About the IBA Arbitration Committee

Established as a Committee of the International Bar Association's Legal Practice Division, which focusses on the laws, practice and procedures relating to the arbitration of transnational disputes, the Arbitration Committee currently has over 2,600 members from 115 countries, and membership is increasing steadily.

Through its publications and conferences, the Committee seeks to share information about international arbitration, promote its use and improve its effectiveness. The Committee has published several sets of rules and guidelines, which have become widely accepted by the arbitration community as an expression of arbitration best practices, such as the IBA Rules on the Taking of Evidence in International Arbitration, as revised in 2010, the IBA Guidelines on Conflicts of Interest in International Arbitration, which are currently under revision, and the IBA Guidelines on Drafting Arbitration Agreements. The Committee also publishes a newsletter twice a year and organises conferences, seminars and training sessions around the globe.

The Committee maintains standing subcommittees and, as appropriate, establishes task forces to address specific issues.

At the time of the issuance of these Guidelines the Committee has – in addition to its Task Force on Counsel Conduct – three subcommittees, namely, the Investment Treaty Arbitration Subcommittee, the Conflicts of Interest Subcommittee and the Young Arbitration Practitioners Subcommittee.

The Guidelines

PREAMBLE

The IBA Arbitration Committee established the Task Force on Counsel Conduct in International Arbitration (the 'Task Force') in 2008.

The mandate of the Task Force was to focus on issues of counsel conduct and party representation in international arbitration that are subject to, or informed by, diverse and potentially conflicting rules and norms. As an initial enquiry, the Task Force undertook to determine whether such differing norms and practices may undermine the fundamental fairness and integrity of international arbitral proceedings, and whether international guidelines on party representation in international arbitration may assist parties, counsel and arbitrators. In 2010, the Task Force commissioned a survey (the 'Survey') in order to examine these issues. Respondents to the Survey expressed support for the development of international guidelines for party representation.

The Task Force proposed draft guidelines to the IBA Arbitration Committee's officers in October 2012.

The Committee then reviewed the draft guidelines and consulted with experienced arbitration practitioners, arbitrators and arbitral institutions. The draft guidelines were then submitted to all members of the IBA Arbitration Committee for consideration. Unlike in domestic judicial settings, in which counsel are familiar with, and subject, to, a single set of professional conduct rules, party representatives in international arbitration may be subject to diverse and potentially conflicting bodies of domestic rules and norms. The range of rules and norms applicable to the representation of parties

in international arbitration may include those of the party representative's home jurisdiction, the arbitral seat, and the place where hearings physically take place. The Survey revealed a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration. The potential for confusion may be aggravated when individual counsel working collectively, either within a firm or through a co-counsel relationship, are themselves admitted to practise in multiple jurisdictions that have conflicting rules and norms.

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 practices 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.

The IBA Guidelines on Party Representation in International Arbitration (the 'Guidelines') are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.

As with the International Principles on Conduct for the Legal Profession, adopted by the IBA on 28 May 2011, the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. They are also not intended to vest arbitral tribunals with powers otherwise reserved to bars or other professional bodies.

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.

The Guidelines are not intended to limit the flexibility that is inherent in, and a considerable advantage of, international arbitration, and parties and arbitral tribunals may adapt them to the particular circumstances of each arbitration.

DISCUSSION

History

[P – 1] The Guidelines were launched in 2013 and form part of the IBA family of Guides and Rules for the conduct of international arbitration – *IBA Rules on the Taking of Evidence in International Arbitration* (2010)[1] (the '**IBA Rules**') and *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014)[2] (the '**IBA Guidelines on Conflicts**') being the others.

[P – 2] In his keynote address to the 2012 ICCA Congress, Sundaresh Menon[3] called for greater regulation in arbitration. He proposed as a *'relatively straightforward and minimally invasive first step … to develop a code of conduct and practice to guide international arbitrators and international arbitration counsel'*.

[P – 3] That call was not new. The IBA had previously published the IBA International Code of Ethics (1956, updated 1988). In the 2001 Goff Lecture, Johnny Veeder QC noted the fact that practitioners would hail from different cultures 'does not mean that international practitioners are pirates sailing under no national flag; it means only that on the high seas, navigators need more than a coastal chart'. In 2009 Cyrus Benson published a Checklist of Ethical Standards for Counsel in International Arbitration, and in 2010 The Hague Principles on Ethical Standards for Counsel appearing before International Courts and Tribunals were published. At the 2010 ICCA Congress, Doak Bishop had called for a code of conduct and warned of complacency. He and Margrete Stevens offered the Rio Code[4] in the following year, which drew heavily on the 1988 IBA International Code of Ethics and the 2006 Code of

[1] See P. Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013) (***'Guide to the Rules'***).
[2] A Guide by the author will follow. [3] Then Chief Justice designate for Singapore.
[4] The 2010 Congress was held in Rio de Janeiro.

Conduct for European Lawyers of the CCBE.[5] It was a good start but was not challenging, comprising, as it did, mainly truisms. The Rio Code has largely fallen by the wayside – not surprising, as the authors themselves called upon the ICCA or the IBA to draft a code. Finally, the IBA itself published the IBA International Principles of Conduct of the Legal Profession in 2011 which have largely been replaced/fallen into disuse in light of the Guidelines.

[P – 4] The IBA responded to the call. Indeed, it had already started. In 2008 the IBA established a 'Task Force on Counsel Conduct in International Arbitration'.[6] In 2010 the Task Force commissioned a survey[7] and in October 2012 the Task Force reported with a draft to the IBA Arbitration Committee's officers who, in turn, consulted some practitioners and institutions. Three months later the draft Guidelines were circulated to members,

[5] The CCBE Code expressly applies to arbitration (Article 4.5) and hence a lawyer subject to the Code must (a) comply with the rules of conduct applied by the tribunal (Article 4.1); (b) have due regard to the fair conduct of the proceedings (Article 4.2); (c) whilst maintaining due courtesy and respect towards the tribunal, defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences for himself (Article 4.3); and (d) never knowingly give false or misleading information to the tribunal (Article 4.4). The CCBE Code is designed to mitigate the effects of EU Directive 98/5/EC, Article 6.1 of which states: 'Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practicing under his home country professional title shall be subject to the same rules of professional conduct as lawyers practicing under the relevant professional title of the host Member State in respect of all activities he pursues in its territory.' This appears to embody double deontology: if an English lawyer conducts an arbitration in Paris he may be subject to both English and French regulation. Whether the same applies to the English lawyer acting in a London-seated arbitration who meets a witness in Paris is less clear. The answer probably lies in the Directive referring to practising on a permanent basis, so meeting a witness or even conducting a reference in another Member State would not be caught, but there is little guidance.

[6] It may well be significant that seven of the 23 members hailed from North America and included some of the more prominent members.

[7] A member of the Task Force, Cyrus Benson, comments: 'An extensive and widely circulated survey was conducted, the results of which demonstrated that many participants in international arbitration are uncertain about what rules or sets of rules govern the conduct of party representatives … A high percentage of those responding to the survey expressed a desire for guidance in this area …' (Cyrus Benson, 'The IBA Guidelines on Party Representation: an Important Step in Overcoming the Taboo of Ethics in International Arbitration', *Les Cahiers de l'Arbitrage/Paris Journal of International Arbitration*, (2014), 47–57).

inviting comments in some three weeks.[8] There was scathing criticism[9] led by the then ASA President, Michael Schneider. This resulted in some changes: 'shall' became 'should' and other minor textual changes, and weeks later the Guidelines were adopted by the IBA Council.[10]

What the alternatives were

[P – 5] One option would have been to leave matters of counsel conduct to the inherent power of each tribunal without seeking to establish norms of behaviour. On an *ad hoc* basis, tribunals could determine what powers they have and how best any such powers should be exercised. No doubt the fallback would have been that, by entrusting the dispute to the tribunal, and the process for doing so, the parties had presumptively entrusted the tribunal with wide-ranging powers concerning process. Tribunals, in all probability, have the power to combat 'run-of-the-mill' (if there is such a thing) abuse and obstruction by appropriate measures so as to preserve the integrity of the process. The old maxim of 'hard cases make bad law' would arise in this event. There will be well-publicised (or gossiped) instances of outrageous behaviour that justify the need for sanctions for misconduct.

[P – 6] Another route would be to 'legislate' by the route of institutional rules. At the time of writing, only the LCIA has done so, and its Rules are discussed below.

[P – 7] The third option is internationally accepted guidance or rules that can be adopted as and when required. That is the option taken by the IBA with the Guidelines.

[8] This timescale has been forcefully criticised.

[9] This continued after adoption: see e.g. Michael Schneider's September 2013 Presidential Message: 'Yet another opportunity to waste time and money on procedural skirmishes: The IBA Guidelines on Party Representation.'

[10] This difficult 'birth' of the Guidelines is significant in understanding the acceptance or otherwise of the Guidelines. There remain calls for a radical rethink. It is not the function or purpose of this Guide to continue the call for a rethink or to endorse the Guidelines as a whole. The Guidelines exist, for better or worse, and this Guide aims to accompany the reader through them. Difficulties and inconsistencies are highlighted for that purpose.

[P – 8] The rationale for the Guidelines is said to be, in part, 'educational',[11] but they go beyond what many would perceive as global minimum standards: in part to combat 'guerrilla tactics', but the guerrilla will often accuse his opponent first to deflect attention away from himself – that is the true behaviour of the guerrilla. One thing that is near certain is that the guerrilla will adapt and find ways around any attempt at regulation.

[P – 9] One of the further reasons to have a single standard reflected in the Guidelines is to avoid the so-called 'double deontology'. To define terms (as most people meeting the phrase for the first time admit to not understanding it): deontology[12] is, in philosophy, a group of ethical theories that place special emphasis on the relationship between duty and the morality of human actions.[13] In deontological ethics an action is considered morally good because of some characteristic of the action itself, not because the product of the action is good. Deontological ethics holds that at least some acts are morally obligatory regardless of their consequences. So, in essence, deontology is, in this context, the set of ethical rules that bind a lawyer (or the rules of the relevant bar or law society). Double deontology is being subject to two or more potentially conflicting sets of rules. This may be because the lawyer is called to two different bars or is a member of two different law societies; or because, being a member of a bar or law society, the lawyer is also subject to the ethical

[11] Especially, rather patronisingly, of 'less developed nations' where local rules of the bar 'are not to the same standard' – see Alexis Mourre and Eduardo Zuleta, 'The IBA Guidelines on Party Representation in International Arbitration', Dispute Resolution International, 7:2 (November 2013), 135.

[12] The term *deontology* is derived from the Greek *deon*, 'duty', and *logos*, 'science'. The early developer was Immanuel Kant, a renowned eighteenth century Prussian philosopher. Kant's theory was that nothing was good without qualification: every action is neutral until some outside force qualifies it under some code or structure. Deontology was the system he devised for establishing what was good and what was bad. He reasoned that there was no universal deontology and that every group, or, in theory, every individual, could have its (or his) own deontology.

[13] By contrast, teleological ethics (also called consequentialist ethics or consequentialism) holds that the basic standard of morality is precisely the value of what an action brings into being. Deontological theories have been termed formalistic, because their central principle lies in the conformity of an action to some rule or law.

rules prevailing at a different place where he practises; for example, at the seat.[14]

[P – 10] The spectre of double deontology is, however, a false prophet. The tribunal is not concerned – or, at least, ought not to be – with professional ethics, regulation or discipline. They are, however, concerned with a fair process and determination. It should not be thought that by raising the spectre of double deontology the tribunal is the forum for ethical matters to be resolved, for that is the preserve of national courts, law societies and bars.

[P – 11] It could be said that the Guidelines simply add to the problem rather than being part of the solution. The attempt to legislate creates the potential for disputes over the precise terms and an expectation of behaviours that might have been tolerated or overlooked absent the Guidelines. Furthermore, the tribunal's role is to determine the substantive dispute in an impartial and independent manner and to safeguard the integrity of the process. Involvement in counsel behaviours risks distraction from the primary task and may jeopardise independence and neutrality (or at least the perception of independence ad neutrality). The qualities that a tribunal have to determine the substantive dispute may be ill-suited to investigation into counsel conduct.

An introduction

[P – 12] The Preamble to the Guidelines is no more than an introduction. In contrast, the Preamble to the IBA Rules contains a substantive set of principles that governs the general application and interpretation of the IBA Rules. The IBA Guidelines on Conflicts has no Preamble; rather it has an Introduction that is more of a narrative introduction, owing more to the style of the Guidelines than the IBA Rules.

[14] Double deontology is less of a problem within the United States because a lawyer must be licensed in every state in which he practises. Furthermore, the US system has a number of facets that limit the potential for problems: highly regulated reciprocal bar admissions; the differing standards all derive from one source – the ABA Model Rules; there is a common system of common law and legal tradition; and most functions can be performed under one licence.

[P – 13] At the outset it must be emphasised that the Guidelines seek to balance different legal traditions in the context of a healthy debate as to whether the conduct of counsel should be regulated so as to level the playing field between different cultures and practices. As a consequence of the balance that is sought to be struck by the Guidelines they will always be vulnerable to attack as being incomplete, vague or favouring common law or civil law traditions (although nobody really contends for the latter). This is inevitable and should not be seen as a weakness in the Guidelines. The key objective of the Guidelines, as is evident from the preamble, is that counsel "should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings." The objective is uncontroversial and ought to be widely accepted.

Rationale

[P – 14] The rationale for the Guidelines being guidelines rather than rules is intended, apparently, to "highlight their contractual nature." This is, at best, confusing. One might have thought that rules would be something that the parties, by contract, have adopted; whereas guidelines are guidance that the parties are, strictly, not obligated to comply with, and which hence have less affinity with a contractual relationship. The consequence is said to be that the "parties may thus adopt the Guidelines or a portion thereof by agreement", but precisely the same words appear in Preamble 2 to the IBA Rules, so that is hardly persuasive. The statement that "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" is true but hardly takes the debate any further: it rather begs the question of authority. Absent consent, it is difficult to immediately see where the authority of the tribunal might derive from, especially with regard to Party Representatives rather than as regards the Party itself.

[P – 15] The concluding words of the Preamble, of flexibility and adapting the Guidelines to the particular circumstances of the reference, find near identical words in Preamble 2 to the IBA Rules.

Integrity and honesty

[P – 16] The Preamble states that the taking of evidence shall be conducted with "integrity and honesty". It is not clear why the phrase 'good faith' was not used.[15] Integrity and honesty would seem to amount to much the same thing as 'good faith' – a term used by the IBA Rules (although note that Guideline 27 refers to the good faith of the Party Representative in the context of the tribunal dealing with issues of misconduct, but it does so without imposing the obligation in the first place).[16]

[15] There is a respected school of thought that contends that there is a duty to arbitrate in good faith – in turn derived from the general principle that contractual duties must be performed in good faith.

[16] If it is right that integrity and honesty amounts to much the same thing as good faith, the common law has some guidance. Contracts of insurance are regarded as being of the 'utmost good faith', and partnership agreements are likewise viewed as contracts of good faith. In the context of an insurance contract, Lord Mansfield CJ said as long ago as 1766: *'The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon.'* Carter v. Boehm (1766) 3 Burr 1905, 1910

Nevertheless, in English law, unlike many civil systems, there is no principle of good faith of general application. As Bingham LJ said:

'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair and open dealing …': Interfoto Picture Library v. *Stiletto Visual Programmes* [1989] 1 QB 433, 439

Good faith is recognised in the United States where the Restatement (Second) of Contracts requires that 'every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement'. Even in the civil law jurisdictions of Western Europe there are very considerable differences in the significance of 'good faith' and the uses to which the doctrine is put within each legal system. In some systems, good faith has provided a basis for pre-contractual grounds for relief or compensation (notably as regards duties of disclosure and information and breaking off from negotiations); the addition of 'supplementary' obligations to those expressly provided for by contract or legislation; the control of unfair contracts; the toughening of sanctions for deliberate breaches of contract; the control of the exercise of a Party's contractual rights; and relief on account of supervening circumstances or the substantively unfair nature of the contract as a whole.

Accepting that 'good faith' must mean something, what lessons can be derived from English case law as to the meaning of the phrase? In one case it was interpreted as the 'observance of reasonable commercial standards of fair dealing': Berkley *Community Villages* v. *Pullen* [2007] EWHC 1130 (Ch); in another that a contractual right could only be exercised for a 'genuine commercial reason': *Paragon Finance* v. *Plender* [2005] 1 WLR