

IBA Asia Pacific Arbitration Group (APAG) Arbitration in Practice Webinar Series

Part 4: Arbitration in Practice:

A close look at the IBA Guidelines on Party Representation in International Arbitration

11 September 2020

IBA Guidelines on Party Representation in International Arbitration

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the IBA Council
25 May 2013
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Introduction of Panelists

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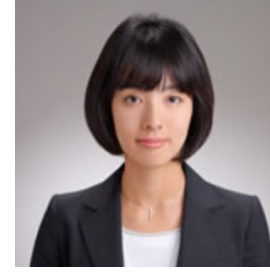


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Agenda for this Webinar



I. A BRIEF INTRODUCTION TO THE GUIDELINES

II. PANEL DISCUSSION

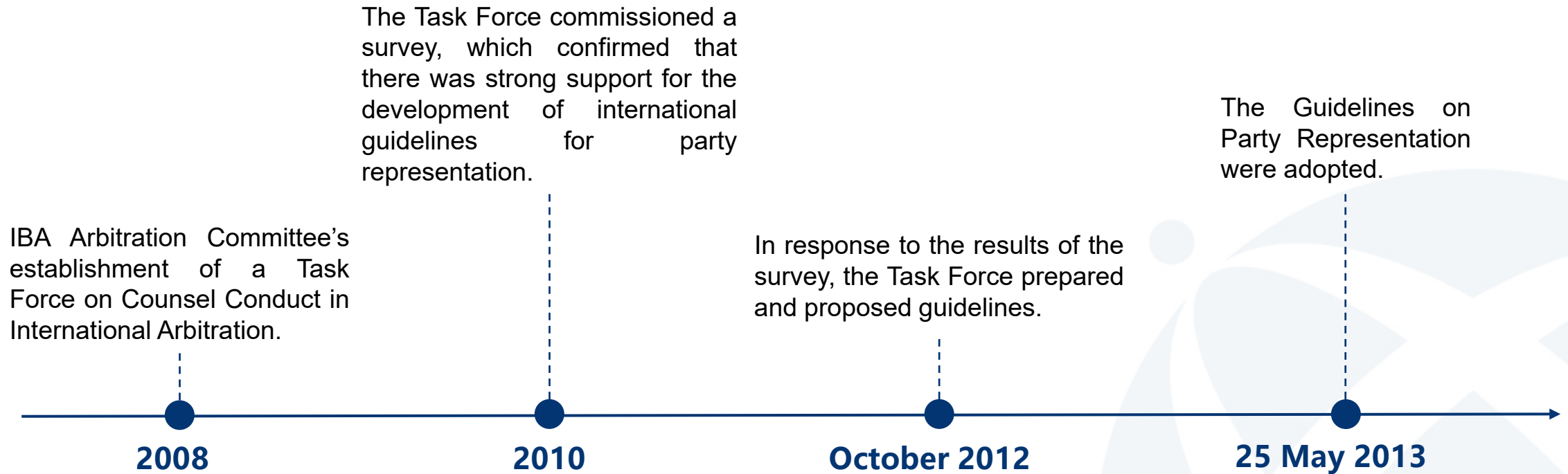
III. POLLING QUESTIONS

IV. Q&A SESSION

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I. A Brief Introduction to the Guidelines – The Origin of the IBA Guidelines



I. A Brief Introduction to the Guidelines – The Content of the IBA Guidelines

Section 1: The Application of the Guidelines

Section 3: Communications with Arbitrators

Section 5: Information Exchange and Disclosure

Section 2: Party Representation

Section 4: Submissions to the Arbitral Tribunal


Section 6: Witnesses and Experts

Section 7: Remedies for Misconduct



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II. Panel Discussion – Question 1



Assuming that the parties have agreed to apply the Guidelines, would the ethical rules of the counsel's home jurisdiction still apply?

What would happen, if there is a conflict between the Guidelines and the local rules?



...the significant increase over the past decade in the number of international arbitrations taking place and the expansion of practitioners participating in the process necessarily renders the question of ethics an important, but increasingly difficult, one to address.

(Chief Justice Sundaresh Menon, opening of the ICCA Congress, Singapore 2012)

Guideline 1

1. *The Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them 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

2. *In the event of any dispute regarding the meaning of the Guidelines, the Arbitral Tribunal should interpret them in accordance with their overall purpose and in the manner most appropriate for the particular arbitration.*

Guideline 3

- 3. 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 of loyalty 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.*

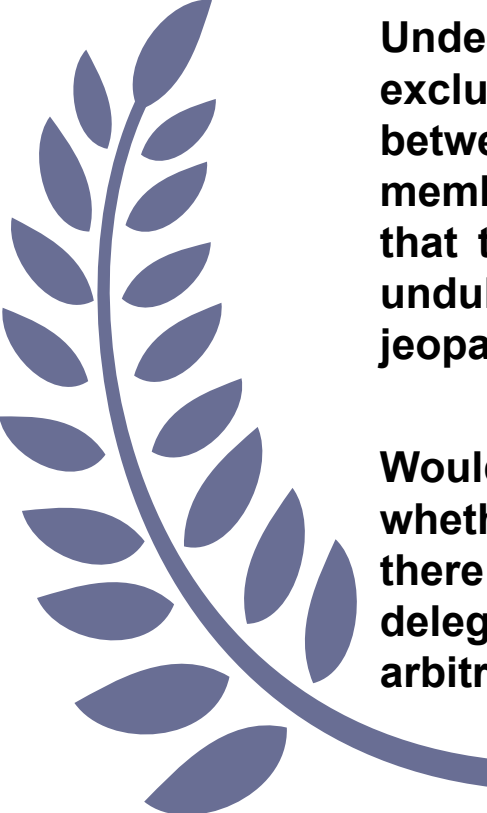
The professional conduct rules of many national bars either expressly or impliedly regulate the actions of lawyers admitted to practice before that bar during their representation of parties to an international arbitration. There is no ‘arbitration exception’ or ‘international arbitration exception’ from most national rules of professional conduct; a lawyer is subject to the same ethical regulations in arbitration as in his or her other professional activities

(Gary B Born International Commercial Arbitration, 2nd ed, p 2852)

In Conclusion


- Yes, counsel remain bound by their home jurisdiction professional conduct and ethical rules in international arbitration even where the parties have chosen to apply the *Guidelines*
- The resolution of conflict between home jurisdiction rules and the *Guidelines* is a personal obligation of counsel – the better view is that the rules must prevail

II. Panel Discussion – Question 2



Under *Guidelines 5* and *6*, the Tribunal is empowered to exclude new Party Representatives if there is a conflict between the new representative and the existing Tribunal members, have you seen any cases where you would say that the exclusion of a new Party Representative would unduly prejudice a Party's right to be heard and therefore jeopardize future enforcement?

Would the Arbitral Tribunal be the proper body to decide whether or not to exclude a Party Representative where there is a conflict of interest, or should this function be delegated to another body, such as the court of arbitration of the relevant arbitral institution?



Party Representation: Guidelines 4-6

Party Representation

4. *Party Representatives should identify themselves to the other Party or Parties and the Arbitral Tribunal at the earliest opportunity. A Party should promptly inform the Arbitral Tribunal and the other Party or Parties of any change in such representation.*
5. *Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.*
6. *The Arbitral Tribunal may, in case of breach of Guideline 5, 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*

Essential Structure

- Rule regulates conflicts of interest arising through *changes* in party representation – visiting consequences on the party representative, instead of the arbitrator
- By contrast, at the *outset* of an arbitration, the IBA Guidelines on Conflicts of Interest in International Arbitration regulate when an arbitrator may properly accept appointment
- Basic position is that, once a tribunal is constituted, party freedom to change counsel is restricted by principle of preserving integrity of arbitral proceeding

Hrvatska v Slovenia (2008)

- Tribunal in ICSID case constituted 20 April 2006. Substantive hearing scheduled for 5 May 2008. On 25 April 2008, law firm for respondent advised of persons attending substantive hearing, including QC from same London Chambers as Tribunal President
- On 28 April 2008, law firm for claimant objected
- Upon enquiry at substantive hearing, respondent advised that the QC had been approached to act in February 2008
- Tribunal ruled that, even though Chambers are not law firms, and there was no actual conflict, the claimant understandably discerned an “*appearance of impropriety*”
- QC not permitted to participate further in case, pursuant to inherent procedural powers arising under ICSID Convention (ruling dated 6 May 2008)

Rompetrol v Romania (2010)

- Also an ICSID proceeding. Lead counsel for claimant, Salans, changed to new partner who had formerly been an employee of the same law firm as a tribunal member. Counsel for respondent sought the lawyer's removal
- Tribunal considered *Hrvatska*, noted it was not a binding precedent, and observed that the power to remove counsel should be exercised:
 - only in “*extraordinary circumstances...which genuinely touch on the integrity of the arbitral process **as assessed by the Tribunal itself***” (emphasis in original), and
 - “*rarely, and in compelling circumstances*”
- That high threshold was not reached. Application denied

Thoughts on These Guidelines in Practice

- Guideline 5: “**would** create a conflict of interest” (cf IBA Conflict of Interest Guidelines – where “*justifiable doubts*” is sufficient)
- Comments:
 - “if **compelling** circumstances so justify”, and
 - “where [the Tribunal] has found it has the requisite authority”
- Guideline 6: what other options available than excluding counsel (and note “*all or part*”)?
- Contrast *Hrvatska* (and its aggravating circumstances) with clinical assessment in *Rompetrol*
- *Short point*: removal is certainly not automatic consequence, but likely exceptional power

II. Panel Discussion – Question 3

When would it be acceptable for a party to have *ex parte* communications with an arbitrator and are there any appropriate situations that could be added to the list at Guideline 8?

(from both a common law and civil law perspective)

**IBA Guidelines
on Party
Representation in
International
Arbitration**

**Ex Parte Communications with Arbitrators
Guidelines 7-8**

Guideline 8

It is not improper for a Party Representative to have *Ex Parte* Communications in the following circumstances:

- (a) Communicating with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.
- (b) Communicating with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.
- (c) Subject to the Parties' agreement, communicating with a prospective Presiding Arbitrator for the purposes of (a).
- (d) A Party Representative should not seek the views of the prospective Arbitrator on the substance of the dispute.

Comments to Guidelines 7-8

Applications to the Arbitral Tribunal without the presence or knowledge of the opposing Party or Parties may be permitted in certain circumstances, if the parties so agreed, or as permitted by applicable law. Such may be the case, in particular, for interim measures.

II. Panel Discussion – Question 4

How do Guidelines 9 to 11 seek to prevent false submissions of fact or false evidence being placed before Tribunals by Party Representatives?



Guideline 9: *A Party Representative should not make any **knowingly false submission of fact** to the Arbitral Tribunal.*

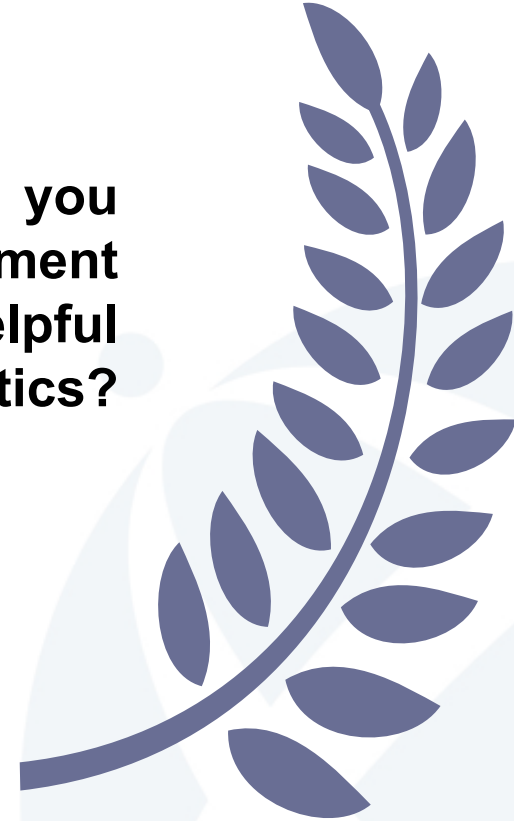
Guideline 10: *In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of **confidentiality** and **privilege**, promptly correct such submission.*

Guideline 11: *A Party Representative should not submit **Witness or Expert evidence that he or she knows to be false**. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Depending upon the circumstances, and subject to countervailing considerations of confidentiality and privilege, the Party Representative should promptly take remedial measures, which may include one or more of the following*

- (a) advise the Witness or Expert to testify truthfully;*
- (b) take reasonable steps to deter the Witness or Expert from submitting false evidence;*
- (c) urge the Witness or Expert to correct or withdraw the false evidence;*
- (d) correct or withdraw the false evidence;*
- (e) withdraw as Party Representative if the circumstances so warrant.***

II. Panel Discussion – Question 5

What are some common guerrilla tactics you have experienced during the document production phase in practice and how helpful are the Guidelines in addressing such tactics?



Guideline 12: *When the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration.*

Guideline 13: *A Party Representative should not make any Request to Produce, or any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay.*

Guideline 14: *A Party Representative should explain to the Party whom he or she represents the necessity of producing, and potential consequences of failing to produce, any Document that the Party or Parties have undertaken, or been ordered, to produce.*

Guideline 15: *A Party Representative should advise the Party whom he or she represents to take, and assist such Party in taking, reasonable steps to ensure that: (i) a reasonable search is made for Documents that a Party has undertaken, or been ordered, to produce; and (ii) all non-privileged, responsive Documents are produced.*

Guideline 16: *A Party Representative should not suppress or conceal, or advise a Party to suppress or conceal, Documents that have been requested by another Party or that the Party whom he or she represents has undertaken, or been ordered, to produce.*

Guideline 17: *If, during the course of an arbitration, a Party Representative becomes aware of the existence of a Document that should have been produced, but was not produced, such Party Representative should advise the Party whom he or she represents of the necessity of producing the Document and the consequences of failing to do so.*

II. Panel Discussion – Question 6

What are acceptable norms for Witness/Expert preparation and should limitations be imposed on Witness/Expert preparation (if so, to what extent)?

(from both a common law and civil law perspective)

IBA Guidelines
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International
Arbitration

**Witnesses and Experts
Guidelines 18–25**

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Comments to Guidelines 18–25

The Guidelines are intended to reflect best international arbitration practise with respect to the preparation of Witness and Expert testimony.

20. A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.

24. A Party 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.

- 21. A Party Representative should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances.*
- 22. A Party Representative should seek to ensure that an Expert Report reflects the Expert's own analysis and opinion.*
- 23. A Party Representative should not invite or encourage a Witness to give false evidence.*



- 20.6 Subject to the mandatory provisions of any applicable law, rules of law and any order of the Arbitral Tribunal otherwise, it shall not be improper for any party or its authorised representatives to interview any potential witness for the purpose of presenting his or her testimony in written form to the Arbitral Tribunal or producing such person as an oral witness at any hearing.



25.5 It shall be permissible for any party or its representatives to interview any witness or potential witness (that may be presented by that party) prior to his appearance to give oral evidence at any hearing.

Comments to Guidelines 18–25

Many international arbitration practitioners desire more transparent and predictable standards of conduct with respect to relations with Witnesses and Experts in order to promote the principle of equal treatment among Parties. Disparate practises among jurisdictions may create inequality and threaten the integrity of the arbitral proceedings.

III. Polling Questions – Question I

Guidelines 26 – 27 concern “Remedies for Misconduct”. Among the remedies that are available to the Arbitral Tribunal listed below, which do you think is the most appropriate and effective?

1. Admonish the Party Representative;
2. Draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;
3. Allocate more arbitration cost on the party whose Party Representative has committed Misconduct;
4. Taking any other appropriate measure in order to preserve the fairness and integrity of the proceedings; and
5. There are no appropriate remedies.



III. Polling Questions – Question II

In arbitrations in which issues of counsel conduct arise, how often do you think the *IBA Guidelines on Party Representation in International Arbitration* are referenced?

1. In 50% or more of cases
2. In less than 50% but more than 30% or more of cases
3. In less than 30% of cases



IV. Q & A Session



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