Adoption of IBA Guidelines on Party Representation in arbitration agreements

January 13, 2014

The International Bar Association’s recently released Guidelines on Party Representation in International Arbitration allow parties to adopt a uniform standard of conduct to govern legal representatives in international arbitration. Where the parties to an arbitration come from very different legal backgrounds with conflicting rules on party representation, applying the Guidelines is worth seriously considering as this may significantly contribute to a time- and cost-effective arbitration process.

Rules and practices on counsel conduct and party representation may substantially differ among jurisdictions. Since international arbitration usually involves parties from different countries, the parties’ legal representatives (or counsel) often come from different legal systems with their own procedural rules on ethical conduct and on party representation. This may lead to uncertainty as to which of these rules and codes are to be applied, which in turn can adversely affect the arbitral proceedings. The purpose of the Guidelines is to address this uncertainty.

The Guidelines offer parties a uniform transnational code of conduct that they can adopt to govern the conduct of their counsel in international arbitration. For the Guidelines to apply in a given arbitration, the parties in question must so agree, for example in their arbitration agreement or in the Terms of Reference drawn up at the outset of the arbitration. Arbitrators may also issue a procedural order in which they declare the Guidelines to be applicable.

Whether it is advisable to adopt the Guidelines in arbitration agreements or subsequently depends on the parties involved and on the circumstances of the case.

The Guidelines address six main key matters:

- **Party representation**

  A party should not appoint a representative who has a relationship with an arbitrator that would create a conflict of interest. If a conflict of interest arises after the arbitral tribunal is constituted, the arbitral tribunal may take measures to safeguard the integrity of the proceedings. This rule also covers changes in party representation in the course of the arbitration.

- **Communication with arbitrators**

  Subject to limited and narrow exceptions, party representatives are not allowed to communicate with the arbitrators without the other parties knowing or being present, unless otherwise agreed by the parties.

- **Submissions to the arbitral tribunal**

  Party representatives are subject to a duty of candour and honesty when making a submission to the arbitral tribunal: they should not make any knowingly false submission of fact nor submit any witness or expert evidence that is known to them to be false.

- **Information and disclosure**

  To prevent potential disparity in access to information or evidence, the Guidelines encourage taking objectively reasonable steps to preserve, search for and produce documents that a party has an obligation to disclose.

  Party representatives must advise their clients to preserve documents relevant to the arbitration. Also, party representatives should not suppress or conceal any documents requested. Document production should not be used as a means of harassing or causing unnecessary delay in the arbitral proceedings.

- **Witnesses and experts**

  Party representatives may not encourage witnesses or experts to give false statements, but are allowed to assist witnesses and experts with the preparation of their evidence. When doing this, they should ensure that a witness statement reflects the witness’s own account of the relevant facts and an expert report, the expert’s own analysis and opinion.

- **Remedies for misconduct**

  The Guidelines grant arbitrators wide discretion when dealing with any breaches of the Guidelines. If there is misconduct by a party representative, the arbitral tribunal may admonish him or her, draw appropriate inferences in assessing the evidence relied upon, consider the misconduct in apportioning the costs of the arbitration or take any other appropriate measure to preserve the fairness and integrity of the proceedings.

  The Guidelines allow parties to adopt a uniform standard of conduct to govern legal representatives in international arbitration. They accommodate the legal and cultural differences among parties and the complex and multinational nature of the disputes involved.

  However, opinions on the Guidelines’ efficacy are divided. The Guidelines ensure greater certainty in the conduct of international arbitrations, and may speed up proceedings if applied well, thus cutting costs. On the other hand, it remains to be seen whether the Guidelines have much to add to the practice of international arbitration, since national regulations on party representation will remain applicable in any event. And some commentators question whether arbitral tribunals will indeed ‘police’ the Guidelines and ensure that their application is consistent and principled.

  For parties, it is important to always consider critically the added value of the Guidelines in deciding whether to agree on having them apply. Where the parties to an arbitration come from very
different legal backgrounds with conflicting rules on party representation, agreeing to have the Guidelines apply may be an attractive option to avoid subsequent ethics disputes and to ensure the arbitration process is time- and cost-efficient.