

The IBA Guidelines on Party Representation: An Important Step in Overcoming the Taboo of Ethics in International Arbitration

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In international arbitration, disparities in counsel conduct are neither uncommon nor exceptional. Counsel can act ethically, but differently on fundamental matters such as *ex parte* communications, document disclosure, witness preparation and submissions to tribunals. If the international arbitration community does not attempt to even the playing field by regulating itself, there could be grave consequences. The IBA Guidelines on Party Representation in International Arbitration (“Guidelines”) are the product of an international effort to build consensus on best practices in counsel conduct which, when applied to a given case, are designed to create a level playing field and contribute to the just resolution of disputes. The Guidelines are not perfect, do not address all potential issues that may arise and will not please everyone. However, they are a significant step forward, particularly their provisions on information exchange and disclosure, witness preparation and *ex parte* communications. Beyond their content, the Guidelines are beneficial because they prompt the parties, their representatives and tribunals to discuss the traditionally taboo topic of counsel conduct at the start of the proceedings. The Guidelines should enhance the confidence of participants in the international arbitration process and, over time, help harmonize and foster best practices for counsel conduct.

Most of us assume, quite naturally, that as party representatives we and our adversaries act in accord with our ethical obligations. That assumption undoubtedly is correct in the vast majority of cases. However, it fails to account for a critical underlying problem – that those ethical obligations may differ, sometimes significantly.

My real-life introduction to ethics in arbitration came in a case where it became clear that the co-arbitrator nominated by the other side was receiving information from my adversaries and using it to question our witnesses. Initially shocked, I discussed it with our local co-counsel, who informed me that *ex parte*

1. The views expressed are those of the author personally and not in his capacity as a member of the IBA Task Force on Counsel Conduct in International Arbitration.

communications were common practice and did not violate any local ethical obligations at the seat (*i.e.*, the obligations that applied to opposing counsel and the arbitrator in question). I kept silent on that occasion and relied on the hope that what I considered to be an appearance of partiality would not sit well with the other arbitrators. But it was not a situation I found acceptable nor one that was easy to explain to the client. More subtle examples arose in the context of document disclosure, where I have come to believe in several cases that, while I was working to assist my client in locating, identifying and producing documents responsive to disclosure requests or production orders (consistent with my training as a New York and English lawyer), my adversaries were not making similar efforts. While it is possible I was objectively wrong in my belief, the fact that many lawyers around the world have no ethical obligation to actively assist their clients in disclosure at least suggests it was not altogether the product of paranoia. (Specific aspects of certain of these cases made clear it was not.) Again, a situation that does not leave one with a glowing feeling of confidence in the system.

To be clear, these experiences do not involve scandalous or unethical conduct. Instead, they concern lawyers on different sides of the same case acting ethically but nonetheless very differently on matters of importance. This situation of disparity in counsel conduct, one that did not seem at all uncommon or exceptional from my perspective, prompted questions in my mind as to whether: (i) acting to comply with my ethical obligations was putting clients at a disadvantage *vis-à-vis* my adversaries; and (ii) it was satisfactory to simply continue the long-held tradition of leaving discussions of ethics out of the arbitral process? Several years ago, I began giving more serious thought to these questions and it did not take long for me to conclude that they are and should be considered rhetorical in nature. Yes, acting to comply with one's ethical obligations can, in certain cases, place the compliant lawyer at a disadvantage and no, it is not ok for discussions of counsel ethics to remain taboo in international arbitration.

In 2006, I proposed that a logical starting point to address these ethical clashes would be to model a set of guidelines on the successful International Bar Association ("IBA") Rules on the Taking of Evidence. I suggested that:

"It should be possible to identify those areas of ethical uncertainty that give rise to the risk of uneven playing fields or prejudice, and seek a consensus on ethical guidelines to address them. Although this would still leave the problem of conflicting domestic rules and their applicability to international arbitration, it would provide a degree of comfort to practitioners and clients alike, and so further enhance the reputation of international arbitration as a forum for fair and efficient dispute resolution. This, in turn, should help to reduce the scope for challenging arbitral awards. It might also mitigate the prospect of ethics becoming the next tactical arena for anyone seeking to delay or derail arbitral proceedings".²

In 2008, I took this proposition a step further by presenting a suggested checklist that parties could discuss and consider adopting at the outset of a case

2. Cyrus Benson and Charlie Lightfoot, *Wanted An Ethical Compass*, Global Arbitration Review (June 2006).

in order that all counsel would conduct themselves in the same way, ethically speaking.³ My premise was that if *"the bounds of permissible and expected conduct are transparent, counsel need not worry about where the ethical lines are or what, conduct their adversaries may feel free to engage in without ethical constraint."* Similarly, counsel would no longer have, or would have less, difficulty explaining to clients why certain actions must be taken and others must never be. Adopting guidelines from the checklist would also create an even playing field for parties and their representatives while removing or reducing any divergence of views held by tribunal members as to what conduct may be acceptable or unacceptable.

Perhaps to my discredit, having identified what was in my mind a clear problem and proposed a possible way to address it, I largely continued my own practice under the ethical *"cone of silence"*.⁴ But not always. In one case I recall we did raise an ethical issue at the procedural hearing and obtained agreement from opposing counsel that the English rules would apply to the document disclosure process. The issue was raised due to concerns that the lawyers who might be charged with overseeing the process on the other side would be subject to a much lesser obligation, being from a jurisdiction where counsel do not typically assist the parties they represent to collect or produce documents. Unlike my previous experiences discussed above, we and our client felt this agreement had acted to level the playing field in an important area, and I suspect it may have entered into the Tribunal's thinking when considering and ruling upon various requests for production orders, including in circumstances where we were later able to demonstrate that responsive documents had not been produced.

Around the same time, in what I considered to be a welcome and positive development, the IBA Arbitration Committee formed a Task Force on Counsel Conduct in International Arbitration (*"Task Force"*). The Task Force, ultimately comprised of twenty-three members from twelve countries around the world, was mandated to determine whether differing norms of counsel conduct may undermine the fundamental fairness and integrity of international arbitration proceedings and, if so, whether there was anything the IBA might do to address the issue.

As Task Force, one critical threshold question we sought to explore was whether the international arbitration community saw a need for guidance in the area of counsel conduct. 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 in various cases. A very high percentage of those responding to the survey expressed a desire for guidance in this area and saw the IBA Arbitration Committee as well positioned to lead the way. The substantive work of the Task Force therefore sought to identify areas of uncertainty and to reach a consensus on guidelines to address them. Whether either goal was achievable was always a question. In the end, however, the IBA Guidelines on Party Representation in

3. Cyrus Benson, *Can Professional Legal Ethics Wait? The Need for Transparency in International Arbitration*, *Dispute Resolution International*, Vol. 3, No. 1 (March 2009).

4. A term coined, I believe, and used to great comedic effect, by the 1960's American TV series *"Get Smart"*.

International Arbitration (the “Guidelines”) were adopted by resolution of the IBA Council dated 25 May 2013.⁵

Publication of the Guidelines has provoked substantial debate about their utility and desirability, with the issue taken up at numerous conferences and seminars – including the recent IBA Arbitration Day in Paris.⁶ With this development alone, the Taboo of Ethics in International Arbitration has been broken, hopefully never to be restored. The Guidelines are not perfect and represent a consensus product, which by definition requires compromise and some level of what may be seen as ambiguity. But, as discussed further below, they represent an important and meaningful step forward to address what heretofore has been aptly described as the “*ethical abyss*”.⁷

Critics of efforts to formulate guidelines can be grouped into three main, non-exclusive camps. To make them easier to identify, we can call them: (i) denialist; (ii) laissez-faire; and (iii) skepticist. The denialist camp denies the existence of any issue of counsel conduct in international arbitration, while the laissez-faire camp believes that arbitration should not be regulated and that attempts to create guidelines destroy the benefits that come with a free system. Finally, the skepticist camp believes that the act of regulating counsel conduct will cause abuse, costs and delays that will overshadow any benefits.⁸

Members of the first camp argue that the issue of uneven playing fields and unethical conduct is largely alien to international arbitration, *i.e.*, that counsel more or less play by the same rules and the lack of frequent discussion of ethical issues in arbitral proceedings proves they do not exist. This may be true in arbitrations where the lawyers are from the same jurisdiction or where their respective ethical codes are similar. But it is naïve to think that lawyers from very different legal traditions play by the same ethical rules in international arbitration proceedings. They quite clearly do not and, in many cases, are ethically mandated not to. The denialists further argue that national bar regulations and arbitral institutions are sufficient to handle any issues of counsel conduct, should they arise. I am unaware of any institutional arbitral rules that purport to regulate in this area, although the proposed next generation of the LCIA Rules has something to say on the

5. In drafting the Guidelines, the Task Force made a conscious decision not to use the word “ethics” or “ethical”, which were felt to connote or be associated with codes of general application rather than guidelines to be adopted (or not) for use in specific arbitral proceedings.

6. The groundwork had been laid at previous events, including at the IBA Annual Conference in Buenos Aires in October 2008 and the 2010 ICCA Conference, where Doak Bishop and Margrete Stevens presented their International Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals. See Doak Bishop & Margrete Stevens, *International Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals*, in *Arbitration advocacy in changing times*, ICCA congress series No. 15 (Rio 2010) at 408 (Albert Jan van dan Berg ed., 2011) (proposing an international code of ethics for party representatives in international arbitration).

7. Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Int’l Law (2001-2002) at 341 (“*Where ethical regulation should be, there is only an abyss*”).

8. Michael Schneider, President of the Swiss Arbitration Association, who continues to criticize the impact of the IBA Rules on the Taking of Evidence and Guidelines on Conflicts of Interest, predicts that the IBA Guidelines “*risk becoming a major source of procedural motions and disruption*” and are “[y]et another opportunity to waste time and money on procedural skirmishes”. *President’s Message: Yet Another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation*, 31 ASA Bulletin 3/2013 (September 2013).

subject. As for national bars, many codes or sets of rules are unclear as to when and how they apply to international arbitration proceedings, many lawyers are subject to multiple and potentially conflicting codes, and national regulators of the legal profession often have all they can handle with alleged violations or issues occurring in domestic practice.⁹ Moreover, not all jurisdictions have rigorous bar regulations or admission requirements.¹⁰ And, of course, while often forgotten, party representatives in international arbitration do not have to be lawyers and thus may not be regulated by any national code of conduct. As a result, national bars and codes notwithstanding, members of the arbitration community who are subject to more rigorous or restrictive regulation will, especially as international arbitration becomes increasingly diversified, come up against adversaries who are not similarly constrained. As noted above, this does not mean such adversaries act unethically, but it does mean they act differently and it is difficult – at least for me – to articulate any basis for why this should be acceptable.

Advocates of the laissez-faire approach argue that arbitration is designed to be a flexible process and that attempts to create rules and guidelines will destroy the benefits of arbitration by bringing it closer to litigation. This is the same refrain heard from some when the IBA Rules on the Taking of Evidence were promulgated, but few would argue today that international arbitration has been harmed by the growing recognition of best practices that those rules have introduced and fostered. The same could be said of the earlier introduction of the reasoned award and abandonment of doctrines such as *amiable compositeur*. And at least in my experience and practice, as disputes being resolved in international arbitration continue to increase in number and significance, increasingly sophisticated clients want more predictability, not unchecked and difficult to explain “flexibility”. Put another way, just because something is a characteristic of national court litigation does not mean it should be seen as a bad thing for arbitration. Guidelines that attempt to harmonize the conduct of counsel in fundamental areas of arbitral process fall squarely within this category, while doing nothing leaves a relic of the past in a process that must adapt for the present and future.

The skeptics, unlike the denialists, recognize that at least some ethical issues exist for party representatives. However, they believe the act of discussing

9. See Hanns-Christian Salger, “The Role of Bar Associations”, in *Guerilla Tactics in International Arbitration*, Günther J. Horvath & Stephen Wilske, eds., Kluwer 2012 at 291-98 (“[d]espite the numerous articles and war stories about guerilla tactics or even Taliban tactics that seem to be increasingly employed in international arbitration, no involvement of any bar association or similar institution in charge of supervising the professional conduct of lawyers has been reported. Indeed, when approaching experienced arbitrators and arbitration counsels on this use, the answer was consistent: ‘Never heard of it!’”); see also *Debate: Does Each Player Meet the Others’ Expectations? Does the Arbitration Process Meet the Users’ Expectations?* in Dossier of the ICC Institute of World Business Law: Player’s interaction in International Arbitration (2012) at 5 (citing Hans van Houtte indicating that he filed a complaint with the English Law Society against an English solicitor for intolerable behavior and never received a response).

10. Alia O. Algazzar, “Experiences from Arabic Islamic Legal Systems” in *Guerilla Tactics in International Arbitration*, Günther J. Horvath & Stephan Wilske, eds., Kluwer 2013 (“Egypt and most of the Arab countries, with the exception of Algeria, only require the satisfaction of merely superficial requirements for admission to the national bar. The main requirements are that the applicant be of the state’s nationality and holds a law degree... [P]oor economic conditions give newly qualified law practitioners the incentive to abandon their ethical beliefs and to turn a blind eye to their moral duties.”).

such issues will lead to more problems than the ethical issues pose, prompting procedural posturing, cost and delay as parties begin to use ethics challenges as tactical tools. Their position is the inverse of my reasoning for why something needs to be done and mimics similar arguments with respect to the IBA Rules on Taking of Evidence and Guidelines on Conflicts of Interest. I am unaware of any empirical or even persuasive anecdotal support for this proposition (*i.e.*, that without the guidelines on Evidence and Conflicts there would be fewer document disputes and/or challenges to arbitrators), and the benefits of clarity, harmonization and best practices in these areas seems obvious and fundamental to the integrity of the arbitral process.¹¹ With the need for guidance on counsel conduct recognized, it seems wrongheaded to anticipate tactical abuse as a basis for aborting this guidance before it is tested.

Moreover, if we as the international arbitration community do not attempt to regulate ourselves, there could be consequences, perhaps grave ones, for international arbitration as we know it. If domestic bars are called upon to regulate our conduct in the context of international arbitration more explicitly, and if we do not then have a set of accepted guidelines or norms to show them the situation is under control, the result could greatly impede the efficiency and efficacy of the arbitral process. Domestic bar associations are less able to grasp the global implications their regulations may have, and their motivation for such regulations may not always be in the best interest of promoting international arbitration. The result could be an international patchwork of clashing regulations making it more, rather than less, difficult to create a level playing field in truly international cases.

California provides a salient example. International arbitrations are rarely seated there because, due to "*an accident of legislative history*", California does not allow foreign attorneys to represent their clients in international arbitration conducted in California (*i.e.*, counsel must be admitted to the California bar)¹² and has notoriously strict disclosure requirements for arbitrators and arbitral institutions that arose as a reaction to mandatory domestic arbitration.¹³ Any spread of such (or similar) practices could be devastating.

With that said, and as noted above, the Guidelines are the product of an international effort to build consensus on best practices in counsel conduct which, when applied to a given case, are designed to create a level playing field and contribute to the just resolution of disputes. If followed, they should not place any counsel in the situation of having to act contrary to his or her own domestic rules or be at a disadvantage vis-à-vis his or her adversary. As with most such projects, the Guidelines do not address all potential issues that may arise nor will they please everyone. While time will tell whether the arbitration community will accept the Guidelines as an expression of best practices or a worthy aspiration, in the

11. See Charles Brower, *Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator*, Berkeley J. Int'l L. Publicist Vol. 5 at 1, 31 (arguing that ethics and transparency ensure legitimacy, and that "*we must continue to aspire to fulfill Lord Hewart's pronouncement that 'it is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'*").

12. See, e.g., David D. Caron & Leah H. Harhay, *A Call to Action: Turning the Golden State into a Golden Opportunity for International Arbitration*, Berkeley J. Int'l Law, Vol. 28:2 at 497, available at http://works.bepress.com/david_caron/102.

13. See Charles Brower, *supra* note 11, at 5 (discussing California's "*over-legislating*").

meantime they provide a practical starting point for open discussion, recognition and resolution of several of the most significant issues that may arise. If nothing else, the Guidelines are beneficial because they prompt the parties and the tribunal to discuss counsel conduct at the start of proceedings and, by doing so, should enhance the confidence which participants in international arbitration have in the process. The Guidelines also provide direction and help ensure that those new to the practice of international arbitration have a sense for what may be expected and do not unwittingly diverge into what some might perceive as inappropriate conduct. In addition, the Guidelines should assist party representatives in pushing back if the party they represent seeks to engage in misconduct or encourages them to do the same.

The dialogue about counsel conduct guidelines should start early in the arbitration – ideally at the time of the first procedural conference or drafting of terms of reference to ensure that the parties, their representatives and the tribunal are on the same page regarding ethical standards. The Guidelines are designed to be adopted in whole or in part, and it is important for counsel to consider them and to identify areas where higher standards than those in the Guidelines may apply or where a particular Guideline may conflict with their ethical obligations. The essential aspect of the process to capture is that all players in the arbitration engage in discussion and ideally agree to a common set of standards to be followed by all counsel for purposes of that arbitration.

It is important to understand the scope of the Guidelines, which is covered by Guidelines 1 to 3. Guideline 1 establishes that the Guidelines will apply when and to the extent that the parties have agreed or the tribunal, after consulting the parties and determining that it has the authority to rule on matters of party representation, wishes to rely on them. Guideline 2 provides a rule of interpretation, specifically that the tribunal should interpret the Guidelines according to their overall purpose and in the matter "*most appropriate*" for the particular arbitration, meaning that the Guidelines are meant to be adapted for the needs of the specific case at issue. Guideline 3 then makes clear that the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules or agreed arbitration rules. It recognizes that the difficulty with the scope of any regulation of ethical conduct is that when party representatives step into the area of international arbitration, they do not shed the ethical regulation to which they are subject. Indeed, they remain subject to the regulation of the bars they are members of and may become subject to certain laws and regulations at the place of arbitration.

The substantive Guidelines address six areas: party representation generally (Guidelines 4-6); communications with arbitrators (Guidelines 7-8); submissions to the tribunal (Guidelines 9-11), information exchange and disclosure (Guidelines 12-17), witnesses and experts (Guidelines 18-25), and remedies for misconduct (Guidelines 26-27). The purpose of this Article is not to provide a detailed commentary on the individual Guidelines. I will not, however, resist the temptation to offer some headline observations.

Particular criticism has been leveled against the inclusion of Guidelines 12 to 17 on information exchange and disclosure. These criticisms include that: (i) disclosure is already regulated by the 2010 IBA Guidelines on Taking of Evidence; (ii) they expand the scope of document production; and (3) although the Guidelines

purport to cover ethical conduct by party representatives, they expand parties' obligations of document preservation.¹⁴

The first criticism appears to be based on a misreading or misunderstanding of what the Guidelines address or how they interact with the scope of the IBA's Rules on the Taking of Evidence. Put simply, with respect to document disclosure, the Rules on the Taking of Evidence address the **scope** of disclosure (*i.e.*, what information must be produced, when and by whom). The Guidelines, on the other hand, address the role and obligations of counsel in ensuring that documents falling within that scope are preserved, located and produced. The Guidelines thus provide that party representatives should inform their clients about document preservation and retention (Guideline 12) and explain the necessity of producing documents and the potential consequences of failing to do so (Guideline 14). They should assist the party in taking reasonable steps to search for and produce all non-privileged, responsive documents (Guideline 15) and neither suppress nor conceal documents or advise the client to do the same (Guideline 16). They should not make requests to produce or objections for improper purposes (Guideline 13). Finally, where counsel becomes aware of the existence of a document that should have been but was not produced, they should again advise the party of the necessity to produce it and the consequences of failing to do so (Guideline 17). None of this is covered or addressed by the Rules on the Taking of Evidence. It is, however, complementary to those Rules and, it is submitted, necessary to make them fully effective.

The other criticisms are equally misplaced. The claim of "expansion" of the scope of document disclosure seems to be directed at the fact that parties are to be prompted to diligently search for and produce documents they have undertaken and/or are obligated to produce. That, of course, does not expand the "scope" of document disclosure but merely seeks compliance with it. Similarly, that parties may not destroy documents within the scope of disclosure as defined by the Rules on the Taking of Evidence (*i.e.*, they must preserve them), seems at least implicit in those Rules. The Guidelines, it is acknowledged, make this obligation explicit by enlisting counsel's support in the preservation process and introducing a temporal requirement¹⁵.

To my mind, the only Guidelines that – if strictly applied – may result in a situation where counsel feels he or she must violate domestic ethical obligations to comply with them are those governing witness preparation. Thus, the comments to Guidelines 18 to 25 expressly permit preparing a witness with practice questions and answers. While rather extensive witness preparation is normal practice for counsel from the United States,¹⁶ mock cross-examination is prohibited by the

14. Schneider, *supra* note 8 at 1.

15. This temporal requirement cannot, of course, be triggered before the Guidelines are adopted by the parties or tribunal in the case at issue.

16. Restatement (Third) of the Law Governing Lawyers § 116(1) (200). *"Preparing a witness may include: discussing the witness's recollection and probable testimony; revealing to the witness other testimony and evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing document or other physical evidence that may be introduced; and discussing the probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear"*.

English Bar.¹⁷ In many civil law jurisdictions witness preparation is prohibited altogether. Some jurisdictions have created exceptions to allow for witness preparation in the context of international arbitration, with the Paris Bar a highly publicized example (albeit one that does not provide guidance as to the boundaries of what is permissible).¹⁸ In any event, the point to be made is that, if counsel feel that to engage in practice examinations with witnesses would run counter to domestic ethical obligations, it is important to raise that issue at the beginning of the case when the Guidelines are being discussed and seek agreement on a modified process to apply to all counsel.

Guidelines 4 and 5 may appear rote. They aim to ensure that party representatives identify themselves at the earliest opportunity (Guideline 4) and that counsel do not accept to act after the tribunal has been constituted when they have a conflict of interest with an arbitrator (Guideline 5). Most readers will recognize these as a response to the recent (and notorious) challenges to barristers and the issue that arose in *Hrvatska Elektroprivreda v. The Republic of Slovenia*,¹⁹ where the Respondent introduced as counsel a member of the chairman's chambers at a late stage of the arbitration.

While the Guidelines are a significant step forward, I consider there are two flaws worthy of note. The first, which appears throughout, is the use of the word "should" rather than "shall" to qualify the obligations of Party Representatives.²⁰ In many codes of conduct, including the Rules of Professional Conduct of the New York State Bar Association, "should" connotes a permissive obligation while "shall" is used for mandatory obligations.²¹ The Guidelines define "Misconduct" as "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." The use of "should" throughout the Guidelines permits an argument that there cannot be "Misconduct" because there cannot be a "breach" of a permissive (i.e., "should") obligation. In my view, most of the Guidelines address fundamental aspects of the arbitral process and warrant the use of "shall" to avoid any ambiguity. Guideline

17. Bar Counsel Code of Conduct 705(a): "a barrister must not (a) rehearse, practise or coach a witness in relation to his evidence"; Bar Standards Board: Guidance on Witness Preparation (Oct 2005): It should be "borne in mind ... that there is a distinction, when interviewing a witness, between questioning him closely in order to enable him to present his evidence fully and accurately or in order to test the reliability of his evidence (which is permissible) and questioning him with a view to encouraging the witness to alter, massage or obscure his real recollection (which is not)."

18. Paris Bar Resolution of 26 February 2008: "In the context of international arbitrations, seated in France or elsewhere, it is permissible for counsel to prepare a witness before his or her oral examination."; see <http://avocatparis.org/presentation-abrtrage-international>.

19. *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ISCID Case No. ARB/05/24), Order Concerning the Participation of a Counsel dated May 6, 2008 (upholding the request for disqualification of counsel under the tribunal's inherent power to take measures to preserve the integrity of its proceedings under Article 44 of the ISCID Convention).

20. Michael Schneider notes that ASA recommended this change to "should", which was made during the comments stage. See Schneider *supra* note 8.

21. Paragraph 6 of the "Scope" provides:

"The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These Rules define proper conduct for purposes of professional discipline... Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules. The Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action".

9 acts as just one example. It reads: “A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal”.

The second flaw is the absence of Guidelines on submissions of law. The issue of legal authorities is carved out from the scope of Guidelines 9 and 10, which cover only submissions of fact. The comments to Guidelines 9 and 10 specify that “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”. While that commentary suggests counsel may not make frivolous or unsupported legal arguments (a point on which it would be laudable to reach agreement), it is commentary only and does not appear in the Guidelines themselves. Parties discussing the Guidelines might wish to suggest incorporating the commentary into the procedural order with the same status as a Guideline.

I have one final observation regarding the potential power of the tribunal to sanction party representatives. These issues have prompted criticism of Guidelines 26 and 27, which set forth an escalating scale of potential actions a tribunal may consider when it finds that party representatives have committed misconduct and a series of considerations to take into account when doing so.

I agree that tribunals should be very reluctant to “admonish” counsel. The word “admonish” suggests a role reserved for local bars and courts. However, adverse inferences and, potentially, cost sanctions seem to be very much within the authority of tribunals depending on the circumstances.²² Most importantly, however, when a lawyer has breached the Guidelines, it will very likely affect the credibility of the lawyer’s (and by extension the client’s) case before the tribunal. As maintaining credibility is in most cases critical to success, the Guidelines should largely enforce themselves. In addition, for me the principal need for and force of the Guidelines is not with respect to unethical counsel, but counsel who are ethical but act differently because they are subject to different local norms. Where the Guidelines are adopted for such counsel – again, the vast majority practicing today in international arbitration – the Guidelines addressing sanction for misconduct should never come into play. In the above respects, the debate on whether the Guidelines have teeth and whether tribunals are empowered to enforce them²³ is and will hopefully remain largely academic.

22. The commentary to Guideline 3 points out that an obligation or duty that applies to a party representative is an obligation or duty of the party that he or she represents and that the party itself may bear the consequences of its representatives’ misconduct.

23. See e.g., *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ISCID Case No. ARB/05/24), Order Concerning the Participation of a Counsel dated May 6, 2008 (upholding the request for disqualification of counsel under the tribunal’s inherent power to take measures to preserve the integrity of its proceedings under Article 44 of the ISCID Convention.); *Rompetrol Group N.V. v. Romania* (ISCID Case No. ARB/06/3), Decision on the Participation of a Counsel dated January 14, 2010 (considering and denying request to exclude counsel, while referring to counsels’ obligation to comply with the applicable rules of professional conduct and ethics.); *Northwestern Nat’l Insurance Co. v. INSCO, Ltd.*, No. 11 Civ. 1124(SAS), 2011 WL 4552997 at 5 (S.D.N.Y. Oct. 3, 2011) (finding that “[a]ttorney disqualification is ‘a substantive matter for the courts and not arbitrators’ for the simple reason that ‘it requires an application of substantive state law regarding the legal profession.’ In other words, arbitrators are selected by parties to a dispute primarily for their ‘expertise in the particular industries engaged in’ and cannot be expected to be familiar with the standards of conduct applicable to the legal profession” and noting that the panel explicitly refused to address the pending question of ethics.); *Reliastar Life Insurance Company of New York v. EMC National Life Company*, 564 F.3d 81 (2d Cir. 2009) (finding that an arbitral tribunal had the power to allocate costs as a

The desirability of a level playing field cannot seriously be challenged. Nor can it seriously be contested that counsel acting ethically but differently with respect to fundamental matters such as *ex parte* communications, document disclosure, witness preparation and submissions to tribunals will disrupt the achievement of that goal. The Guidelines are intended to harmonize and foster best practices for counsel conduct in these areas and thus protect the level playing field we all want while enhancing the integrity of the arbitral process in the eyes of its participants and users. The Guidelines are not perfect and only time will tell whether they will succeed in realizing their intent. They should be embraced by the arbitral community, given that time and revised or adjusted as appropriate. Any other approach is premised upon nostalgic conceptions of international arbitration's "flexibility" that, if they ever had validity, no longer serve the purpose of providing a viable alternative method of resolution for the increasingly complex and significant disputes our clients are being asked to entrust to it.

sanction for bad faith conduct despite a clause providing for even apportionment of costs between the parties and differentiating *InterChem Asia 2000 Pte, Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp.2d 340 (S.D.N.Y. 2005) because in that case the tribunal attempted to sanction counsel directly).