

IBA Guidelines on Party Representation in International Arbitration

Adopted by a resolution of
the IBA Council
25 May 2013
International Bar Association



the global voice of
the legal profession®

IBA Guidelines on Party Representation in International Arbitration

Adopted by a resolution of
the IBA Council
25 May 2013
International Bar Association



the global voice of
the legal profession®

International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD
United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

ISBN: 978-0-948711-27-5

All Rights Reserved
© International Bar Association 2013

No part of the material protected by this copyright notice may be reproduced or utilised in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage and retrieval system, without written permission from the copyright owner.

Contents

Members of the Task Force	i
About the IBA Arbitration Committee	iv
The Guidelines	
Preamble	1
Definitions	3
Application of Guidelines	4
Party Representation	6
Communications with Arbitrators	6
Submissions to the Arbitral Tribunal	8
Information Exchange and Disclosure	10
Witnesses and Experts	13
Remedies for Misconduct	16



the global voice of
the legal profession®

Members of the Task Force

Alexis Mourre

*Co-Chair, IBA Arbitration Committee
Castaldi Mourre & Partners
Paris, France*

Eduardo Zuleta

*Co-Chair, IBA Arbitration Committee
Gómez-Pinzón Zuleta
Bogotá, Colombia*

Julie Bédard

*Chair, Task Force
Skadden, Arps, Slate, Meagher & Flom LLP
New York, USA*

Funke Adekoya

*Álex
Falomo Ikoyi, Lagos, Nigeria*

José María Alonso

*Baker & McKenzie
Madrid, Spain*

Cyrus Benson

*Gibson, Dunn & Crutcher LLP
London, England*

Louis Degos

*K & L Gates LLP
Paris, France*

Paul Friedland

*White & Case LLP
New York, USA*

Mark Friedman

*Co-Chair, IBA Arbitration Committee 2011–2012
Debevoise & Plimpton LLP
New York, USA*

Judith Gill QC

*Co-Chair, IBA Arbitration Committee 2010–2011
Allen & Overy LLP
London, England*

Christopher Lau

*Maxwell Chambers
Singapore*

Laurent Levy

Levy Kaufmann-Kohler
Geneva, Switzerland

Torsten Lorcher

CMS Hasche Sigle
Cologne, Germany

Fernando Mantilla-Serrano

Shearman & Sterling LLP
Paris, France

Yoshimi Ohara

Nagashima Ohno & Tsunematsu,
Tokyo, Japan

William Park

Boston University School of Law
Boston, Massachusetts, USA

Kenneth Reisenfeld

Patton Boggs LLP
Washington, DC, USA

Catherine Rogers

Penn State, The Dickinson School of Law
University Park, Pennsylvania, USA

Arman Sarvarian

University of Surrey, School of Law
Guildford, England

Anne-Véronique Schlaepfer

Schellenberg Wittmer
Geneva, Switzerland

Margrete Stevens

King & Spalding, LLP
Washington, DC, USA

Claus von Wobeser

Co-Chair, IBA Arbitration Committee 2005–2006
Von Wobeser y Sierra, SC
México DF, México

Alvin Yeo

Wong Partnership LLP
Singapore

About the IBA Arbitration Committee

Established as a Committee of the International Bar Association's Legal Practice Division, which focuses 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 inquiry, the Task Force undertook to determine whether such differing norms and practises 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 practises and procedures have been developed in international arbitration to accommodate the legal and cultural differences among participants and the complex, multinational nature of the disputes. Domestic professional conduct rules and norms, by contrast, are developed to apply in specific legal cultures consistent with established national procedures.

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.

Definitions

In the IBA Guidelines on Party Representation in International Arbitration:

'Arbitral Tribunal' or *'Tribunal'* means a sole Arbitrator or a panel of Arbitrators in the arbitration;

'Arbitrator' means an arbitrator in the arbitration;

'Document' means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

'Domestic Bar' or *'Bar'* means the national or local authority or authorities responsible for the regulation of the professional conduct of lawyers;

'Evidence' means documentary evidence and written and oral testimony.

'Ex Parte Communications' means oral or written communications between a Party Representative and an Arbitrator or prospective Arbitrator without the presence or knowledge of the opposing Party or Parties;

'Expert' means a person or organisation appearing before an Arbitral Tribunal to provide expert analysis and opinion on specific issues determined by a Party or by the Arbitral Tribunal;

'Expert Report' means a written statement by an Expert;

'Guidelines' mean these IBA Guidelines on Party Representation in International Arbitration, as they may be revised or amended from time to time;

'Knowingly' means with actual knowledge of the fact in question;

'Misconduct' means 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;

'Party' means a party to the arbitration;

'Party-Nominated Arbitrator' means an Arbitrator who is nominated or appointed by one or more Parties;

'Party Representative' or *'Representative'* means any person, including a Party's employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar;

'Presiding Arbitrator' means an arbitrator who is either a sole Arbitrator or the chairperson of the Arbitral Tribunal;

'Request to Produce' means a written request by a Party that another Party produce Documents;

'Witness' means a person appearing before an Arbitral Tribunal to provide testimony of fact;

'Witness Statement' means a written statement by a Witness recording testimony.

Application of Guidelines

- 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.*
- 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.*
- 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.*

Comments to Guidelines 1–3

As explained in the Preamble, the Parties and Arbitral Tribunals may benefit from guidance in matters of Party Representation, in particular in order to address instances where differing norms and expectations may threaten the integrity and fairness of the arbitral proceedings.

By virtue of these Guidelines, Arbitral Tribunals need not, in dealing with such issues, and subject to applicable mandatory laws, be limited by a choice-of-law rule or private international law analysis to choosing among national or domestic professional conduct rules. Instead, these Guidelines offer an approach designed to account for the multi-faceted nature of international arbitral proceedings.

These Guidelines shall apply where and to the extent that the Parties have so agreed. Parties may adopt these Guidelines, in whole or in part, in their arbitration agreement or at any time subsequently.

An Arbitral Tribunal may also apply, or draw inspiration from, the Guidelines, after having determined that it has the authority to rule on matters of Party representation in order to ensure the integrity and fairness of the arbitral proceedings. Before making such determination, the Arbitral Tribunal should give the Parties an opportunity to express their views.

These Guidelines do not state whether Arbitral Tribunals have the authority to rule on matters of Party representation and to apply the Guidelines in the absence of an agreement by the Parties to that effect. The Guidelines neither recognise nor exclude the existence of such authority. It remains for the Tribunal to make a determination as to whether it has the authority to rule on matters of Party representation and to apply the Guidelines.

A Party Representative, acting within the authority granted to it, acts on behalf of the Party whom he or she represents. It follows therefore that an obligation or duty bearing on a Party Representative is an obligation or duty of the represented Party, who may ultimately bear the consequences of the misconduct of its Representative.

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 arbitral proceedings.*

Comments to Guidelines 4–6

Changes in Party representation in the course of the arbitration may, because of conflicts of interest between a newly-appointed Party Representative and one or more of the Arbitrators, threaten the integrity of the proceedings. In such case, the Arbitral Tribunal may, if compelling circumstances so justify, and where it has found that it has the requisite authority, consider excluding the new Representative from participating in all or part of the arbitral proceedings. In assessing whether any such conflict of interest exists, the Arbitral Tribunal may rely on the IBA Guidelines on Conflicts of Interest in International Arbitration.

Before resorting to such measure, it is important that the Arbitral Tribunal give the Parties an opportunity to express their views about the existence of a conflict, the extent of the Tribunal's authority to act in relation to such conflict, and the consequences of the measure that the Tribunal is contemplating.

Communications with Arbitrators

7. *Unless agreed otherwise by the Parties, and subject to the exceptions below, a Party Representative should not engage in any Ex Parte Communications with an Arbitrator concerning the arbitration.*

8. *It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:*
- (a) *A Party Representative may communicate 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) *A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.*
 - (c) *A Party Representative may, if the Parties are in agreement that such a communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.*
 - (d) *While communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute.*

Comments to Guidelines 7–8

Guidelines 7–8 deal with communications between a Party Representative and an Arbitrator or potential Arbitrator concerning the arbitration.

The Guidelines seek to reflect best international practices and, as such, may depart from potentially diverging domestic arbitration practices that are more restrictive or, to the contrary, permit broader Ex Parte Communications.

Ex Parte Communications, as defined in these Guidelines, may occur only in defined circumstances, and a Party Representative should otherwise refrain from any such communication. The Guidelines do not seek to define when the relevant period begins or ends. Any communication that takes place in the context of, or in relation to, the constitution of the Arbitral Tribunal is covered.

Ex Parte Communications with a prospective Arbitrator (Party-Nominated or Presiding Arbitrator) should be limited to providing a general description of the dispute and obtaining information regarding the suitability of the potential Arbitrator, as described in further detail below. A Party Representative should not take the opportunity to seek the prospective Arbitrator's views on the substance of the dispute.

The following discussion topics are appropriate in pre-appointment communications in order to assess the prospective Arbitrator's expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest: (a) the prospective Arbitrator's publications, including books, articles and conference papers or engagements; (b) any activities of the prospective Arbitrator and his or her law firm or organisation within which he or she operates, that may raise justifiable doubts as to the prospective Arbitrator's independence or impartiality; (c) a description of the general nature of the dispute; (d) the terms of the arbitration agreement, and in particular any agreement as to the seat, language, applicable law and rules of the arbitration; (e) the identities of the Parties, Party Representatives, Witnesses, Experts and interested parties; and (f) the anticipated timetable and general conduct of the proceedings.

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.

Finally, a Party Representative may communicate with the Arbitral Tribunal if the other Party or Parties fail to participate in a hearing or proceedings and are not represented.

Submissions to the Arbitral Tribunal

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

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.*

Comments to Guidelines 9–11

Guidelines 9–11 concern the responsibility of a Party Representative when making submissions and tendering evidence to the Arbitral Tribunal. This principle is sometimes referred to as the duty of candour or honesty owed to the Tribunal.

The Guidelines identify two aspects of the responsibility of a Party Representative: the first relates to submissions of fact made by a Party Representative (Guidelines 9 and 10), and the second concerns the evidence given by a Witness or Expert (Guideline 11).

With respect to submissions to the Arbitral Tribunal, these Guidelines contain two limitations to the principles set out for Party Representatives. First, Guidelines 9 and 10 are restricted to false submissions of fact. Secondly, the Party Representative must have actual knowledge of the false nature of the submission,

which may be inferred from the circumstances.

Under Guideline 10, a Party Representative should promptly correct any false submissions of fact previously made to the Tribunal, unless prevented from doing so by countervailing considerations of confidentiality and privilege. Such principle also applies, in case of a change in representation, to a newly-appointed Party Representative who becomes aware that his or her predecessor made a false submission.

With respect to legal submissions to the Tribunal, a Party Representative may argue any construction of a law, a contract, a treaty or any authority that he or she believes is reasonable.

Guideline 11 addresses the presentation of evidence to the Tribunal that a Party Representative knows to be false. A Party Representative should not offer knowingly false evidence or testimony. A Party Representative therefore should not assist a Witness or Expert or seek to influence a Witness or Expert to give false evidence to the Tribunal in oral testimony or written Witness Statements or Expert Reports.

The considerations outlined for Guidelines 9 and 10 apply equally to Guideline 11. Guideline 11 is more specific in terms of the remedial measures that a Party Representative may take in the event that the Witness or Expert intends to present or presents evidence that the Party Representative knows or later discovers to be false. The list of remedial measures provided in Guideline 11 is not exhaustive. Such remedial measures may extend to the Party Representative's withdrawal from the case, if the circumstances so warrant. Guideline 11 acknowledges, by using the term 'may', that certain remedial measures, such as correcting or withdrawing false Witness or Expert evidence may not be compatible with the ethical rules bearing on counsel in some jurisdictions.

Information Exchange and Disclosure

- 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.

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.*
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.*
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.*
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.*
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.*

Comments to Guidelines 12–17

The IBA addressed the scope of Document production in the IBA Rules on the Taking of Evidence in International Arbitration (*see* Articles 3 and 9). Guidelines 12–17 concern the conduct of Party Representatives in connection with Document production.

Party Representatives are often unsure whether and to what extent their respective domestic standards of professional conduct apply to the process of

preserving, collecting and producing documents in international arbitration. It is common for Party Representatives in the same arbitration proceeding to apply different standards. For example, one Party Representative may consider him- or her-self obligated to ensure that the Party whom he or she represents undertakes a reasonable search for, and produces, all responsive, non-privileged Documents, while another Party Representative may view Document production as the sole responsibility of the Party whom he or she represents. In these circumstances, the disparity in access to information or evidence may undermine the integrity and fairness of the arbitral proceedings.

The Guidelines are intended to address these difficulties by suggesting standards of conduct in international arbitration. They may not be necessary in cases where Party Representatives share similar expectations with respect to their role in relation to Document production or in cases where Document production is not done or is minimal.

The Guidelines are intended to foster the taking of objectively reasonable steps to preserve, search for and produce Documents that a Party has an obligation to disclose.

Under Guidelines 12–17, a Party Representative should, under the given circumstances, advise the Party whom he or she represents to: (i) identify those persons within the Party’s control who might possess Documents potentially relevant to the arbitration, including electronic Documents; (ii) notify such persons of the need to preserve and not destroy any such Documents; and (iii) suspend or otherwise make arrangements to override any Document retention or other policies/practises whereby potentially relevant Documents might be destroyed in the ordinary course of business.

Under Guidelines 12–17, a Party Representative should, under the given circumstances, advise the Party whom he or she represents to, and assist such Party to: (i) put in place a reasonable and proportionate system for collecting and reviewing Documents within the possession of persons within the Party’s control in order to identify Documents

that are relevant to the arbitration or that have been requested by another Party; and (ii) ensure that the Party Representative is provided with copies of, or access to, all such Documents.

While Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration requires the production of Documents relevant to the case and material to its outcome, Guideline 12 refers only to potentially relevant Documents because its purpose is different: when a Party Representative advises the Party whom he or she represents to preserve evidence, such Party Representative is typically not at that stage in a position to assess materiality, and the test for preserving and collecting Documents therefore should be potential relevance to the case at hand.

Finally, a Party Representative should not make a Request to Produce, or object to a Request to Produce, when such request or objection is only aimed at harassing, obtaining documents for purposes extraneous to the arbitration, or causing unnecessary delay (Guideline 13).

Witnesses and Experts

18. *Before seeking any information from a potential Witness or Expert, a Party Representative should identify himself or herself, as well as the Party he or she represents, and the reason for which the information is sought.*
19. *A Party Representative should make any potential Witness aware that he or she has the right to inform or instruct his or her own counsel about the contact and to discontinue the communication with the Party Representative.*
20. *A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.*
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.*
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.*
25. *A Party Representative may pay, offer to pay, or acquiesce in the payment of:*
- (a) expenses reasonably incurred by a Witness or Expert in preparing to testify or testifying at a hearing;*
 - (b) reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify; and*
 - (c) reasonable fees for the professional services of a Party-appointed Expert.*

Comments to Guidelines 18–25

Guidelines 18–25 are concerned with interactions between Party Representatives and Witnesses and Experts. The interaction between Party Representatives and Witnesses is also addressed in Guidelines 9–11 concerning Submissions to the Arbitral Tribunal.

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 practices among jurisdictions may create inequality and threaten the integrity of the arbitral proceedings.

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

When a Party Representative contacts a potential Witness, he or she should disclose his or her identity and the reason for the contact before seeking any information from the potential Witness (Guideline 18). A Party Representative should also make the potential Witness aware of his or her right to inform or instruct counsel about this contact and involve such

counsel in any further communication (Guideline 19).

Domestic professional conduct norms in some jurisdictions require higher standards with respect to contacts with potential Witnesses who are known to be represented by counsel. For example, some common law jurisdictions maintain a prohibition against contact by counsel with any potential Witness whom counsel knows to be represented in respect of the particular arbitration.

If a Party Representative determines that he or she is subject to a higher standard than the standard prescribed in these Guidelines, he or she may address the situation with the other Party and/or the Arbitral Tribunal.

As provided by Guideline 20, a Party Representative may assist in the preparation of Witness Statements and Expert Reports, but should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances (Guideline 21), and that any Expert Report reflects the Expert's own views, analysis and conclusions (Guideline 22).

A Party Representative should not invite or encourage a Witness to give false evidence (Guideline 23).

As part of the preparation of testimony for the arbitration, a Party Representative may meet with Witnesses and Experts (or potential Witnesses and Experts) to discuss their prospective testimony. A Party Representative may also help a Witness in preparing his or her own Witness Statement or Expert Report. Further, a Party Representative may assist a Witness in preparing for their testimony in direct and cross-examination, including through practise questions and answers (Guideline 24). This preparation may include a review of the procedures through which testimony will be elicited and preparation of both direct testimony and cross-examination. Such contacts should however not alter the genuineness of the Witness or Expert evidence, which should always reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion.

Finally, Party Representatives may pay, offer to pay or acquiesce in the payment of reasonable compensation to a Witness for his or her time and a reasonable fee for the professional services of an Expert (Guideline 25).

Remedies for Misconduct

26. *If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may:*
 - (a) *admonish the Party Representative;*
 - (b) *draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;*
 - (c) *consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;*
 - (d) *take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.*
27. *In addressing issues of Misconduct, the Arbitral Tribunal should take into account:*
 - (a) *the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award;*
 - (b) *the potential impact of a ruling regarding Misconduct on the rights of the Parties;*
 - (c) *the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings;*
 - (d) *the good faith of the Party Representative;*
 - (e) *relevant considerations of privilege and confidentiality; and*
 - (f) *the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct.*

Comments to Guidelines 26-27

Guidelines 26–27 articulate potential remedies to address Misconduct by a Party Representative.

Their purpose is to preserve or restore the fairness and integrity of the arbitration.

The Arbitral Tribunal should seek to apply the most proportionate remedy or combination of remedies in light of the nature and gravity of the Misconduct, the good faith of the Party Representative and the Party whom he or she represents, the impact of the remedy on the Parties' rights, and the need to preserve the integrity, effectiveness and fairness of the arbitration and the enforceability of the award.

Guideline 27 sets forth a list of factors that is neither exhaustive nor binding, but instead reflects an overarching balancing exercise to be conducted in addressing matters of Misconduct by a Party Representative in order to ensure that the arbitration proceed in a fair and appropriate manner.

Before imposing any remedy in respect of alleged Misconduct, it is important that the Arbitral Tribunal gives the Parties and the impugned Representative the right to be heard in relation to the allegations made.



the global voice of
the legal profession®