# SOFT LAW IN INTERNATIONAL ARBITRATION

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# PART III

# ETHICS IN INTERNATIONAL ARBITRATION: SOFT LAW GUIDANCE FOR ARBITRATORS AND PARTY REPRESENTATIVES

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## INTRODUCTION

The integrity of the arbitration process is essential to preserve arbitration's ability to offer parties a fair forum for resolution of their disputes and to maintain trust in the process. To establish clarity and uniformity with respect to ethical obligations and assure such integrity, many arbitral institutions and bar associations have developed ethics codes, rules and guidelines. These soft law tools provide, along with applicable national law, the guidance required to foster ethical conduct and adherence to a common set of ethical obligations for the participants in an arbitration.

It is not possible to review all of the many codes, rules and guidelines that have been developed to address ethical considerations in arbitration. The four documents reproduced and discussed in this chapter are the most prominent:

- American Bar Association and American Arbitration Association Code of Ethics for Arbitrators
- International Bar Association Rules of Ethics for International Arbitrators
- International Bar Association Guidelines on Conflicts of Interest in International Arbitration
- International Bar Association Guidelines on Party Representation in International Arbitration.

The first three guidelines deal with the arbitrators themselves and are intended to ensure that the integrity of the arbitration process is not subverted by the participation of arbitrators who do not meet the standards enunciated. The fourth guideline is intended to level the playing field in international arbitration, where parties may be prejudiced by the often significant variances in the ethical obligations governing conduct by party representatives and to curb improper conduct by party representatives.

## I. AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes

### a. Background

As arbitration gained wider acceptance in the 1970s and the use of commercial arbitration to resolve a variety of disputes grew and formed a significant part of the system of justice, the maintenance of high standards and the need to assure confidence in the arbitration process became important concerns of the American Bar Association (ABA). Together with the American Arbitration Association (AAA), the ABA developed and issued the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes in 1977 (the "1977 Code"), the first set of guidelines to specifically address the ethics of arbitrators.

As the new millennium approached, a review was conducted to determine whether changes in the 1977 Code were needed in response to changes in the law governing arbitration, the increasing globalization of commercial transactions and changes in public expectations and perceptions. The 2004 Code of Ethics for Arbitrators in Commercial Disputes (the "2004 Code") emerged from that review. It largely mirrored the 1977 version and thus was labeled a revision of the 1977 Code. The most fundamental change in the 2004 revision, a change made to conform to international practice, was the application of a presumption of neutrality for all arbitrators, including party appointed arbitrators, a change from the presumption under the 1977 Code. As expected with the issuance of the 2004 Code and the changed presumption, U.S. practice has moved away from the appointment of non-neutral arbitrators and such a process is rarely employed now.

### b. The Canons

Canon I describes the overall responsibilities of the arbitrator to uphold the integrity and fairness of the process. It requires self-judgment in assessing whether or not to accept an appointment. An arbitrator should accept an appointment only if fully satisfied that he or she can serve impartially, independently and competently. Significantly, in light of the criticism in recent years that arbitrators do not attend to arbitrations in a timely manner, the Canon also requires that the arbitrator be satisfied that he or she can be available to commence and conduct the arbitration in a timely manner. The Canon requires the arbitrator to avoid any relationship while serving as an arbitrator that might create the appearance of partiality and to avoid entering into such a relationship for a reasonable period of time after the final award is rendered. The Canon further requires conducting a fair and efficient process and obligates the arbitrator to take all reasonable efforts to prevent delaying tactics, harassment or other abuse or disruption of the arbitration.

Canon II addresses the arbitrator's disclosure obligations and requires disclosure of any direct or indirect financial or personal interest and disclosure of any relationship which any of the parties might reasonably believe could affect impartiality or lack of independence. This requirement includes disclosure of any relationship with any party, counsel, any co-arbitrator or any witness and requires disclosure of any such relationship involving the arbitrator's family or household members, current employer, partners or professional associates. The Canon requires arbitrators to make "reasonable efforts" to inform themselves of any such interests or relationships and to resolve any doubt as to whether or not disclosure should be made in favor of disclosure. There is no time limit set on disclosure obligations.

Canon III addresses communications with the parties and provides that there shall be no *ex parte* communications with limited specified exceptions.

Canon IV requires the arbitrator to conduct the proceedings fairly and diligently and to allow each party a fair opportunity to present its evidence and arguments and to allow the parties the opportunity to be represented by counsel or any other person chosen by the party.

Canon V requires that the arbitrator decide all issues submitted for determination by exercising independent judgment without delegation to any other person.

Canon VI requires maintaining the confidentiality of information acquired during the arbitration proceedings. It prohibits informing anyone about the substance of the deliberations.

Canons VII and VIII deal with compensation, advertising and promotion.

Canon IX establishes a presumption that all arbitrators are neutral unless they are specifically designated as Canon X arbitrators.

Canon X addresses the possibility that parties may in some cases elect to appoint non-neutral arbitrators even after the 2004 revision of the code. To assure the integrity of such an arbitration, Canon X imposes the same obligations as govern neutral arbitrators but provides for specific exemptions for non-neutral arbitrators.

### c. Implementation

As recognized in its text, the 2004 Code does not take the place of or supersede applicable law, other applicable ethics rules or arbitration agreements to which the parties have agreed and must be read as being subject to any contrary provisions of applicable law, arbitration rules or party agreements. Although thus limited, the 2004 code has been tremendously influential. U.S. arbitrators sitting in domestic arbitrations in the U.S., and often arbitrators sitting in international arbitrations seated in the U.S. or where enforcement in the U.S. may be required, look to the 2004 Code for guidance as to their ethical obligations. The AAA and the AAA's international division, the International Centre for Dispute Resolution (ICDR), both require independence and impartiality and disclosures by arbitrators consistent with the requirements of the 2004 Code.

The 2004 Code is also sometimes, but infrequently, referenced in case law when challenges to an award are based on an arbitrator's partiality, disclosure or conduct.[1] But as has been expressly stated by the courts, the Code is "not the proper starting point for an inquiry into an award's validity . . . . The arbitration rules and code do not have the force

[1] For a compilation of cases which have made express reference to the ABA-AAA Codes, see AMERICAN BAR ASSOCIATION/COLLEGE OF COMMERCIAL ARBITRATORS ANNOTATIONS TO THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, available at http://meetings.abanet.org/webupload/commupload/DR011000/newsletterpubs/code_annotated_updated_feb_2013.pdf.

of law."[2] Thus, to fully appreciate what conduct and disclosure is required, one cannot look only to the 2004 Code, but one must also look—in the U.S., as in every jurisdiction—to the national law that has developed on the subject.

The U.S. Federal Arbitration Act (FAA) § 10 lists "evident partiality" as one of the bases for vacating an award.[3] It is applicable to domestic awards and, in some U.S. jurisdictions, to international awards as well. The seminal (and only) decision concerning "evident partiality" by the Supreme Court was *Commonwealth Coatings Corp. v. Continental Casualty Co*. in 1968.[4] No majority opinion was issued. Justice Black in the plurality opinion, referring to standards for the judiciary, held that for evident partiality the party only needs to show that an arbitrator failed to disclose "any dealings that might create an impression of possible bias."[5] In his often cited concurring opinion, Justice White stated that arbitrators should not be held to the same standards as judges and should not be subject to having their awards vacated if the relationship is trivial. Justice White noted that while early disclosure is best, an arbitrator "cannot be expected to provide his complete and unexpurgated biography."[6]

As a plurality decision, courts may find the holding of the court to be the position taken by those members who concurred in the judgment on the narrowest grounds.[7] Thus, looking to Justice White's concurrence, the majority of circuits follow standards akin to the Second Circuit's rigorous standard that "evident partiality" within the meaning of 9 U.S.C. § 10 will be found where "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[8] The Second Circuit held that an award will not be set aside for failure to make a disclosure unless the arbitrator knows of a "material relationship" with a party and fails to disclose it.[9] The court elaborated, stating that an arbitrator is required to take steps to ensure that the parties are not misled

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[2] *E.g.*, *Freeman v Pittsburgh Glass Works LLC*, 709 F.3d 240, 254 **(**3d Cir. 2013) (internal citations omitted).

[3] 9 U.S.C. § 10(a)(2).

[4] *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

[5] *Id.* at 149.

[6] *Id.* at 151.

[7] *Marks v. United States*, 430 U.S. 188 (1977).

[8] *Scandinavian Reinsurance Co. v. Saint Paul Fire and Marine Ins.Co.*, 668 F.3d 60 (2d Cir. 2012). New York's highest court adopted this Second Circuit standard. *U.S. Electronic Inc. v. Sirius Satellite Radio Inc.,* 17 N.Y.3d 912 (2011).

[9] *Scandinavian Reinsurance Co.*, 668 F3d at 73.

into believing that no nontrivial conflict exists, and an arbitrator is required, if he thinks a nontrivial conflict may exist, to investigate or disclose his reasons for not investigating it.[10] However, the application of this standard is not uniform—some courts may apply a variation of the standard set by the Ninth Circuit that "a reasonable impression of partiality" is required to show evident partiality.[11]

Whatever the standard used, early disclosure can serve to forestall later challenges and consequent delays and expense in court proceedings. Regardless of the fact that applications to vacate awards or deny enforcement rarely succeed on grounds of evident partiality, attacks on arbitrators and awards based on claims of arbitrator partiality are frequent, as is the current practice of hiring investigators to unearth points of contact between arbitrators and parties or their representatives. As Justice White observed, "it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or distrustful party can seize on it as a pretext for invalidating the award."[12]

## II. The IBA Rules of Ethics for International Arbitrators and the IBA Guidelines on Conflicts of Interest in International Arbitration

### a. Background

The International Bar Association (IBA) issued the IBA Rules of Ethics for International Arbitrators in 1987 (the "IBA Rules") to create a framework for the manner in which the obligation of international arbitrators to be impartial, independent, competent, diligent and discreet should be assessed in practice. The IBA Rules reflected internationally acceptable practice and in many respects mirrored the provisions of the AAA-ABA's 1977 Code. The IBA Rules required that arbitrators (a)

[10] *Id.*

[11] *Schmitz v. Zilvetti,* 20 F.3d 1043, 1047 (9th Cir. 1994). It must be noted that several U.S. states have statutes and ethical codes that specifically address arbitrator ethics, including disclosure requirements, which must also be considered. *See e.g.,* California Ethics Standards for Neutral Arbitrators in Contractual Arbitration and California Code Civ. Proc. §1281.9 (setting forth specific and detailed disclosure requirements).

[12] *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. at 151.

proceed diligently and efficiently, (b) accept appointments only if they can act without bias, (c) limit *ex parte* communications with the parties or their representatives, and (d) address matters relating to fees and confidentiality. The IBA Rules described the criteria for assessing questions relating to bias, impartiality and independence and required a prospective arbitrator to disclose "all facts or circumstances that may give rise to justifiable doubts" as to their impartiality or independence. The IBA rules further provided some specificity as to the nature of the relationships for which disclosure was required.

In the years following the issuance of the IBA Rules, the IBA found that arbitrators were still frequently unsure about what facts needed to be disclosed and that arbitrators in the same situation made different choices about disclosures. Challenges to arbitrators were increasing and disclosure of even minor relationships led to objections, challenges and withdrawal or removal of the arbitrator. There was a perceived tension between the parties' right to disclosure of situations that may reasonably call into question an arbitrator's impartiality or independence and the parties' right to select arbitrators of their choosing. An IBA working group studied the issue and concluded that the existing standards set forth in the arbitration rules and law lacked sufficient clarity and uniformity in application.

Following extensive study and peer review, the IBA issued the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Arbitrator Guidelines") reflecting the working group's understanding of best current international practice.[13] The IBA Arbitrator Guidelines enunciated a set of general standards (the "General Standards") relating to impartiality, independence and disclosure. In an effort to foster greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals, the working group also provided a non-exhaustive list of specific situations that commonly arise in practice, and assigned each situation to one of three color-coded lists: red, orange or green (together, the "Application Lists"), in descending order of "seriousness."[14] The IBA Rules remain in effect as to subjects not discussed in the IBA Arbitrator Guidelines but the IBA Arbitrator Guidelines supersede the IBA Rules as to the matters that are treated.

[13] For a history of the drafting of the IBA Arbitrator Guidelines and guide to its interpretation, *see* Otto deWitt Wijnen, Nathalie Voser and Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, BUSINESS LAW INTERNATIONAL Vol. 5 No. 3, 433 (2004).

[14] IBA Arbitrator Guidelines at Part II, ¶ 2.

The portions of the IBA Rules that remain in effect are uncontroversial. However, the portions that were superseded by the IBA Arbitrator Guidelines continue to be the subject of vigorous discussion and debate. The significant increase in recent years in the number of challenges to arbitrators, the growth in the monetary value of cases which has led to the devotion of substantial resources to setting aside unfavorable awards, and the growth of international law firms, which inevitably leads to increased conflicts for arbitrators, has made issues concerning impartiality, independence and disclosure a continuing concern.

### b. The General Standards and the Application Lists

Standard 1 provides that the arbitrator shall be impartial and independent of the parties and shall remain so until the final award is rendered.

Standard 2 requires an arbitrator to decline an appointment or refuse to continue to act if he or she has any doubts as to his or her ability to be impartial or independent or that from a reasonable third party's point of view having knowledge of the relevant facts would give rise to justifiable doubts as to the arbitrator's impartiality or independence. Doubts are justifiable if a reasonable and informed third-party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits presented.

Standard 3 requires the arbitrator to disclose such facts as may in the parties' eyes give rise to doubts as to the arbitrator's impartiality or independence. If in doubt, an arbitrator should disclose, an obligation which continues throughout the proceeding.

Standard 4 states that if no objection is raised after receipt of a disclosure, the parties have waived any potential conflict of interest based on such facts and circumstances except for specified situations listed.

Standard 5 makes it clear that the guidelines apply equally to the tribunal chair as well as to party appointed arbitrators (but not to non-neutral arbitrators).

Standard 6 addresses the growing size of law firms and requires a reasonable consideration of potential conflicts based on activities within an arbitrator's law firm.

Standard 7 imposes an obligation on the parties to inform about any direct or indirect relationship between them and an arbitrator and imposes a duty on the arbitrator to make reasonable enquiries to investigate any potential conflicts of interest.

The working group imposed a *subjective* test for disclosure in the General Standards in recognition of the parties' interest in being fully informed about any circumstance that may be relevant in their view. However, the working group concluded that guidance as to situations likely to occur assessed against an *objective* test would create a desirable uniformity of approach. The working group found that counsel, arbitrators and parties from different cultures and legal systems often reached different conclusions as to whether a given situation raised a potential conflict of interest concern that required disclosure. There was also a concern that excessive disclosures would unnecessarily undermine confidence in the process.

While concededly non-exhaustive, the Application Lists were developed to create such an objective basis for assessing arbitrator relationships. The green list identifies situations in which disclosure is not required and describes relationships which do not constitute valid grounds for challenge or objection. The orange list identifies situations which, in the eyes of the parties, may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The red list identifies situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. The red list is also divided into non-waivable situations and waivable situations.

### c. Implementation

Like the ABA-AAA's 2004 Code, the IBA Arbitrator Guidelines recognize that they are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. Rather it was hoped that the guidelines would find general acceptance and adherence within the international arbitration community and thus assist in the decision-making process on questions of impartiality, independence and disclosure.

The UNCITRAL Arbitration Rules, the AAA/ICDR rules, the London Court of International Arbitration ( LCIA) rules and the rules of other institutions require impartiality and independence and require arbitrators to disclose "any circumstance likely to give rise to justifiable doubts" as to the arbitrator's "impartiality or independence."[15] The ICC requires a statement of impartiality and independence by arbitrators prior

[15] UNCITRAL Model Law on International Commercial Arbitration, Art. 12(1).

to appointment which calls upon them to attest as to any "facts or circumstances, past or present . . . that might be of such a nature as to call into question . . . independence in the eyes of any of the parties"[16] and "any facts or circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."[17] Thus, from the standpoint of the institutions, the IBA General Standards are an acceptable enunciation of independence, impartiality and disclosure requirements.

The Application Lists have met with more limited institutional acceptance. The arbitral institutions have not adopted them due to concerns that the objective nature of the Application Lists is in conflict with the subjective disclosure requirements. As stated by Anne Marie Whitesell, former Secretary General of the ICC International Court of Arbitration, "there is a fundamental incompatibility between the [ICC] rules and the IBA guidelines. Article 7 (2) of the [ICC] rules requires a subjective approach to disclosure. . . . Hence, it is not possible in ICC arbitration to have a list of situations which are said to be objective and never to require disclosure as provided in the IBA guidelines green list."[18] Furthermore she states that the Application Lists may be helpful in deciding what may require disclosure but do not dictate the appropriate outcome in the many situations which fall in the orange list—moreover, there are many facts and circumstances giving rise to objections and challenges that were not covered by the IBA Arbitrator Guidelines at all.[19] This basic incompatibility between the subjective requirements of independence, impartiality and disclosure and the objective nature of the Application Lists caused other institutions to respond similarly in rejecting the Application Lists as controlling. Thus, from an institutional perspective, absolute reliance on the Application Lists by arbitrators may not be consistent with their ethical obligations.

Citation to and reliance on the IBA Arbitrator Guidelines by the courts has been limited. Few court decisions have cited the guidelines and those that have often have done so without deference to their provisions.[20] As in the U.S., some courts have expressly noted that the

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[16] Erik Schäfer, Herman Verbist, and Christophe Imhoos, ICC ARBITRATION IN PRACTICE, at 47 (Kluwer, 2005).

[17] ICC Rules of Arbitration Art. 11(2).

[18] Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC International Court of Arbitration Bulletin, Special Supplement No. 690E, 36-38 (2007).

[19] *Id.*

[20] For a collection and discussion of cases citing the IBA Arbitrator Guidelines through 2009, see Matthias Scherer, *The IBA Guidelines on Conflicts of Interest in International*

guidelines do not override national law and that a result dictated by the application of national law cannot be altered by the guidelines.[21] However, some courts have found the guidelines useful and have relied on them as part of the basis for their decision.[22]

Notwithstanding the general lack of expressed reliance on the IBA Arbitrator Guidelines by courts and institutions, in fact they have had tremendous impact. Many international arbitrators look to them in assessing whether they have a conflict, how serious the conflict is and whether they have a disclosure obligation. Citations to the IBA Arbitrator Guidelines are common in arguments offered in support of objections and challenges and they may have more influence on decisions reached than is acknowledged. The LCIA has stated that the LCIA Court will on occasion refer to the IBA Arbitrator Guidelines in making decisions on challenges and certain of its divisions have concluded that they "reflect actual practice in significant parts of the arbitration community."[23]

The IBA Arbitrator Guidelines should be interpreted in the context of the applicable national law of the seat and the place of possible enforcement, as well as with reference to such additional guidance as may be gleaned from the published discussions of institutional decisions on challenges. The LCIA, which prepares written decisions on challenges to arbitrators, published sanitized versions of a selected group of those decisions in 2011 that are instructive.[24] Discussions of numerous ICC decisions on objections and challenges have also been published.[25] These real-life conclusions reached by institutions can be utilized by arbitrators to assist them in deciding which cases they can accept and what disclosures they should make and by counsel in assessing whether or not there is merit to a challenge they are considering.

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*Arbitration: The First Five Years 2004-2009*, DISPUTE RESOLUTION INTERNATIONAL Vol. 4 No. 1 (2010); *see also* Judith Gill, *The IBA Conflicts Guidelines—Who's Using Them and How?* DISPUTE RESOLUTION INTERNATIONAL Vol. 1, No. 1 (2007).

[21] *See, e.g.*, *A and Others v B* [2011] EWHC 2345, at ¶ 73 (Comm) (15 September 2011).

[22] *See, e.g.*, Swedish Supreme Court, Case No T 2448-06 (19 November 2007), *Anders Jilkén v Ericsson AB*, 5 Stockholm Int'l. Arb. Rev. 167 (2007); *see also New Regency Productions v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007).

[23] (2011) 27 ARBITRATION INTERNATIONAL at 288.

[24] *Id.*

[25] *See* Jason Fry and Simon Greenberg, *The Arbitral Tribunal: Applications of Article 7-12 of the ICC Rules in Recent Cases*, ICC International Court of Arbitration Bulletin, Vol. 20/2 (2009); Whitesell, *supra* n.12.

The IBA and the IBA working group recognized that the IBA Arbitrator Guidelines were the beginning rather than end to the process and planned from the inception to supplement, revise and refine the guidelines based on practical experience. At the time of this writing, the IBA arbitration committee is considering a revision of the guidelines and specifically considering changing the guidelines to address issues that have come to the fore in recent years, including the increasingly common use of advance waivers, the use of secretaries by the tribunal, the question of issue conflict, third party funding, lengthening the time intervals specified in the Application Lists, and the participation in an arbitration of barristers as both arbitrator and counsel who are members of the same chambers.

## III. International Bar Association Guidelines on Party Representation in International Arbitration

### a. Background

Suggestions that guidelines were necessary to govern the ethics of party representatives in international arbitration were first published many years ago.[26] With continuing attention to the topic, the IBA arbitration committee formed a working group to examine the issue in 2008. The topic continued to gain increasing attention. Catherine Rogers, a leading scholar in the field, expressed the view in 2010 that this "ethical no-man's land," should not be permitted to persist.[27] Doak Bishop, in his opening address at the ICCA Congress in 2010, proposed an international code of ethics for lawyers. Sundaresh Menon, in his opening address at the ICCA Congress in 2012, urged the development of a code of conduct and practice to guide international arbitrators and international arbitration counsel. These remarks helped galvanize attention on the issue.

In 2010, the IBA working group conducted a broadly disseminated survey to inform its work. The survey helped identify the divergent ethical practices of party representatives that presented the greatest

[26] *See e.g.*, Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 Am. Rev. Int'l Arb. 214 (1992); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250, 250 (1996).

[27] Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012.

difficulties and confirmed support for the development of international guidelines for party representatives, with an overwhelming majority of the respondents calling for the issuance of such guidelines. In May of 2013, following extensive peer review, the International Bar Association Guidelines on Party Representation in International Arbitration (the "IBA Party Representative Guidelines") were issued. The objective of the guidelines was to assure the fundamental fairness and integrity of international arbitral proceedings. They address two issues relating to conduct by party representatives. First, they address the practices that are unethical under some national codes or rules of professional conduct but not under others. Second, they address what has come to be known as "guerrilla tactics," tactics used to delay, obstruct or subvert the arbitration process.

Differences in ethical obligations are inherent to an international forum where counsel come from different jurisdictions and often find themselves conducting an arbitration seated in a third jurisdiction and physically held in yet another jurisdiction. The IBA working group survey revealed a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration in such circumstances. Without an overriding ethical code there is no clear answer to the question of which ethical obligations are applicable as among all of these possible jurisdictions. Moreover, there is the potential for disadvantaging parties if their party representative is bound by more restrictive ethical rules. Only a common set of ethical obligations could level the playing field. The examples most frequently used to illustrate the significant divergences in ethical obligations of party representatives include witness preparation, the nature of the party representative's obligation to assure production of responsive documents, *ex parte* communications with the arbitrator, statements of fact to the tribunal known to be unsupported by evidence, the obligation to report perjury, the obligation to advise the court of adverse legal authority and differences concerning lawyer communication with employees of an adverse corporate party.

Like counsel ethics, the use of "guerrilla tactics"—misconduct intended to obstruct, delay or derail an arbitration—has been the theme of much comment in recent years.[28] The most common examples of misconduct listed by practitioners include abuse of the information

[28] *See e.g.*, GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION (Günther J. Horvath and Stephan Wilske ed., Kluwer Publ. 2013).

exchange and party disclosure obligations, delay tactics, creating conflicts, frivolous challenges of arbitrators, last-minute surprise, frivolous anti-arbitration injunctions and other approaches to courts, *ex parte* communications, witness tampering, lack of respect and courtesy towards the tribunal and opposing counsel and various other strategies to frustrate an orderly and fair hearing.[29]

### b. The Guidelines

Guidelines 1-3 deal with the manner in which the guidelines should be applied.

Guidelines 4-6 preclude the creation of a conflict by barring taking on a party representation that would create a conflict with an arbitrator and states that the tribunal may exclude the new party representative who takes on a representation in violation of this guideline.

Guidelines 7-8 forbid *ex parte* communications apart from circumscribed interview contacts and absent specific agreement by the parties to the contrary or party non-appearance.

Guidelines 9-11 bar knowingly presenting false evidence and provide guidance on action to be taken if falsity is later discovered.

Guidelines 12-17 address the need to preserve documents and to produce responsive documents and prohibit the making of any request to produce documents for an improper purpose such as to harass or cause unnecessary delay.

Guidelines 18–25 permit party representatives to meet and discuss with experts and lay witnesses to help prepare witness statements and prepare for prospective testimony—however, party representatives may not invite or encourage false evidence. The IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Evidence Rules") had set the international practice in arbitration in favor of allowing witness preparation, a practice that is unethical in many jurisdictions but is standard and ethical practice in others, but had not spelled out the limits of what is permissible in this context. These guidelines affirm and expand upon those rules to provide further guidance.

The IBA Party Representative Guidelines address most of the disparities in ethical obligations among party representatives most

[29] Edna Sussman & Solomon Ebere*, All's Fair in Love and War - Or Is It? The Call for Ethical Standards for Counsel in International Arbitration,* Am. Rev. Int'l Arb., 22 (2011): 612.

frequently cited by the survey respondents.[30] However, not all disparities in ethical obligations were addressed. A purposeful decision was made by the working group not to include guidance relating to the obligation in some jurisdictions to advise the court of adverse legal authority in deference to the difference between civil and common law jurisdictions in this regard.

The guidelines specifically deal with two of the obstructive and delaying tactics identified in the survey: tactics related to (a) information exchange and disclosure, and (b) creating a conflict with an arbitrator. The provisions relating to information exchange and disclosure amplify the provisions in the IBA Evidence Rules and provide further guidance as to those obligations of party representatives. As was the case with respect to the preparation of witnesses, more detailed guidance than was provided by the IBA Evidence Rules was found to be necessary.

Somewhat to their surprise, the working group found that a considerable number of survey respondents believed that the purposeful creation of a conflict with an arbitrator through the appointment of a party representative with a problematic relationship with a sitting arbitrator was an issue that required attention. The IBA Party Representative Guidelines resolve the tension between the parties' right to select their party representative and the right of the tribunal to preserve the integrity of the proceedings by providing that the tribunal has the power to exclude counsel who take on a representation that creates a conflict with an arbitrator after the tribunal is constituted.[31] This conclusion finds support in an ICSID decision in which the tribunal disqualified counsel finding that while the ICSID Convention and ICSID Rules do not explicitly grant arbitrators such a power, and, as a general rule, parties are entitled to choose their counsel, the tribunal may disqualify counsel under "its inherent power to take measures to preserve the integrity of its proceedings" under the ICSID Convention.[32] The IBA's promulgation of this guideline is a noteworthy balancing of the competing considerations and may be regarded as groundbreaking in

[30] The ICDR in its Guidelines for Arbitrators Concerning Exchanges of Information issued in 2007 sought to address these disparities in § 7 by providing that "the tribunal should to the extent possible apply the same rule [as to ethics and privilege] to both sides, giving preference to the rule that provides the highest level of protection." However, such provisions are not commonly found in institutional rules.

[31] It must be noted that the courts in some jurisdictions view the disqualification of counsel as exclusively within the court's jurisdiction.

[32] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia,* (ICSID Case No. ARB/05/24), Order of May 6, 2008.

light of the fundamental principle in arbitration that parties are free to select a party representative of their choosing.

Perhaps because of the multiplicity of possible obstructive tactics and the difficulty of itemizing all of them, other possible improper actions by party representatives are not specifically identified. However, such misconduct may be addressed by the tribunal under its broader powers. The guidelines empower the tribunal to address "misconduct" by a party representative after giving the parties notice and a reasonable opportunity to be heard. Misconduct is broadly defined to include a "breach of the present Guidelines, or any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative."

### c. Implementation

Guidelines 26-27 of the IBA Party Representative Guidelines give the tribunal power to respond to behavior in violation of the guidelines. The tribunal may admonish the party representative, draw inferences, apportion costs, and take other "appropriate measures in order to preserve the fairness and integrity of the proceeding." In determining the remedy, the tribunal is to consider the nature and gravity of the misconduct, the good faith of the party representative, the extent to which the party representative knew about or participated in the misconduct, the potential impact of a ruling on the rights of the parties, the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award.

While these guidelines provide for such powers, like all of the guidelines discussed here, the IBA Party Representative Guidelines have no weight beyond that given to them by the party representatives and/or the arbitrators. As they state, the guidelines are not intended to displace otherwise applicable mandatory law, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. Nor are they intended to vest arbitral tribunals with powers otherwise reserved to bar associations or other professional bodies. It was the intention of the drafters of the guidelines that the parties adopt the guidelines by agreement or that arbitral tribunals apply the guidelines in their discretion, subject to any applicable mandatory rules, if they conclude they have the authority to do so. One of the critical issues that will arise in the coming years as these guidelines are utilized concerns the delineation of the powers of the tribunal. What

steps are tribunals authorized to take with respect to party representative conduct and pursuant to what grant of authority?

The institutions have already taken some steps to provide arbitrators with greater authority and it appears further steps will be taken in the near future. The ICC 2012 Arbitration Rules provide in Article 37(5) that in the allocation of costs the tribunal may consider the extent to which the party "conducted the arbitration in an expeditious and cost effective manner," thus specifically authorizing cost shifting if a party delays or obstructs the proceedings. At the time of this writing, the LCIA is reported to be planning to adopt a rule later this year which incorporates "basic norms expected of counsel in an arbitration under their auspices," and gives tribunals the power to exclude counsel who are found to be in serious and persistent violation of those norms.[33]

The new Commercial Arbitration Rules issued by the AAA effective October 1, 2013, specifically grant authority to the arbitrator under Rule 23 in the case of willful noncompliance with any order issued by the arbitrator to issue any order necessary to enforce rules relating to document production and the procedure set by the arbitrator with the parties to achieve a fair, efficient and economical resolution of the case. The arbitrator is authorized in such circumstances to allocate costs, draw adverse inferences, exclude evidence and other submissions, make special allocations of costs or interim awards of costs and issue any other enforcement order that the arbitrator is empowered to issue under applicable law. The new AAA Rule 58 grants the arbitrator authority, upon a party's request, to order appropriate sanctions where a party fails to comply with its obligations under the rules or with an order of the arbitrator, upon notice and an opportunity to respond. Thus we see growing institutional support for increasing the powers of the tribunal to manage the proceedings to assure a fair process.

It remains to be seen how tribunals and the international arbitration community will utilize the IBA Party Representative Guidelines. Will tribunals seek the adoption of the guidelines? Will party representatives accept their application to their arbitrations? Will party representatives agree to make the guidelines binding obligations or limit their effect to serving as guidelines? Will tribunals make an effort to flush out differences in ethical obligations among party representatives acting before them to level the playing field? Will tribunals incorporate the

[33] Sebastian Perry, *Policing Ethical Conduct: Menon and Paulsson Debate Regulation*, Global Arbitration Review, June 5, 2013.

guidelines in whole or in part in their first procedural order? Will tribunals conclude that they have authority to exercise the powers granted to them under the guidelines to curb misconduct by party representatives? Pursuant to what grant of authority? Will the imposition of consequences on the parties themselves for misconduct by their representative be considered a violation of due process? Will tribunals find that following the process required to impose consequences for party representative misconduct gives rise to mini-hearings and increased costs and delays that make pursuing such a process unattractive? Will institutions amend their rules to provide greater and more explicit authority to the tribunal to address the issues covered by the guidelines? Will the IBA Party Representative Guidelines be as successful and utilized as widely as the IBA Evidence Rules? [34] These are all questions that will be answered as use of the guidelines evolves in the coming years.

[34] A survey conducted in 2012 found that the IBA Evidence Rules are used in 60% of arbitrations—in 53% as guidelines and in 7% as binding rules. In addition, a significant majority of respondents (85%) confirmed that they found the IBA Evidence Rules useful. Queen Mary University of London and White & Case LLP, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*.