

Can Counsel Ethics Beat Guerrilla Tactics?: Background and Impact of the New IBA Guidelines on Party Representation in International Arbitration

By Edna Sussman

[The absence of common legal cultures] does not mean that international practitioners are pirates sailing under no national flag; it only means that on the high seas, navigators need more than a coastal chart."

V.V. Veeder¹

The call for something more than a "coastal chart" to govern counsel ethics in international arbitration has intensified in recent years and has led to action. Following a comprehensive review of the subject, in May of 2013 the International Bar Association issued its Guidelines on Party Representation in International Arbitration (the "Guidelines").² In developing its recommendations, the IBA's Arbitration Committee investigated the different ethical and cultural norms and disciplinary rules that apply to counsel in international arbitrations. While these are only Guidelines with no inherent authority, the Guidelines are likely to foster significant changes that will aid in the accomplishment of their objectives.

The Guidelines should inspire tribunals in international arbitrations to at the very least conduct a conversation with counsel at the inception of the case to clarify what ethical norms govern each party's counsel and whether there are strictures that apply to some but not all of the parties that create inequities. Agreements as to conduct can be incorporated into the first procedural order. But even absent agreement, awareness alone can enable the tribunal to make appropriate adjustments to ensure a fair process. And just knowing about the counsel's practices enables opposing counsel to be better prepared to counter them. If the Guidelines serve no other purpose than to enable and encourage a dialogue of this nature early in the proceeding, they will accomplish a great deal.

The Guidelines may serve to focus the arbitral institutions' attention more closely to counsel ethics and to what role they can play in ensuring the integrity of the process. It is the institutions that have the ability to establish an ethics regime that empowers tribunals with the enforcement powers necessary to drive conduct. In the wake of the Guidelines release, the arbitration community may look to the institutions to issue rules that proscribe unethical conduct or conduct that obstructs or delays the proceedings and authorize the tribunal to issue appropriate sanctions.

Practitioners should welcome the promulgation of the IBA Guidelines. Adherence to the Guidelines would not automatically protect counsel from being in violation of the ethical code of their home jurisdiction. But local ethical codes may provide, or be amended to provide for counsel to be governed by the ethical regime adopted by an international arbitral tribunal. The existence of the Guidelines and the growth of international arbitration as a practice area should encourage the development of such local ethical provisions.

I. Background

Consideration of issues relating to counsel ethics in international arbitration is not new. Michael Reisman and Detlev Vagts recognized the need for uniform ethical guidelines applicable to counsel in international arbitration long ago.³ Jan Paulsson proposed the idea in 1992.⁴ The topic gained prominence in recent years. Catherine Rogers, a leading scholar in the field, expressed the view in 2010 that this "ethical no-man's land"⁵ should not be permitted to persist. A number of commentators believed that there can be no workable solution to this problem, that there were too many guidelines already confusing the field of international arbitration, and that regulation would diminish the flexibility of the process.⁶ However, an increasing number supported the view that the adoption of a code of ethics specific to the conduct of counsel in international arbitration was long overdue. Several proposed solutions emerged.

Doak Bishop and Margrete Stevens proposed an *International Code of Ethics for Lawyers*⁷ which adopted an approach of positing simple, elegant and essential rules for counsel's ethical duties. *The Hague Principles on Ethical Standards*, the work product of the International Law Association, provided another proposed set of ethical rules.⁸ Cyrus Benson offered the *Checklist of Ethical Standards for Counsel in International Arbitration*, a proposal in the form of a checklist to be reviewed at the start of the arbitration by all parties and subject to the agreement of the parties.⁹

Sundaresh Menon's opening address at the ICCA Congress in 2012,¹⁰ urging the development of "a code of conduct and practice to guide international arbitrators and international arbitration counsel," galvanized further debate on the issue. The concept gradually gained acceptability.¹¹ The survey broadly disseminated by the Arbitration Committee of the IBA in order to inform its work

helped identify specific divergent counsel practices that presented the greatest difficulties and confirmed support for the development of international guidelines for party representatives.

II. The Issues to Be Addressed

The Guidelines address the two issues relating to counsel conduct that have been the subject of discussion. First, it addresses the practices that are unethical under some national codes or rules of professional conduct but not under others. Second, it addresses what has come to be known as “guerrilla tactics,” tactics used to delay, obstruct or subvert the arbitration process.

a. Divergence in Ethical Obligations

Differences in ethical obligations are inherent to an international forum where counsel come from different jurisdictions and often find themselves conducting an arbitration seated in a yet another jurisdiction and physically held in yet a third jurisdiction. Without an overriding ethical code there is no clear answer to the question of which ethical obligations are applicable as among all of these possible jurisdictions. Moreover, there is the potential for disadvantaging parties if their counsel is bound by the more restrictive ethical rules. Only a common set of ethical obligations can level the playing field.

The examples most frequently used to illustrate the significant divergences in ethical obligations of counsel include witness preparation, the nature of counsel’s obligation to assure production of responsive documents, *ex parte* communications with the arbitrator, statements of fact to the tribunal known to be unsupported by the evidence, the obligation to report perjury, the obligation to advise the court of adverse legal authority and differences concerning lawyer communication with employees of an adverse corporate party.¹²

b. Guerrilla Tactics

Like counsel ethics, the use of “guerrilla tactics,” those intended to obstruct, delay or derail an arbitration, has been the theme of a growing number of articles¹³ and has been the subject of several recent international arbitration conferences. It was urged that any ethical regulation issued should include provisions that inhibit such conduct.¹⁴

Two reasons are typically offered for the changes in the practice of arbitration that have made this issue of such pressing concern. First, arbitration has evolved from a forum for a speedy, inexpensive and pragmatic decision on trade disputes to a forum that resolves sophisticated legal disputes with millions of dollars, and often hundreds of millions, at stake. With so much at stake, differences in ethical obligations that give a party an advantage are problematic and the size of the amount at stake can drive counsel over the line from zealous representation to guerrilla tactics. Second, as international

arbitration has grown, both counsel and arbitrators new to the practice have become active. With the entry of new practitioners not schooled in the norms of the practice and not part of the former elite international arbitration “club,” there is no shared understanding with the new entrants of how they perceive their role and no in-group induced constraint on their conduct. Whatever the cause, the reality was felt to require action.

A survey conducted to determine whether the use of guerrilla tactics in international arbitration was really a problem of sufficient frequency and moment to warrant attention confirmed the importance of the issue. Sixty-six percent of the 81 respondents reported that they had been subjected to or had witnessed guerrilla tactics. The most common examples of guerrilla tactics described included abuse of document production, delay tactics, creating conflicts, frivolous challenges of arbitrators, last-minute surprise, frivolous anti-arbitration injunctions and other approaches to courts, *ex parte* communications, witness tampering, lack of respect, courtesy towards the tribunal and opposing counsel and various strategies to frustrate an orderly and fair hearing.¹⁵

III. Guidelines Provisions Highlighted

The Guidelines address many of the issues frequently flagged as the most problematic ethical conflicts: The Guidelines:

- Preclude the creation of a conflict by barring taking on a party representation that would create a conflict with an arbitrator and states that the tribunal may exclude the new party representative who takes on a representation in violation of this guideline. Guidelines 5-6.
- Forbid *ex parte* communications (apart from circumscribed interview contacts and absent specific agreement by the parties to the contrary or party non-appearance). Guidelines 7-8.
- Bar knowingly presenting false evidence and provide guidance on action to be taken if falsity is later discovered. Guidelines 9-11
- Address the need to preserve documents and to produce responsive documents and prohibit the making of any request to produce documents for an improper purpose such as to harass or cause unnecessary delay. Guidelines 12-17.
- Permit counsel to meet and discuss with experts and lay witnesses to help prepare witness statements and prepare for prospective testimony but counsel may not invite or encourage false evidence. Guidelines 18-25.

While the provisions cover the most frequently cited ethical conflicts, a question remains whether these provisions are sufficient to curb the many faces of guerrilla

tactics. The Guidelines do specifically deal with two of the identified guerrilla tactics: creating a conflict with the arbitrator and document related tactics. Perhaps the wide variety of obstructive and delaying actions by counsel and the amorphous wording that would be required to describe them precluded their specific inclusion in the guidelines.

The Guidelines do, however, empower the tribunal to address “misconduct” by a party representative after giving the parties notice and a reasonable opportunity to be heard. Misconduct is broadly defined to include 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.”¹⁶ We will have to wait and see if the word “misconduct” is read broadly enough to encompass a wide variety of guerilla tactics.

The Guidelines give the tribunal power to respond to behavior in violation of the Guidelines. The tribunal may admonish the party representative, draw inferences, apportion costs, and take other “appropriate measures in order to preserve the fairness and integrity of the proceeding.” In determining the remedy, the tribunal is to consider the nature and gravity of the misconduct, the good faith of the party representative, the extent to which the party representative knew about or participated in the misconduct, the potential impact of a ruling on the rights of the parties, the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award. Guidelines 26-27.

IV. Implementation of the Guidelines

Like all guidelines, the Guidelines are just guidelines and have no weight beyond that given to them by counsel and/or the arbitrators. As they state, the Guidelines are not intended to displace otherwise applicable mandatory law, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. Nor are they intended to vest arbitral tribunals with powers otherwise reserved to bar associations or other professional bodies. It is the intention of the drafters of the Guidelines that the parties may adopt the Guidelines by agreement or that arbitral tribunals may apply the Guidelines in their discretion, subject to any applicable mandatory rules, if they conclude they have the authority to do so.

While not automatically binding in an arbitration, the Guidelines provide an excellent opening for the tribunal to initiate a discussion with counsel as to what should be deemed to be appropriate conduct in the arbitration to equalize ethical norms, curb guerrilla tactics and ensure fundamental fairness. Those in the arbitral community who were of the view that no counsel ethics regulation should be issued because “if it ain’t broke, don’t fix it,” may be persuaded that it is “broke” now and that corrective action is required.

The Guidelines provisions can be used as a jumping off point to see if other limiting parameters for conduct can be established by agreement. Reference to the Benson checklist, the Bishop & Stevens ethical code and the Hague Principles discussed above can provide specific ideas for expansion by agreement of the Guidelines scope to protect against additional areas of ethical conflict and of potential obstruction and delay. For example, if the tribunal wishes to go further in discouraging guerrilla tactics, the parties can be asked to consider whether they also wish to adopt one of Benson’s checklist items: “A lawyer shall not assert a position, conduct a defense, question witnesses or take other action on behalf of the client when the lawyer knows, or when it is obvious that, such action is irrelevant to the case and/or would serve merely to (i) delay proceedings, (ii) cause undue burden or expense or (iii) harass or maliciously injure another.”¹⁷ It would be difficult for counsel to reject such a provision. But in balancing how far to go with the imposition of specific restraints on misconduct, a tribunal must keep in mind that such strictures could give rise to the possibility of repeated approaches to the tribunal during the pendency of the proceeding asserting violations and requesting sanctions, a scenario which the tribunal may not wish to encourage. Like so many things, judgment must be exercised as to what is best for the case and care must be taken in structuring any special process.

A system of counsel regulation cannot be truly effective unless the tribunal is authorized to take corrective action. The Guidelines limit the tribunal to actions they believe they have the authority to undertake and expressly take no position as to whether the tribunal has the authority to rule on matters of party representation or to apply the Guidelines in the absence of an agreement by the parties. Thus the Guidelines are limited by their very nature. In order to give effect to the Guidelines, in the absence of case-by-case agreement of the parties, action by the arbitral institutions is essential. While it would not comfortably be the institutions’ role to enforce ethical codes, it is well within their purview to promulgate rules that impose ethical constraints and rules that empower the tribunal to impose appropriate remedies.

The institutions have already taken some steps in this direction and it appears further steps will be taken in the near future. For example, the ICDR addressed some of the concerns a few years ago. Article 7 of the ICDR International Dispute Resolution Procedures bars *ex parte* communications with the chair altogether and, like the Guidelines, limits communications with the party-appointed arbitrators to the interview. The ICDR Guidelines for Arbitrators Concerning Exchanges of Information seeks to put the parties on the same footing by providing that the tribunal should to the extent possible apply the same rules as to ethics and privilege to both sides, giving preference to the party’s rule that provides the highest level of protection. By establishing a limited scope for disclosure

and empowering the arbitrator to exercise firm control, the ICDR Guidelines also serve to control many of the document disclosure-related guerrilla tactics.

The ICC 2012 arbitration rules revision now provides in Article 37(6) that in the allocation of costs the tribunal may consider the extent to which the party “conducted the arbitration in an expeditious and cost effective manner” thus specifically authorizing cost shifting if a party delays or obstructs the proceedings. The LCIA is reported to be planning to adopt a rule later this year which incorporates “basic norms expected of counsel in an arbitration under their auspices,” and gives tribunals the power to exclude counsel who were found to be in serious and persistent violation of those norms.¹⁸

V. Conclusion

The Guidelines are likely to be accepted over time as a source of soft law with at least as much influence as has been achieved by the IBA Guidelines on Conflicts of Interest in International Arbitration, which deals with arbitrator conflicts and disclosure obligations. But it is likely that the Guidelines will have much greater impact than would result from their mere adoption in an arbitration. The Guidelines are likely to encourage a meaningful dialogue between the tribunal and the parties regarding ethical obligations that go beyond those dealt with in the Guidelines. The Guidelines are also likely to inspire institutional action to embrace the issue and adopt institutional rules that give the tribunal authority to enforce rules that foster a fair process undisturbed by obstructionist tactics.

Endnotes

1. *The 2001 Goff Lecture—The Lawyer’s Duty to Arbitrate in Good Faith*, 18 *Arbitration International* 2002, no. 4, p. 431.
2. International Bar Association, *Guidelines on Party Representation in International Arbitration*, released May 25, 2013.
3. See W. Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, 116-17 (1971); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 *Am. J. Int’l L.* 250, 250 (1996).
4. Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 *Am. Rev. Int’l Arb.* 214 (1992).
5. Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012. Laurel S. Terry, et al., *Transnational Legal Practice*, 42 *Int’l Lawyer* 833 (2008).
6. See authorities cited in Rogers, *supra* note 5 at fn. 28.
7. Doak Bishop & Margrete Stevens, ICCA Congress 2010, *International Code of Ethics for Lawyers*, available at http://www.arbitration-icca.org/media/0/12763302939400/stevens_bishop_draft_code_of_ethics_in_ia.pdf; the code accompanied their keynote address on the subject, available at http://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf.
8. International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards* (Sep. 27, 2010), available at www.ucl.ac.uk/laws/cict/docs/Hague_Sept2010.pdf.
9. Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 *Disp. Resol. Int’l* 78 (Mar. 2009).
10. Sundaresh Menon, *International Arbitration, The Coming of Age for Asia (and Elsewhere)*, ICCA Congress 2012, available at http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf.
11. Sebastian Perry, *Policing Ethical Conduct: Menon and Paulsson Debate Regulation*, *Global Arbitration Review*, June 5, 2013.
12. See Rogers *supra* note 5, at 3-5; Benson *supra* note 9, at 82-85; Catherine A. Rogers, *Lawyers Without Borders*, *U. Pa. J. Int’l L.* Vol. 30:4 at 1036-1037 ((2009).
13. See articles collected in *Guerrilla Tactics in International Arbitration and Litigation* in *Transnational Dispute Management*, Volume 7(2) November 2010.
14. Edna Sussman & Solomon Ebere, *All’s Fair in Love and War—Or Is It? The Call for Ethical Standards for Counsel in International Arbitration*, *Am. Rev. Int’l Arb.* 22 (2011): 612.
15. *Id.*
16. Guidelines, Definitions Section.
17. Benson, *supra* note 9, checklist Category 1(2).
18. Perry, *supra* note 11.

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