In this environment, the reliance on national codes of ethics, and unspoken assumptions as to conduct is not sufficient.

[16] Similar formulations appear in the arbitral laws of leading jurisdictions: s. 33 English Arbitration Act 1996; Art. 1510 French New Code of Civil Procedure; Art. 182 Swiss Federal Statute on Private International Law.

[17] Benson, *supra* n. 10, at 81.

[18] Born, *supra* n. 13.

III. FREEDOM OF CHOICE OF COUNSEL AND 'DOUBLE DEONTOLOGY'

(a) *Freedom of Choice of Counsel*

An element of the flexibility of international arbitration is the freedom of the parties to be represented by persons of their choice. This freedom is a fundamental one: 'the parties' right to select representatives of their own choosing is of fundamental significance: the quality and vigour of a party's representatives can have substantial consequences for the party's opportunity to present its case, for the outcome of the arbitral process and for the parties' perceptions regarding the fairness and legitimacy of the process'.[19]

Although the Model Law contains no reference to the right to representation,[20] the English Arbitration Act 1996 provides that 'unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him'.[21] Similar provisions appear in leading arbitration rules.[22] The entitlement to be represented by a lay-person reflects the flexibility of arbitration, and its distinction from court proceedings performed by members of national bars.[23] In any event, significant international arbitrations only very rarely proceed without the engagement of legal counsel, if only in an advisory capacity.[24]

However, neither the English Arbitration Act 1996 nor leading arbitration rules specify the standards to which such representatives must adhere during proceedings. The injunction in the former to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings' including 'complying without delay with any determination of the tribunal as to procedural or evidential matters or with any orders or directions of the tribunal' falls only indirectly on party representatives, via their instructing parties.[25]

(b) *Identification of Applicable Standards*

In the absence of arbitration-specific codes of conduct, where can such standards be found? I have already mentioned the codes of conduct which govern the practices of lawyers in their own jurisdictions, and may, or may not, extend their

19 Gary Born, *International Commercial Arbitration* 2290 (Kluwer Law International 2009).

20 Although one of the grounds for annulment of an award is that a party was unable to present his case, which might extend to any prohibition on the appointment of chosen legal counsel (Art. 34(2)(a)(ii)).

21 Section 36, Arbitration Act 1996.

22 Art. 18.1 LCIA Rules (1998); Art. 26(4) ICC Rules (2012); Art. 5 UNCITRAL Rules (2010).

23 The IBA Guidelines expressly reflect this possibility defining 'Party Representative'/'Representative' as 'any person [. . .] who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar'.

24 Born, *supra* n. 19, at 2301.

25 Section 40 Arbitration Act 1996; similarly participants in ICC arbitrations are required to 'make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute' (Art. 22(1)).

reach into international arbitration. But what happens to lawyers who work in jurisdictions in which practitioners are subject to different codes of conduct? Do the codes of conduct of the destination state apply to arbitration lawyers? If so, to what extent?

This is the subject of 'double deontology' – the application of two, or more, sets of ethical standards to individual practitioners. Thus, a lawyer may find himself obliged to comply both with the standards of his domestic bar and the standards of the jurisdiction in which the arbitration is seated.[26] It may be illustrated by two frequently-referenced examples: EU Directive 98/5/EC and the Code of Conduct for European Lawyers.

(c) *EU Directive 98/5/EC*

EU Directive 98/5/EC is intended 'to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained'.[27] Article 6(1) states that 'Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory'.[28]

The scope of application of the EU Directive is controversial. Article 6(1) appears to embody double deontology in arbitration proceedings. Irrespective of the principles applicable to a European lawyer in his jurisdiction of qualification, if he seeks to practise under the professional title afforded to him at home, he is subject to the same regulation as a lawyer practising under an equivalent title in another Member State. Thus, an English lawyer practising as a solicitor in respect of arbitration proceedings in Paris would appear to fall within Article 6(1). She will be subject both to English regulations (if applicable) and those of the Paris bar. And what if this lawyer is in fact instructed in a London-seated arbitration but attends on a witness from, say, Russia who is visiting Paris? Would a witness interview or meeting be subject to the rules of the Paris bar on the basis that they constitute 'activities' in French territory?

Although the title of the EU Directive refers to the practice of the profession of a lawyer on a 'permanent basis', suggesting that a fleeting visit to a Member State for an evidential hearing or evidence-gathering exercise would not be captured, there does not appear to be any guidance on the point.[29]

26 To the extent that activities take place other than in the 'home' jurisdiction and the jurisdiction of the seat, such as evidence gathering, further laws may apply.

27 EU Directive 98/5/EC of the European Parliament and of the Council of 16 Feb. 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

28 EU Directive 98/5/EC was required to be brought into effect in Member States by 14 Mar. 2000 (Art. 16).

29 Veeder, *supra* n. 8, at 431.

(d) The Code of Conduct for European Lawyers

Lawyers active in the European Union are also subject to the Code of Conduct for Lawyers in the European Union promulgated by the Council of Bars and Law Societies of Europe (the 'CCBE Code').[30] The CCBE Code has been implemented by law societies and bars of Member States.[31]

The CCBE Code is stated to apply to 'the cross-border activities of the lawyer within the European Union and the European Economic Area'. Cross-border activities means: '(a) all professional contacts with lawyers of Member States other than the lawyer's own; (b) the professional activities of the lawyer in a Member State other than his or her own, whether or not the lawyer is physically present in that Member State'.[32] The CCBE Code expressly states that it is intended to 'mitigate the difficulties which result from the application of 'double deontology'', including as arising from Article 6 of the EU Directive.[33]

Unlike the EU Directive, the CCBE Code refers to arbitration. Article 4.5 states that 'the rules governing a lawyer's relations with the courts apply also to the lawyer's relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis'. Part 4 of the CCBE Code sets out the rules applicable to relations with the courts. Thus a lawyer subject to the CCBE Code must:

- comply with the rules of conduct applied before a court or tribunal (Article 4.1);
- have due regard for the fair conduct of proceedings (Article 4.2);
- while maintaining due respect and courtesy towards the court (or tribunal) defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to himself or herself or to any other person (Article 4.3); and
- never knowingly give false or misleading information to the court (or tribunal) (Article 4.4).

It was conventionally thought that Article 4.1 had limited relevance to arbitration proceedings because tribunals customarily do not prescribe rules of conduct. As I consider below, the introduction of the IBA Guidelines may change that position.

Articles 4.2 and 4.4 are uncontroversial[34] and might be considered fundamental principles which any party representative in arbitral proceedings should have regard to.

30 The CCBE Code was adopted in 1998 and most recently amended in 2006.

31 A useful status table is available at CCBE, Status of the CCBE Code of Conduct at a national level, http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Table_adoption_of_th1_1358409892.pdf (accessed 1 Jul. 2013).

32 CCBE Code, Art. 1.5.

33 CCBE Code, Art. 1.3.1.

34 The implications of the breadth of Art. 4.3 and its requirement of disregard for the lawyer and third parties may give counsel cause for consideration in certain circumstances.

(e) The ABA Model Rules of Professional Conduct

Outside of Europe, the American Bar Association's Model Rules of Professional Conduct provide that 'in any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred [. . .]' (emphasis added).[35] Thus, a US lawyer may face sanction from his regulator for breach of the rules of a jurisdiction in which an arbitration is seated.

IV. COMMON FLASHPOINTS

The existence of overlapping and contradicting ethical standards might be of academic interest only were it not for their potential to have practical implications for the fair disposal of proceedings. It is not uncommon for counsel to feel constrained about participating in an activity or making a submission in circumstances where they are conscious that opposing counsel has no such qualms. This can be a source of frustration both for counsel but also for clients who may, for example, perceive themselves as practically subject to a higher standard of behaviour than the counterparty to the arbitration. This is not the equality of treatment fundamental to arbitral procedure.

The principal areas of concern for counsel and clients will be familiar. They are:

- the extent to which counsel may accept instructions in circumstances where conflicts arise;
- the extent to which counsel can make submissions, either in written or oral form, regarding allegations of unusual seriousness (such as fraud or illegality) and the degree of evidence required to permit this;
- the extent to which counsel must draw the attention of the tribunal and the counterparty to arbitration to legal authority which is contrary to the position counsel is advancing;
- the extent to which counsel is obliged to search for documents requested by a counterparty to arbitration;
- whether a witness affiliated with a party may testify as a witness of fact, or whether such association precludes the witness from doing so;
- the extent to which counsel can assist witnesses in the preparation of their written testimony;
- the extent to which counsel can prepare witnesses for oral testimony before the tribunal;
- the extent to which counsel may communicate with a potentially adverse party where such party is represented by counsel; and

35 ABA Model Rules of Professional Conduct, Art. 8.5.

- the extent to which counsel may have ex-parte communications with members of the tribunal.

Of these, the preparation of witnesses and the search for, and disclosure of, documentation are often the most inflammatory activities.[36] It is not the divergences in approach between practitioners from inquisitorial systems and those from adversarial systems which necessarily causes the most controversy. For example, English lawyers are resistant to the notion of 'coaching' witnesses prior to their exposure to examination by the tribunal and opposing counsel. It is a deeply ingrained principle that witnesses may not be told with any specificity how they should respond to inquisitorial and hostile questioning.[37] By contrast, a United States qualified lawyer has considerably more freedom in preparing his witnesses for examination. The vivid term of 'woodshedding' refers to the 'conference' which American advocates would schedule with their witnesses in the rudimentary facilities close to the courthouse prior to an evidential trial.

V. GUERRILLA ARBITRATION TACTICS

The instances above may arise where good faith differences arise between counsel as to ethical standards. Increased attention has been paid in recent years to the deployment of tactics in bad faith in order to frustrate the orderly progress of proceedings. These so-called guerrilla tactics appear to have proliferated, such is the concern they have generated.[38] However, empirical data garnered in one survey by Edna Sussman and Solomon Ebere suggested that although a majority of respondents had experience of such behaviour, it was rare. The authors conclude that 'the international arbitration bar is perhaps, generally speaking, a quite civilized and ethical bar'.[39]

What are 'guerrilla tactics'? While practitioners may apply the definition differently, Sussman and Ebere identified the following traits:

- excessive document production requests;
- late or excessive document production, with pertinent documents submerged in a mass of irrelevant material;
- delay tactics, such as advancement of client or personal health concerns or availability issues as a means of delaying proceedings;

36 The 2012 International Arbitration Survey found that 62% of respondents found mock cross-examination of witnesses appropriate. Twenty-four per cent considered it inappropriate, School of International Arbitration at Queen Mary, University of London, International Arbitration Survey 2012, Current and Preferred Practices in the Arbitral Process: International Arbitration Survey, available at http://www.arbitrationonline.org/survey/ (accessed on 1 Jul. 2013).

37 The case of *R v. Momodou* is a cautionary tale in this regard, and one which informs English lawyers as to what they can and cannot do with witnesses (Momodou (Practice Note) [2005]1 WLR 3442, at 61-62).

38 Sussman and Ebere, *supra* n. 6, at 611.

39 *Ibid.*, at 612.

- the creation of conflicts, such as by instructing counsel after the formation of the tribunal so as to embarrass an arbitrator;
- the use of meritless challenges of arbitrators for tactical reasons;
- the introduction of evidence, arguments or documents at a late stage so as to destabilize opposing counsel;
- the filing of meritless anti-arbitration injunctions or the application to courts on other grounds (including criminal);
- the use of ex-parte communications with arbitrators;
- intimidation of witnesses and experts, such as by making complaints to the proposed expert's professional regulator;
- a lack of respect to the tribunal and opposing counsel, including by means of frequent complaints about due process and threats of challenge to any award; and
- the frustration of hearings by counsel taking excessive time, raising objections to put off opposing counsel, employing 'theatrical' trickery, such as empty boxes of evidence or the use of blank paper to imply the existence of a crucial, new document.[40]

Other authors have written about 'the deliberate nomination of different specialist arbitrators in multiple disputes to deprive the other parties of specialist legal advice; or the deliberate conflicting out of specialist counsel by a party to the same end; or one party's beauty-parading of arbitral candidates which looks more at partiality than beauty; or the wilful aggravation of the parties' dispute in order to put unfair pressure on the adverse party'[41] and intimidation of arbitrators and the imposition of political pressure on parties or witnesses.[42]

As one author has noted, 'guerrilla tactics range from the completely illegal and inappropriate, such as witness intimidation and phone tapping, to the merely sly, such as ambushing the opposing party with new evidence or ex parte communications with arbitrators'.[43]

VI. THE ROLE OF THE TRIBUNAL IN COUNSEL MISCONDUCT

(a) Limitations on the Tribunal's Powers

In the event of a breach of an applicable ethical standard, there is the possibility of complaint being made to a lawyer's regulator. But it is rare to hear of national regulators sanctioning lawyers for ethical misdemeanours in overseas proceedings.

40 *Ibid.*, at 613 to 615.

41 Veeder, *supra* n. 8, at 434.

42 Gunther J. Horvath, *Guerrilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?*, in *Austrian Yearbook on International Arbitration*, vol. 2011, 297 (Christian Klausegger, Peter Klein, et al. eds., Manz'sche Verlags- und Universitätsbuchhandlung 2011).

43 *Ibid.*, at 297.

In the words of one commentator 'it is fairly rare that misconduct "abroad" results in all too serious consequences "at home"'[44] and those of another 'there is no supra-national authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far'.[45] In a sense this is not unsatisfactory. It would be undesirable for aggressive arbitrants to embark on collateral attacks against opposing counsel via recourse to their regulator for the purposes of intimidation. That form of guerrilla tactic may be precluded by regulator indifference.

However, that reality does mean that the burden of policing the activities of counsel falls, for practical purposes, exclusively on the arbitral tribunal. Herein lies a practical problem. The tribunal has no jurisdiction over counsel, merely over the parties. No nexus lies between arbitrators and representatives, other than indirectly, via the arbitrants. The effect of this is that a tribunal is stymied from the outset if it determines that direct action should most appropriately be taken against counsel. Unlike a regulator, the tribunal cannot sanction representatives. Unlike a court, the tribunal cannot impose wasted costs orders upon counsel.[46]

(b) Authority to Disqualify Counsel

There is an exception to this principle which has been tentatively explored by international tribunals.[47] The question is whether a tribunal may order a party to dismiss counsel or terminate its representation in exceptional circumstances.

Thus, in the International Centre for Settlement of Investment Disputes ('ICSID') case of *Hrvatska* v. *Slovakia*[48] a tribunal was invited to 'recommend to the Respondent that it refrain from using the services' of a British barrister who was affiliated with the barristers' chambers with which the President of the Tribunal was affiliated. The tribunal observed that the ICSID Convention provided no express authority for the disqualification of counsel. However, in the light of (a) the wholly alien nature of the barristers' chambers' system to the claimant; (b) the failure by the respondent to notify the claimant or the tribunal of the barrister's involvement; and (c) the tardiness of the notification of the barrister's involvement, the tribunal ordered that the barrister participate no further in the case. Citing the importance of dispelling the atmosphere of apprehension and distrust which had arisen, the tribunal concluded that it had an inherent power to take measures to preserve the integrity of the proceedings, and such powers extended to exclusion of counsel.

44 I. Caytas, *Transnational Legal Practice: Conflicts in Professional Responsibility* 3 (1992), cited in Born, *supra* n. 19, at 2307.

45 Rogers, *supra* n. 14, at 341.

46 This principle is recognized in the IBA Guidelines where it is stated that 'A Party Representative, acting within the authority granted to it, acts on behalf of the Party whom he or she represents. It follows therefore that an obligation or duty bearing on a Party Representative is an obligation or duty of the represented party, who may ultimately bear the consequences of the misconduct of its Representative', IBA Guidelines, Comments to Guidelines 1-3, 13.

47 As to the principle, see Born, *supra* n. 19, 2321 to 2323.

48 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24.

By contrast, an ICSID tribunal in the case of *Rompetrol v. Romania*[49] evinced considerable unease about the disqualification of counsel. The tribunal noted that if an inherent power of the sort exercised in *Hrvatska* did exist, it must be exercised only in 'extraordinary circumstances, these being circumstances which genuinely touch on the integrity of the arbitral process as assessed by the Tribunal itself'. In *Rompetrol* a member of the claimant counsel team had previously practised in the same law firm as the arbitrator appointed by the claimant. Of the request to disqualify, the tribunal observed that 'a power on the part of a judicial tribunal of any kind to exercise a control over the representation of the parties in proceedings before it is by definition a weighty instrument, the more so if the proposition is that the control ought to be exercised by excluding or overriding a party's own choice'. Finding no power in the ICSID Convention which would permit exclusion, and declining to rely on the inherent power in *Hrvatska*, the tribunal refused the application.

Thus, ICSID jurisprudence is inconsistent on the extent to which counsel may be excluded by a tribunal.[50] It is unlikely that a tribunal in *commercial* proceedings would incline any more forcefully towards excluding counsel in circumstances where so doing would be likely to form the basis for a challenge to an award or to its enforcement under Article V(1) of the New York Convention. Thus, it has been said that 'any such authority would need to be exercised in only the most exceptional circumstances, because of the risk of denying a party its opportunity to be heard and its opportunity to select counsel of its choice. Where a lawyer persistently engaged in unacceptable, obstructive conduct, particularly without approval by his or her party, such a procedural order might be necessary to ensure the fairness of the arbitral process'.[51]

(c) Means Typically Employed by Tribunals

The traditional means by which tribunals police refractory behaviour is through procedural orders against arbitrants.[52] The most common method of achieving this is through costs sanctions, or the threat thereof. This is not entirely satisfactory, as it presupposes that parties to arbitration are cognizant both: (a) of the tactics being employed on their behalf; and (b) of the unacceptability of such tactics in the arbitral arena. It also gives rise to the possibility of satellite disputes between party and counsel at a later stage arising from such conduct. Thus, for one author, 'cost

49 *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3.

50 There is also an unreported decision of an ICSID annulment committee which rejected an application to disqualify claimant's counsel, apparently on the facts, rather than an absence of authority.

51 Born, *supra* n. 19, at footnote 140.

52 For discussion of this topic in the context of investment arbitration see (1) Thomas W. Wälde, *Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms*, and (2) Abba Kolo, *Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal*, 26 Arb. Intl. 3 (2010).

assessments are a blunt instrument for policing counsel. They are indirect, do not fully address the problems and ultimately target the parties, not counsel'.[53]

The imposition of costs sanctions also presupposes two things. First, that the deprecated activities are impermissible in the eyes of the tribunal and second, that they are visible to the tribunal. Where counsel behaviour does not fall outside the spectrum of reasonably civilized behaviour, one is referred back to the fundamental issue underlying this topic: what standards are to be applied to proceedings and the representatives acting in them? As shall be demonstrated, this is where the IBA Guidelines play a role. It is also the case that acts such as 'wood-shedding' of witnesses may not be apparent to arbitrators (although, experienced arbitrators will readily detect the influence of counsel behind an over-slick witness). Nor may a failure to comply with document production adequately ever emerge. If a document exists which is not produced and is not inadvertently alluded to by a witness or evidenced by a produced document, the tribunal and the opposing party may remain oblivious.

Procedural orders are not confined to costs sanctions. Tribunals have wide-ranging powers to issue interim orders to preserve the integrity and fairness of proceedings. Thus an International Chamber of Commerce (ICC) tribunal may 'order any interim or conservatory measure it deems appropriate',[54] a London Court of International Arbitration (LCIA) tribunal may 'order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award'[55] and an UNCITRAL tribunal may grant interim measures to, inter alia, 'maintain or restore the status quo', and prevent 'prejudice to the arbitral process'.[56] Such wide-ranging powers have frequently been deployed to prevent the aggravation of disputes and to circumscribe over-zealous conduct on the part of parties, and by necessity, their counsel. Examples include ordering that parties refrain from proceedings in other fora and from seeking leverage from publicity campaigns against their opponent.

VII. THE IMPACT OF COUNSEL MISCONDUCT ON ARBITRAL AWARDS

Behaviour which tests the bounds of propriety is usually motivated by the desire to win at all costs. What happens if an award is obtained by means more foul than fair? Clearly, any such award would be susceptible to challenge under the applicable law at the seat. Article 34 of the Model Law provides for annulment of an award in circumstances where a party was unable to present his case. Such circumstances might include those where a tribunal had been overly indulgent in

53 R. Doak Bishop, *Advocacy and Ethics in International Arbitration: Ethics in International Arbitration* in *Arbitration Advocacy in Changing Times*, ICCA Congress Series, 2010 Rio, Vol. 15, 387 (Albert Jan van den Berg ed., 2011).
54 Art. 28(1) ICC Rules.
55 Art. 25.1(c) LCIA Rules.
56 Art. 26 UNCITRAL Rules.

permitting opposing counsel to abuse the arbitral process, thus satisfying the high threshold for annulment envisaged by Article 34(2)(ii).

Although not expressly mentioned, fraud on the arbitrators is generally accepted as a basis for annulment of an award under Article 34(2).[57] The position is consistent under some non-Model Law statutes. Thus, the Arbitration Act 1996 provides for 'the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy' as a ground for challenge.[58] The Arbitration Act 1996 also provides an exhaustive list of bases on which an award may be challenged for 'serious irregularity', a number of which might be engaged by counsel misconduct. These include where the tribunal has been bullied by counsel into failing to 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'.[59] Similarly, although more minimalistically phrased, the French New Code of Civil Procedure permits challenge on the basis of violation of due process and where recognition or enforcement would be contrary to international public policy.[60] The Swiss Federal Statute on Private International Law permits set aside where the principle of equal treatment of the parties or the right of the parties to be heard was violated or where the award is contrary to public policy.[61]

By extension, any arbitral award procured by fraud or in a manner which did not permit a party to present its case would be susceptible to refusal of recognition or enforcement under Articles V(1) or V(2) of the New York Convention.

VIII. PREVIOUS ATTEMPTS TO CODIFY ETHICAL STANDARDS

Before considering the IBA Guidelines in detail, previous attempts to record ethical standards applicable to counsel promulgated by experienced practitioners are considered.

(a) Cyrus Benson's Checklist of Ethical Standards for Counsel in International Arbitration

In 2009 Cyrus Benson published his nine category checklist of ethical standards (the 'Benson Checklist').[62] The Benson Checklist identified areas of professional conduct where counsel might be subject to differing ethical obligations. It then offered proposed resolutions which might be accepted, rejected or modified by parties. Mr Benson stated 'the overriding principle of the Checklist is that international arbitration should be characterized not by gamesmanship and guesswork as to what may or may not be ethically required or permitted, but by

57 See Born, *supra* n. 19, at 2632.
58 Arbitration Act 1996, s. 68(2)(g).
59 Arbitration Act 1996, s. 68(2)(a).
60 French New Code of Civil Procedure, Art. 1520.
61 Swiss Federal Statute on Private International Law, Art. 190.
62 Benson, *supra* n. 10.

transparency and application of the same ethical standards by counsel in the context of any particular arbitral proceedings'.[63]

Mr Benson's nine categories were: general conduct; integrity/duty of candour; legal submissions; evidence; disclosure; communications with witnesses; communications with arbitrators; communications with opposing counsel; and orders/awards of the arbitrators.

Mr Benson adopted a distinction between aspirational resolutions (suggesting that counsel should do something) and mandatory resolutions (requiring that counsel must or shall do something).

The device which underlies the Benson Checklist is the optionality of the provisions. Thus, parties can select from aspirations or obligations which reflect the principal issues of concern in the field of ethics. A party's representative may be prevented under his code of conduct from agreeing to notify the tribunal of non-disclosure by his client. Such a notification might place him in breach of his obligation of confidentiality or loyalty to his client (which such client is not prepared to waive). The applicable obligation cannot be adopted, or can be modified to reflect the specific circumstances. The Benson Checklist reflects the principles of party autonomy and flexibility which are hallmarks of the arbitral process.

The extent to which tribunals or parties have sought to provoke debate by means of a checklist of principles based on or analogous to the Benson Checklist cannot be known. However, it has the merit of focusing the participants in an arbitration at the outset of proceedings on their ethical obligations and any specific areas of concern which may be engendered by representation by counsel from different backgrounds.

(b) Bishop and Stevens' International Code of Ethics for Lawyers Practising before International Arbitral Tribunals

A more ambitious, but less flexible approach, was proposed by R Doak Bishop and Margrete Stevens in 2011.[64] Their draft International Code of Ethics (the 'Bishop/Stevens Code') runs to 28 rules and is expressly intended to prevail over national codes of conduct.

The Bishop/Stevens Code was prepared by reference to existing ethical standards applicable to lawyers. Most of the proposed rules cross-refer to an equivalent provision in either the CCBE Code or the IBA's International Code of Ethics (a non-binding code published by the IBA first in 1956, and updated in 1988, and now superseded by the shorter International Principles on Conduct of the Legal Profession of 2011).[65]

The Bishop/Stevens Code is broader in scope than the Benson Checklist. It addresses issues which go beyond the conduct of proceedings and counsel's

63 *Ibid.*, at 89.
64 Bishop and Stevens, *supra* n. 6.
65 The number of principles is less (ten compared to twenty-one rules), but the latter document sets out a lengthy explanation and amplification of the core principles.

relationship with the Tribunal. Thus it makes provision for client/counsel relationship rules, such as independence and the circumstances in which counsel should take on instructions. It covers privilege, counsel/client confidentiality, conflicts and fees.

The Code is intended to prevail over national ethics or other standards before international arbitral tribunals. Thus its intended deployment would require consent from and, possibly, adoption by national regulators.

With regard to the conduct of proceedings the Bishop/Stevens Code ventures over similar territory to the Benson Checklist, featuring rules on respect for the tribunal, ex parte communications, legal submissions, witness and expert evidence, document production and professional courtesy.

The Benson Checklist and the Bishop/Stevens Code seek to achieve different things. One is a proposed Code of Conduct which supersedes national codes in the realm of arbitration; one is a proposed procedural checklist which can be adapted by the parties and the tribunal. Where they cover the same ground, there is much commonality, reflecting the consensus amongst arbitral practitioners on decorum, candour and honesty, disclosure and evidence-gathering and presentation.

One other attempt to record applicable principles should be noted.

The Hague Principles on Ethical Standards for Counsel appearing before International Courts and Tribunals were introduced in 2010. This short document is intended to apply to 'any person discharging the functions of counsel by representing, appearing on behalf of, or providing legal advice to a party in proceedings before an international court or tribunal'.[66] The principles cover core values such as fairness, independence, and professionalism, and specific guidance on relations with the client, conflicts of interest, relations with the court or tribunal, presentation of evidence and relations with others.

Aspects of the Benson Checklist and the Bishop/Stevens Code are included, such as a requirement for respectful communication with the court or tribunal, a prohibition on ex parte communications, a prohibition on the presentation of false or misleading evidence, a requirement of courtesy as between counsel, and a prohibition on direct communication with the opposing party, where such party has retained counsel.

IX. THE IBA GUIDELINES

(a) Guidelines, Not Rules

Emerging from the debate catalysed by the contributions above come the IBA Guidelines.[67]

66 The Hague Principles on Ethical Standards for Counsel appearing before International Courts and Tribunals, para. 1.1.
67 Both Mr Benson and Ms Stevens were members of the Task Force which produced the IBA Guidelines.

At the outset it should be noted that these are 'guidelines'. They are not rules. In that regard they are closer in architecture and spirit to the IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Conflicts Guidelines'), than to the IBA Rules on the Taking of Evidence in International Arbitration (the 'IBA Rules'). Like the former they consist of a statement, or series of statements, (a 'guideline' in the IBA Guidelines, a 'principle' in the IBA Conflicts Guidelines), followed by explanatory text. This is designated 'comments' in the IBA Guidelines.

The use of the term 'guidelines' is explained in the preamble:

> The use of the term guidelines rather than rules is intended to highlight their contractual nature. The parties may thus adopt the Guidelines or a portion thereof by agreement. Arbitral tribunals may also apply the Guidelines in their discretion, subject to any applicable mandatory rules, if they determine that they have the authority to do so.[68]

The reference to adoption of a 'portion' of the Guidelines recalls the Benson Checklist. Unlike a set of rules which would ordinarily be imported wholesale into the arbitration procedure, the IBA Guidelines envisage an elective approach to their implementation. Certain guidelines may be adopted, others may be discarded if they do not reflect the parties' wishes.

(b) Application of the Guidelines

Guidelines 1 to 3 address the application of the IBA Guidelines.

Guideline 1 provides that the Guidelines apply 'where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely on them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings'.

Guideline 2 provides that in the event of any dispute regarding the meaning of the Guidelines, they should be interpreted 'in accordance with their overall purpose and in the manner most appropriate for the particular arbitration'.

Guideline 3 provides that the Guidelines are not intended to 'displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a Party representative's primary duty to the party whom he or she represents or a Party representative's paramount obligation to present such party's case to the Arbitral Tribunal'.

Application by the parties of the Guidelines (or part thereof) may be effected in a number of ways. Express reference might be made to the Guidelines in the arbitration agreement, a party might volunteer their application upon the emergence of a dispute, or the tribunal might seek the parties' agreement in its first draft procedural order.

---

68 IBA Guidelines, preamble, 10.

More controversial may be the circumstances in which the tribunal seeks to rely on the Guidelines of its own accord. The Guidelines make clear that the tribunal may do so 'having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings'. The accompanying comments state that 'These Guidelines do not state whether Arbitral Tribunals have the authority to rule on matters of Party representation and to apply the Guidelines in the absence of an agreement by the Parties to that effect. The Guidelines neither recognize nor exclude the existence of such authority. It remains for the Tribunal to make a determination as to whether it has the authority to rule on matters of Party representation and to apply the Guidelines'. Thus, the tribunal is left with the discretion to determine whether it may rule on matters of party representation having taken account of the applicable laws and conditions of the arbitration. This flexibility permits the development of a consensus amongst practitioners as to the circumstances in which such authority may be exercised.

The Guidelines do not, however, envisage the imposition of direct duties and sanctions arising from breach thereof upon counsel.[69] The accompanying comments state that 'A Party Representative, acting within the authority granted to it, acts on behalf of the Party whom he or she represents. It follows therefore that an obligation or duty bearing on a Party Representative is an obligation or duty of the represented Party, who may ultimately bear the consequences of the misconduct of its Representative'.[70] Thus, any determination as to the authority to rule on matters of party representation is a determination as to the authority to act against parties with regard to representation, not directly against counsel.

Guideline 3 encapsulates the limitations of the IBA Guidelines. They are not intended to displace otherwise applicable mandatory laws or disciplinary rules. Nor could they, absent consensus from national regulators to this effect. Thus, the IBA Guidelines are distinguishable from the more radical Bishop/Stevens Code which is intended to supersede domestic regulations to the extent that they implicate arbitration proceedings. In this regard, the IBA Guidelines do nothing to address the twin questions bedevilling this topic: (i) do domestic regulations apply to practitioners in international arbitration; and (ii) what domestic regulations so apply?

Guideline 3 also reflects a tension which permeates the IBA Guidelines, namely the potentially countervalent obligations of ethical integrity under the IBA Guidelines and loyalty to one's client. Guideline 3 expressly states that the IBA Guidelines are not intended to undermine a representative's loyalty to his client, nor his 'paramount obligation' to present such party's case to the tribunal. Thus, the Guidelines make clear that no concept of overriding duty to the tribunal is embodied in the Guidelines. They apply only to the extent that they are not inconsistent with obligations to the client and his case.

---

69 Although Guideline 26(a) entitles the tribunal to 'admonish' a party representative.

70 It will be recalled that 'Party Representative' means a person 'whether or not legally qualified or admitted to a Domestic Bar'.

(c) Party Representation

Guidelines 4 and 5 oblige representatives to identify themselves to the opposing party and the tribunal at the earliest opportunity, and not to accept representation of a party when a relationship exists between the representative and an appointed arbitrator that would create a conflict of interest. Parties are also obliged to make prompt notification of any change in representation.

Guideline 6 empowers a tribunal, in the event of a conflict of interest of the sort identified above, to 'take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings'.

These Guidelines address squarely the situation which arose in the *Hrvatska* and *Rompetrol* cases. The late introduction of counsel so as to create a conflict of interest and thus imperil the proceedings may also be characteristic of deliberate guerrilla tactics. To the extent that the Guidelines are deployed in proceedings by virtue of the parties' agreement, the quandary about the authority to disqualify which arose in *Hrvatska* and *Rompetrol* may be avoided by the express authorization in Guideline 6. The tribunal may derive comfort from the parties' agreement that counsel may be excluded in appropriate circumstances.

The requirement that representatives identify themselves and changes in representation are notified at the earliest opportunity is also salutary. Tribunals sometimes make orders to this effect of their own accord, especially where sensitivities are apparent at an early stage in proceedings. This may particularly be the case where an arbitration involves persons affiliated with English barristers' chambers. As the *Hrvatska* case makes clear, the location of an arbitrator and counsel under the same roof may be alarming to parties unfamiliar with this system. Disclosure of any issues of this sort at an early stage will promote trust and confidence in the ongoing proceedings.

(d) Communications with Arbitrators

Guidelines 7 and 8 address the issue of ex parte communications between parties and their representatives, on the one hand, and arbitrators, on the other. Guideline 7 contains a prohibition on ex parte communications 'concerning the arbitration'. Guideline 8 sets out the exceptions to this rule. These are:

- communication between a party representative and a prospective party-nominated arbitrator to determine 'his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest';
- communication between a party representative and a prospective or appointed party-nominated arbitrator for the purpose of selection of the presiding arbitrator; and
- if the parties agree, communication between a party representative and a prospective presiding arbitrator to determine 'his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest'.

Further guidance is provided to the effect that permitted communications may include a 'general description of the dispute' but may not seek views on the 'substance of the dispute'.

These precepts reflect what is common practice amongst arbitration practitioners seeking out available arbitrators on behalf of their clients. As the comments note, 'the Guidelines seek to reflect best international practices and, as such, may depart from potentially diverging domestic arbitration practices'.

The comments provide a useful checklist of what are appropriate topics of discussion between counsel and prospective arbitrators, namely, '(a) the prospective Arbitrator's publications, including books, articles and conference papers or engagements; (b) any activities of the prospective Arbitrator and his or her law firm or organization within which he or she operates, that may raise justifiable doubts as to the prospective Arbitrator's independence or impartiality; (c) a description of the general nature of the dispute; (d) the terms of the arbitration agreement, and in particular any agreement as to the seat, language, applicable law and rules of the arbitration; (e) the identities of the Parties, Party Representatives, Witnesses, Experts and interested parties; and (f) the anticipated timetable and general conduct of the proceedings'.[71]

Somewhat peculiarly further exceptions are buried in the comments, and do not appear in the Guidelines. They concern, first, applications to the tribunal 'in certain circumstances, if the parties so agreed, or as permitted by applicable law. Such may be the case, in particular, for interim measures'. The subject of ex parte interim measures is a controversial one[72] and its inclusion, on an optional basis, in the revised Model Law provoked heated debate.[73] This may account for the relegation of this exception into what is effectively a footnote.

The second exception concerns default by a counterparty to arbitration and the entitlement to ex parte communications if the counterparty 'fails to participate in a hearing or proceedings and are not represented'. To some extent this reflects common sense. If the counterparty is absent from a hearing, communications made at that hearing cannot be made in their presence. Caution should be employed, however, as is always the case when faced with a non-participating party. Ensuring that attempts at communication of arbitral documents to such party are made can be valuable in the event of a challenge to any award on the basis of lack of notice of the arbitration proceedings or failure of due process.

(e) Submissions to the Arbitral Tribunal

Guideline 9 states that 'a Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal'. Its counterpart, Guideline 10,

---

71 See, by way of comparison, the Chartered Institute of Arbitrators' 'Practice Guideline 16: The Interviewing of Prospective Arbitrators' which provides guidance and commentary on the relevant principles.

72 See, for example, Born, *supra* n. 19, at 2015; Redfern, Hunter, et al., *Redfern and Hunter on International Arbitration* 322 (Oxford U. Press 2009).

73 Model Law Art. 17B; and see Hans van Houtte, *Ten Reasons against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 Arb. Intl. 85 (2004).

states that in the event that a representative learns of a previously made false submission of fact, he should correct such submission 'subject to countervailing considerations of confidentiality and privilege'. Thus, again the tension between ethics and appointer loyalty arises.

With regard to evidence of witnesses and experts, Guideline 11 prohibits a representative from submitting evidence 'that he or she knows to be false'. If a witness or expert presents, or intends to present, evidence which the representative discovers to be false, the representative should promptly advise his client of the 'necessity of taking remedial measures and of the consequences of failing to do so'. Remedial measures 'may include' (a) advising the witness or expert to testify truthfully, (b) taking reasonable steps to deter the witness or expert from submitting false evidence, (c) urging the witness or expert to correct or withdraw the false evidence, (d) correcting or withdrawing the false evidence, or (e) withdrawing as party representative if circumstances so warrant. Again, these are subject to countervailing considerations of confidentiality and privilege. The comments also acknowledge that certain remedial steps, such as correction of evidence or withdrawal, may not be compatible with applicable ethical rules.

With regard to legal submissions, the Guidelines themselves are silent. However, the accompanying comments entitle a party representative to 'argue any construction of a law, a contract, a treaty or any authority that he or she believes is reasonable'. It is perhaps telling that there is no corresponding prohibition on arguing *unreasonable* contentions of law within the body of the Guidelines, suggesting that this principle may have been incapable of agreement amongst the drafters.

(f) Information Exchange and Disclosure

Guidelines 12 to 17 are concerned with the exchange of information and disclosure obligations. Guideline 12 obliges a party representative to inform its client of the necessity of preserving 'potentially relevant' documents. Guideline 13 prohibits the making of requests to produce documents or objections to requests 'for an improper purpose, such as to harass or cause unnecessary delay'. Guidelines 14 and 15 require a party representative to explain to its client the necessity of document production and consequences of failing to do so, and to advise its client on taking steps to ensure a reasonable search for documents is undertaken and non-privileged responsive documents are produced. Guideline 16 prohibits a representative from suppressing or concealing documents which have been requested or in respect of which production has been ordered. Finally, Guideline 17 reflects an ongoing obligation to produce documents which should have been produced which are brought to the attention of counsel at a later stage of the proceedings.

Guidelines 12 to 17 complement and bolster the document production provisions of the IBA Rules. The IBA Rules are essentially silent on the manner in which a party satisfies itself as to the existence or non-existence of documents

which it has been ordered to produce.[74] Guideline 15 requires a party representative to advise on what constitutes a reasonable search and to assist in its performance. The comments refer to the conduct of a 'reasonable and proportionate' search. They also note that 'one Party Representative may consider him- or her-self obligated to ensure that the Party whom he or she represents undertakes a reasonable search for, and produces, all responsive, non-privileged Documents, while another Party Representative may view Document production as the sole responsibility of the Party whom he or she represents. In these circumstances, the disparity in access to information or evidence may undermine the integrity and fairness of the arbitral proceedings'. Thus the Guidelines, sensibly, propose an obligation on counsel actively to participate in the search process.

(g) Witnesses and Experts

The preparation of witness evidence and for witness testimony raises some of the most fraught issues in arbitral ethics. Unsurprisingly, the IBA Guidelines are extensive on this subject, setting out seven Guidelines addressing various elements of the evidence gathering and presentation process.

Guideline 18 requires a party representative to identify himself, the party he represents, and the reason for which information is sought, when seeking information from a potential witness or expert. Guideline 19 expands on this to require a representative to make any potential witness aware that he has the right to inform or instruct his own counsel about the contact and to discontinue the communication with the representative.

Guidelines 20 to 23 relate to the preparation of evidence. Thus, a representative may assist witnesses and experts in the preparation of witness statements and expert reports (Guideline 20). A representative should seek to ensure that a witness statement reflects the witness's own account and an expert report the expert's own analysis and opinion (Guidelines 21 and 22). A representative should not encourage a witness to give false evidence (Guideline 23).

Guideline 24 states that a representative may 'consistent with the principle that the evidence given should reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony'.

Guideline 25 permits payment to witnesses or experts only in respect of expenses reasonably incurred, reasonable compensation for loss of time, and reasonable fees for the professional services of the expert.

---

74 Art. 3(3)(a)(ii) entitles a *requesting* party to identify 'specific files, search terms, individuals or other means of searching for . . . . Documents in an efficient and economical manner'. Art. 9(2)(c) entitles the Tribunal to exclude from evidence documents where there is an 'unreasonable burden to produce the requested evidence'. Thus, the concept of conducting a reasonable search for documentation is implied in the IBA Rules.

Given the potential for controversy arising from differing ethical standards regarding contact with potential witnesses (which may be perceived as encroachment upon the territory of the opposing party), the comments address this directly: 'Some jurisdictions require higher standards with respect to contacts with potential Witnesses who are known to be represented by counsel. For example, some common law jurisdictions maintain a prohibition against contact by counsel with any potential Witness whom counsel knows to be represented in respect of the particular arbitration. If a Party Representative determines that he or she is subject to a higher standard than the standard prescribed in these Guidelines, he or she may address the situation with the other Party and/or the Arbitral Tribunal'. Thus, the Guidelines expressly envisage the application of more restrictive standards in respect of witness contact in the event that an inequality would arise from differing approaches.

Another flashpoint, the preparation of witnesses for evidential hearings, is addressed in the comments. With regard to Guideline 24 which permits discussions regarding prospective testimony, it is stated that 'a Party Representative may assist a Witness in preparing for their testimony in direct and cross-examination, including through practise questions and answers. This preparation may include a review of the procedures through which testimony will be elicited and preparation of both direct testimony and cross-examination. Such contacts should however not alter the genuineness of the Witness or Expert evidence, which should always reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion'.

This wording, although vague, appears to go quite far towards the type of witness coaching which is deprecated in certain jurisdictions. By contrast, the Benson Checklist states that 'a lawyer's interview of any witness or potential witness shall not take the form of rehearsing specific lines of direct, cross or redirect examination or otherwise coaching the witness to adopt proposed testimony as his or her own'.[75]

(h) Remedies for Misconduct

Guideline 26 prescribes potential remedies for misconduct by a party representative. These are (a) admonition of a party representative; (b) the drawing of appropriate inferences in assessing the evidence relied upon or the legal arguments advanced by the party representative; (c) considering the party representative's misconduct in apportioning costs; and (d) taking any other appropriate measure in order to preserve the fairness and integrity of the proceedings.

Guideline 27 stipulates the factors which a tribunal should take into account when considering remedies. These include the need to preserve the integrity and fairness of the proceedings and the enforceability of the award, the potential impact of any ruling on the rights of the parties, relevant considerations of

75 Benson, *supra* n. 10, at 92.

privilege and confidentiality and the extent to which the party represented by the miscreant representative knew of, condoned, directed or participated in the misconduct.

The comments state that the purpose of the remedial measures is to 'preserve or restore the fairness and integrity of the arbitration'. This reflects the arbitrators' remit and the extent of their jurisdiction. They cannot sanction counsel directly, and their principal concern is the integrity of the arbitration proceedings. It is not for them to pursue counsel who flaunt their orders or disrupt their proceedings. The reference to admonition of counsel is interesting, but it must be questioned what practical weight, if any, it has. Tribunals are free to criticize the conduct of counsel in their awards; the concept of admonition may suggest a more formal and firm censure. Where arbitral awards are published (for example, in the investment arbitration universe), this may act as a deterrent. But where the award is never disclosed beyond the parties, it is likely to be of limited significance.

X. OMISSIONS FROM THE IBA GUIDELINES

Having looked at the content of the IBA Guidelines, it is instructive to consider what they do *not* cover.

(a) Courtesy and Respect

It may be thought regrettable that there is no generalised statement requiring counsel to adhere to basic notions of civility and respect. The closest that the Guidelines get is the note in the preamble that the Guidelines are 'inspired by the principle that party representatives should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings'. By contrast the Benson Checklist[76] and the Bishop/Stevens Code[77] expressly address this. It may be thought that such a statement would serve little practical purpose, and fit ill with the more specific injunctions in the Guidelines, but reference to it might serve to discourage aggressive behaviour in particularly rancorous proceedings.

(b) Identification of Adverse Authority

It is a feature of the professional codes of certain jurisdictions that authority adverse to a party's case is brought to the attention of the decision-maker, if the opposing party does not do so.[78] It is included in the Benson Checklist,[79] but would

76 Benson, *supra* n. 10, at 89.

77 Bishop and Stevens, *supra* n. 62, at 415 and 419.

78 See, for example, Indicative Behaviour 5.2 in the English SRA Code of Conduct 2011 'drawing the court's attention to relevant cases and statutory provisions, and any material procedural irregularity' so as to demonstrate that a solicitor has achieved the mandatory outcome of not deceiving or recklessly misleading the court and paragraph 708 of the Bar Code of Conduct 'A barrister when conducting proceedings in Court . . . must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argues'.

79 Benson, *supra* n. 10, 91.

likely be too alien to the practices of a great many counsel to merit inclusion in the Guidelines. Arguably such an obligation would have greater relevance to international arbitration than to domestic court proceedings where the judge and both sets of counsel would be expected to have a similar level of familiarity with developments in the proper law.

(c) Improperly Obtained Evidence or Documents

The question of improperly obtained evidence is not an uncommon one in arbitration proceedings. This may raise issues of evidence obtained by means of illegality or other impropriety, or merely inadvertent disclosure, such as privileged communications mistakenly included in document production. Tribunals have different means available to them when directed to such evidence. For instance, the IBA Rules empower a tribunal to exclude from evidence or production documentation on the basis of 'legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable'.[80]

The Benson Checklist contains provision for this scenario.[81] It would potentially have been a valuable addition to the Guidelines, and could have prescribed the options available to a tribunal when faced with improperly obtained evidence, from exclusion, to the imposition of sanctions on the party seeking to rely on such evidence. In doing so, the Guidelines would have complemented the IBA Rules usefully.

(d) Status of Settlement Negotiations

The Benson Checklist addresses the admissibility of settlement negotiations, providing that 'any proposals for settlement of the case made by the other party or its lawyer' shall not be divulged to the tribunal absent consent by the other party's lawyer.[82] There appears to be some measure of consensus on the inadmissibility of settlement negotiations in international arbitration.[83] This is ultimately a matter of evidence. However it also engages ethical considerations. Further, an agreed basis on which settlement materials could be exchanged would be conducive to the good faith settlement of proceedings.

There are other areas which might usefully be included in an ethical code for arbitration practitioners, but which cannot be said to be omissions from the IBA Guidelines. That is because the IBA Guidelines are narrow in focus, and constrained by their nature: they do not seek to regulate counsel directly, they aim to influence counsel, via their instructing parties. Thus, questions of privilege, acceptance of instructions, fees, compensation and funding, conflicts, confidentiality, and counsel marketing, which form part of national codes of conduct, are rightly absent from the IBA Guidelines.

---

80 IBA Rules, Art. 9(2)(b).
81 Benson, *supra* n. 10, 92.
82 *Ibid.*, at 93.
83 See, for example, Jeff Waincymer, *Procedure and Evidence in International Arbitration* 812 (Kluwer Law International 2012) and Born, *supra* n. 19, at 1913.

Similarly, matters of overzealous party conduct, such that might require interim orders to preserve the integrity of the arbitration or prevent its aggravation, are left to the discretion of tribunals and the powers afforded to them by contract, law and applicable rules. The same is true of procedural and evidential matters. Delay tactics, late evidence and uncooperative behaviour are a matter for arbitral discretion in determining the conduct of proceedings.

XI. CONCLUSION: PROSPECTS FOR THE IBA GUIDELINES

The IBA Rules and the IBA Conflicts Guidelines have been influential in the development of a 'soft law' of arbitration. They have earned their place of prominence in a harmonized arbitral procedure. Will the IBA Guidelines come to assume a similar role in the architecture of arbitral practice?

At the outset it must be acknowledged that the IBA Guidelines do not address the fundamental questions faced by international practitioners: what *mandatory* rules of conduct apply to arbitration practitioners? Is it those of their home jurisdiction? Is it those of the seat of the arbitration? The IBA Guidelines expressly do not displace such rules (which, absent regulator consent, they could, of course, not do). The questions remain.

That said, the IBA Guidelines may be relevant to the ethical standards imposed on certain counsel. As observed above, a European lawyer subject to the CCBE Code must comply with the rules of conduct applied before a tribunal.[84] If the IBA Guidelines are applied by a tribunal by agreement of the parties (or at the tribunal's instigation in certain circumstances), the 'switch' contained in the CCBE Code would be activated and counsel would be directly subject to the IBA Guidelines' provisions.

It is also the case that the remedies for misconduct which appear at the end of the Guidelines are underwhelming. The admonition of counsel, drawing of adverse inferences and implementation of costs sanctions are not new. They exist already in the arsenal of tribunals faced with delinquent parties and counsel.

Much will turn on how the parties and their arbitrators adopt the Guidelines. If it were common practice for the Guidelines to be tabled alongside Procedural Order No. 1, a healthy and transparent debate could be had about ethical principles and the manner in which the arbitration would take place. Concerns could be identified, standards set and arbitrants reassured. That would be worthwhile.

Those who seek in the IBA Guidelines the universal moral compass for arbitration advocated over the years will be disappointed. This is not that document. It confines its concern to the ethical standards applicable in individual arbitrations, not the ethical code by which arbitral practitioners should generally conduct themselves.

---

84 CCBE Code, Art. 4.1.

The Guidelines are unlikely to be the last word on the subject.[85] They do not advance the debate as to the extent to which arbitration is emancipated from domestic norms in the area of ethics. As discussed above, they also betray the tensions in their conception, and the limitations inherent in arbitration to police counsel conduct. Consigning the invigilation of counsel to individual tribunals can only achieve so much. As advocated by a number of practitioners, the arbitral institutions may yet have a role to play in developing and enforcing arbitral norms.[86] Developments in this regard can be expected in the near future. But for now, the burden falls on the tribunal and the Guidelines can only fortify them in shouldering that task.

---

85 As at the time of writing, a number of practitioners have commented on the Guidelines and the prospects for their success. See, for example, Alexis Mourre & Eduardo Zuleta, *The IBA Guidelines on Party Representation in International Arbitration*, 7 Dispute Resolution International 135 (2013) and 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 Bull. 497 (2013).

86 It is understood that a mechanism to this effect will be included in the revised LCIA Rules. At the time of writing, these had not been finalized, but the draft LCIA Rules promulgated by the LCIA contain a number of provisions with regard to counsel behaviour. These include notification of the identity of party representatives, the power of the tribunal to withhold approval of changes to representation if such changes could compromise the composition of the tribunal or finality of the award, requiring parties to ensure that legal representatives comply with specified guidelines, and empowering tribunals to order sanctions against legal representatives including a written reprimand or caution, and any other measure necessary to maintain the general duties of the tribunal.