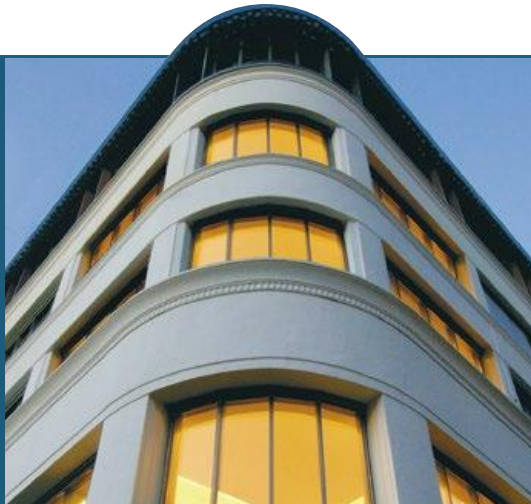


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REMEDIES FOR MISCONDUCT UNDER THE 2013 IBA GUIDELINES ON PARTY REPRESENTATION

European ADR: Ethics, Empathy and Exasperation

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2013 IBA Guidelines on Party Representation

- Standards of professional ethics diverge across the world
- Survey: high degree of uncertainty as to which rules govern counsel conduct in international arbitration
- Promote level playing field among lawyers (educational role)
- Foster trust between lawyers, and between arbitrators and lawyers
- “Self-regulation” to enhance legitimacy of arbitral process

Contractual Nature

- Guidelines, not a code of ethics for lawyers
- Apply basically in 2 scenarios:
 - Where the parties have so agreed
 - Where the arbitrators, after consultation with the parties, wish to rely upon them after having determined that they have authority to rule on matters of party representation
- Do not affect the fundamental duties of counsel to the party whom he or she represents

Guiding Principle

- 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.*” (Preamble)

Contents of 2013 IBA Guidelines

- Guidelines on:
 - Party Representation
 - Communications with Arbitrators
 - Submissions to the Arbitral Tribunal
 - Information Exchange and Disclosure
 - Witnesses and Experts
 - Remedies for Misconduct

Premise: Guidelines need “teeth”

- Set of standards meaningless if no possibility for arbitral tribunal to impose **sanctions** on those who violate such standards
- Guidelines 26 and 27



Guideline 26: Potential Remedies for Misconduct

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. admonishing the Party Representative;
- b. draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;
- c. considering the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the 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.

Guideline 27: The Most Proportionate Remedy

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 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.

The Debate: (1) Arbitral Tribunals' Authority?

- Arbitrators appointed to resolve disputes between parties
- Inherent authority to ensure fairness and police the process
- But: limits?
 - Arbitrators best suited to remedy counsel's misconduct (familiar with factual circumstances and context)

or

- No jurisdiction over counsel: to be left to domestic authorities

The Debate: (2) Asymmetry?

- Party representatives owe the duties under the Guidelines
- But: parties suffer the repercussions of any violation of the Guidelines (except for admonishment) – result of contractual nature
- Should a party suffer the consequences of its counsel's misconduct?
- Party itself aware? Innocent? Responsible?

The Debate: (3) Overregulation?

- Do Guidelines increase adversarial climate?
- New opportunities to disrupt proceedings?
- Slower and more costly proceedings?
- Broad definition of “misconduct” and broad scope of potential remedies (“any other appropriate measure”)
- Risk of parallel disciplinary proceedings before arbitral tribunals and professional bodies

Remedies for Misconduct in Practice

- US case law: Courts increasingly encourage cost sanctions against counsel misconduct and arbitration guerillas
 - *First Preservation Capital v. Smith-Barney* (S.D.Fla.1996)
 - *Polin v. Kellwood Co.* (S.D.N.Y. 2000)
 - *Superadio Partnership v. Winstar Radio Productions* (MA 2006)
 - *Reliastar Life Insurance Co. v. EMC* (2nd Cir. 2009)
 - *Positive Software Solutions, Inc. v. New Century Mortgage Corp.* (5th Cir. 2010)

LCIA: revised draft of 2014 Rules

- Article 18.5: *“Each party shall ensure that all its legal representatives have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of appearing by name before the Arbitral Tribunal.”*
- Annex: “General Guidelines for the Parties’ Legal Representatives”
- Article 18.6 – Potential sanctions:
 - a written reprimand;
 - a written caution as to future conduct in the arbitration;
 - [a reference to a regulatory and/or professional body];
 - any other measure necessary to maintain general duties of the Arbitral Tribunal under Article 14.4(i) and (ii).

Other Institutions

- AAA Commercial Arbitration Rules (R-23 and R-58)
 - adverse inferences, exclusion of evidence, cost/fee shifting, other appropriate sanctions
- ICDR International Arbitration Rules (Articles 28 and 31)
 - cost/fee shifting for dilatory or bad faith conduct
- ICC Rules and UNCITRAL Arbitration Rules
 - Little guidance: discretion in apportioning costs and fees
- Chartered Institute of Arbitrators (CI Arb)
 - Professional Conduct Committee

Other means to deter unethical conduct (1)

- Encourage counsel to set out where they are registered as lawyers
- Communicate expectations regarding treatment of communications, witnesses, disclosure, etc.
- Ask counsel whether they agree to be subject to sanctions if they behave unethically
- “Ethical checklist” for counsel in Procedural Order No. 1

Other means to deter unethical conduct (2)

- Announce that parties will be held responsible for counsel misconduct
- Publication of award imposing sanctions due to counsel misconduct (“naming and shaming”)?
- Awarding costs against the party representative personally?
- Complaint to regulatory authority?

Conclusions

- Continued trend towards greater self-regulation
- 2013 IBA Guidelines on Party Representation are likely to become de facto reference point for tribunals and counsel
- “Teeth” are necessary and available – but controversial
- Remedies for Misconduct (Guidelines 26 and 27) have yet to be tested in practice

Thank you!

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