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Swiss Arbitration Association

IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION COMMENTS AND RECOMMENDATIONS BY THE BOARD OF THE SWISS ARBITRATION ASSOCIATION (ASA)

Since 2013, several discussions have taken place within the ASA Board on the IBA Guidelines on Party Representation in International Arbitration (“the Guidelines”). ASA Board members have taken up this subject at various arbitration events. The recent initiative of the LCIA, which is proposing general guidelines as an Annex to its new Arbitration Rules, has also been duly noted, with great interest. The ASA Board recognizes the importance of the role of counsel in international arbitration and is aware of differences in professional practices and ethics. Without overestimating the practical importance of these differences, ASA shares the view of the IBA and its Arbitration Committee that these differences deserve attention; it respects the impressive work and thought that has gone into the preparation of the Guidelines.

However, the ASA Board has serious reservations about the Guidelines. These reservations relate not just to some of the provisions of the Guidelines but more generally arise from the approach adopted for dealing with these differences. ASA believes that three questions should be asked: (i) do the status of party representatives and any differences in the applicable rules and practices require additional measures? (ii) do the measures proposed provide the remedy for any problems identified? and (iii) do the remedies proposed really do more good than harm? ASA believes that there are few, if any situations concerning party representatives which require rules on party representation, applicable in the arbitration. The measures proposed do not provide adequate relief and in particular are unlikely to resolve a possible detriment to a party from situations where the playing field may not have been level. Above all, the Guidelines risk doing considerable unintended harm, not least to the detriment of the users.

ASA, therefore, seeks to engage a broader consultation on the Guidelines and their content. In the present state of its deliberations it summarises its reservations along the following lines:

1. The Guidelines place on arbitral tribunals responsibilities and require **decisions on issues which are alien to the arbitration process** and which should not be mixed with it. They do so in particular by providing “remedies for misconduct” (Guidelines 26-27) to be applied by arbitral tribunals.

- 1.1 The conduct of lawyers is normally regulated by their (domestic) professional organisations, which generally also are the bodies which apply

sanctions in case the regulations are breached. Courts and arbitral tribunal before which lawyers appear as representatives of their clients are responsible for a fair and orderly conduct of the proceedings. Normally, in a very significant number of jurisdictions, they do not assume responsibility for the enforcement of rules concerning the professional ethics of counsel.

1.2 The separation between the organisation which issues and enforces the professional rules of lawyers' conduct, on the one hand, and the courts and tribunals before which the lawyers appear may be considered as an essential feature of the proper administration of justice in a significant number of jurisdictions. Indeed, the two types of functions are arguably incompatible: the person who decides the dispute presented by counsel of the parties should not at the same time decide whether this counsel complied with ethical rules of the profession.

1.3 The Guidelines merge these two functions. This is problematic for both of them. An arbitral tribunal which is called upon to deal at the same time with the case brought by the parties and with complaints against counsel who argue the case may find it difficult to preserve the confidence in its impartiality by the parties and their counsel.

1.4 The merger of these two functions is particularly problematic with respect to those provisions of the Guidelines which concern the relations between the party representative and his or her client. Requiring the arbitral tribunal to investigate this relationship (for instance examining whether counsel has informed or advised the client, as required by Guidelines 12, 14 – 17, or determining the extent of the client's involvement in misconduct of counsel, as required by Guideline 27 (f)), would seem highly undesirable if that same tribunal then is required to proceed and decide the dispute on the merits. Such investigations would also be in clear violation of the lawyer–client privilege. The mere possibility of such an investigation is of a nature to seriously undermine the confidence of the parties and their counsel.

2. Irrespective of the concerns about using arbitral tribunals to ensure the proper applications of ethical rules and standards, the inclusion in the Guidelines of a section on "Remedies for Misconduct" gives rise to further concern. These remedies even reach beyond "breaches" of the Guidelines to "any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative". Such arbitral remedies are not necessary and, worse, they risk **an increase in procedural complications**, causing further delay and costs in the proceedings:

2.1 Under most if not all frequently used arbitration rules arbitrators have, expressly or implicitly, the powers to ensure the "fundamental fairness and integrity" of the proceedings. If they do not always make adequate use of such powers, this would seem to be essentially a question of arbitration practice and arbitrator awareness rather than a lack of rules or guidelines.

2.2 If there would be a concern that existing arbitration rules do not address sufficiently the risk that unethical conduct of counsel might cause to fair and orderly conduct of the proceedings, such concern should be addressed by rules or guidelines regulating the procedure and the powers of arbitrators (including, for

instances the rules on evidence) and not by arbitral remedies specific to the conduct of party representatives.

2.3 For instance, when procedural imbalances or disadvantages occur in the arbitration as a result of differences in the rigour with which orders for the production of documents are complied with, it makes no difference from the perspective of procedural fairness whether the failure of compliance is due to “misconduct” of the party or of the party representative. Any redress that may have to be provided in the arbitration would have to consider the procedural rules rather than by focussing on the party representative under Guideline 14.

2.4 The new set of “remedies” are likely to be pursued in arbitration practice. The provisions in Guidelines 26 and 27 may be taken as a welcome incentive by all those who wish to delay the proceedings and/or distract opposing counsel and the arbitral tribunal from the merits of the case. In cases where the Guidelines are adopted it may for instance have to be expected that in addition to arguing whether certain facts are true or false, counsel will begin arguing that opposing counsel knew a fact was false and therefore should be sanctioned.

2.5 A particular source of concern in this respect is that Guideline 1 grants the Arbitral Tribunal broad discretion to apply the Guidelines even in the absence of party consent. Depending on their views on the sources of their authority, arbitrators may apply the Guidelines on their own initiative. The existence of the Guidelines and the high reputation enjoyed by the IBA may lead arbitrators to apply the Guidelines as “best practices”, irrespective of the parties’ consent.

2.6 The likely consequence will be that the application of the Guidelines will lead to more procedural requests, further increasing the loss of time and money, distracting from the resolution of the merits of the dispute, and alienating the parties.

3. To the extent to which rules and practices concerning lawyers’ conduct differ from one jurisdiction to another, attempts at standardisation, even in the form of guidelines, are necessarily at the expense of at least some of the existing rules and practices. It would be preferable to **promote the understanding of such differences** and the communication across the standards rather than imposing one standard over another.

4. Compared to the fundamental flaws in the Guidelines, relating to the very principle of issuing and applying guidelines of this nature, the content of the individual provisions seems of secondary importance. It is recognised that most of the Guidelines are unobjectionable, in line with common practice and partly even a matter of course. However, even the enforcement of such unobjectionable rules, for the reasons explained, is problematic if it takes place within the arbitral process and by the arbitral tribunal. Nevertheless **some problematic provisions** deserve to be highlighted.

4.1 The Guidelines inappropriately attempt to interfere with attorney-client privilege by subjecting the relationship and communications between counsel and party to the jurisdiction of the arbitral tribunal (Guidelines 12, 14-17, 27(f)); it is indeed difficult to understand how an arbitral tribunal may make a ruling on a requested remedy for misconduct in these cases while taking into account, as required by Guideline 27 (e), “relevant considerations of privilege and confidentiality”. Aspects of this section of the Guidelines were proposed and rejected during the

process of revising the IBA Rules on the Taking of Evidence in the years prior to 2010.

- 4.2 The Guidelines inappropriately expand the duties of the parties concerning document production beyond the scope of the IBA Rules on the Taking of Evidence 2010 by introducing (or implicitly assuming) concepts that are not universally acknowledged, such as an assumption in favour of broad discovery of documents and even a hitherto unknown general need, prior to any document production order or request, to preserve documents for possible later production (Guidelines 12-17, including the official Comments thereto).
- 4.3 Apart from the above, the Guidelines mostly address issues and suggest solutions that are of little relevance or can be solved by existing means without entering into a delicate dispute about counsel misconduct; thus the Guidelines do not respond to any true need.

5. ASA expressed its concerns to the IBA Arbitration Committee during the course of the elaboration of the Guidelines. It appreciates the efforts made by the Committee to take account of some of these observations. Other concerns remain and, among them, the most serious ones. Endeavours to define minimum standards for party representatives would appear to be a perfectly appropriate position. To this extent, the approach followed by the LCIA is constructive (even if the LCIA's text leaves considerable room for debate). What ASA finds objectionable is the creation of a detailed set of guidelines that aim to "level the playing field", but that draw only from certain legal systems and that impose standards or duties of which many relate to procedural institutions that are unknown in a large number of important jurisdictions – and that are commonly considered to be unwelcome in international arbitration. This approach is likely to have the unintended consequence of rendering arbitration more complex and costly with (at best) minimal benefit for users.

In light of these considerations, ASA has reached the following conclusions:

CONCLUSIONS

1. It is not the role of arbitrators to enforce standards and ethical rules of professional conduct. No responsibility for the enforcement of such standards should be placed on the arbitrator.
2. By prescribing what in effect amounts to rules of professional conduct (even if in the form of "guidelines") and allowing recourse to the arbitral tribunal in case of "misconduct", the Guidelines place on the arbitral tribunal a new responsibility which is alien to its mandate.
3. The responsibility of arbitral tribunals to ensure procedural fairness and efficiency should be met in the framework of existing rules of procedure and does not require new rules on party representation.
4. The Guidelines risk provoking further procedural requests, causing additional loss of time and money and distracting from the main function of the proceedings.
5. It is therefore not advisable to adopt the Guidelines for application in specific arbitration proceedings. Arbitral tribunals should not apply the Remedies for

Misconduct of Party Representatives especially in the absence of express consent by both parties. Their power to sanction misconduct of any of the parties (without distinguishing between the party and its counsel) would remain unaffected.

6. To the extent that differences exist in practices of party representation and ethical rules relating to them, it appears preferable to recognise the differences and respect diversity rather than seeking uniformity by promoting “guidelines”. The first step for professional arbitration practitioners is to seek to understand the differences and to work with them. Remaining concerns about the “level playing field” are not best addressed by injecting into the arbitral process a set of detailed guidelines which are in part rooted in procedural institutions that are unwelcome in arbitration. ASA finds that fair and equal treatment for the parties is best ensured by way of minimum standards or, if this were found to be necessary, in the context of arbitration rules and their application. ASA is eager to cooperate constructively in efforts to foster this approach.

ASA welcomes any comments arbitration institutions, practitioners and user might offer. This dialogue may lead ASA to revisit its comments and recommendations in the future.

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