President's Message

Yet another opportunity to waste time and money on procedural skirmishes: The IBA Guidelines on Party Representation

One of the principal factors which today absorb the time of arbitrators, parties and counsel, increasing the costs of arbitral proceedings, is the ever growing numbers of procedural motions. The greatest culprits in this respect are no doubt the document production requests, and the IBA played an important role in the spread of this curse. Before the adoption of the IBA Rules on the Taking of Evidence (the "Evidence Rules"), large parts of the world conducted arbitration without this form of discovery or disclosure which now generally is called prudishly "document production". Even in North America it was widely stated (with regret or satisfaction) that discovery is not available in international arbitration, and the generation of American arbitration lawyers practicing before the Iran-US Claims Tribunal in The Hague saw how well this could work (unfortunately this generation now seems to have been replaced by a new one which falls back into the old practice of imitating court proceedings). While the Evidence Rules usefully curb the most horrendous versions of "document production", they have also helped to place the practice firmly on the menu of almost every international arbitration case.

The Evidence Rules were followed by the IBA Guidelines on Conflicts of Interest which have become the widely accepted yardstick for determining conflicts and have replaced independent thinking as to whether a particular situation really constitutes an actual, potential or perceived conflict of interest – stimulating instead the imagination of all those who wish to disrupt proceedings by challenging arbitrators. Other IBA Para-regulatory Texts[1] include the Rules of Ethics for International Arbitrators, the 2010 IBA Guidelines on Drafting Arbitration Clauses and the 2011 International Principles on Conduct for the Legal Profession.

And now we are presented with the **Guidelines on Party Representation in International Arbitration**, adopted by the IBA in May of this year (the "Guidelines"). With great respect for the distinguished group of practitioners and friends who prepared this new text it must be said that the Guidelines, while presented as the solution to what in reality appears only as a marginal problem, risk becoming a major source of procedural motions and disruption.

---

[1] Volume 37 of the ASA Special Series, dealing with that subject is about to be completed.

ASA is seriously concerned with this risk. Prior to the adoption of the Guidelines, in March 2013, it submitted Observations to the IBA Arbitration Committee. ASA appreciates that the Committee made some changes before adopting the Guidelines; but the most problematic provisions and, most importantly, the risk of disruption remain. Some of the concerns are highlighted here. They will be further developed by ASA under the leadership of Felix Dasser.

First of all, the Guidelines are a misnomer: while following ASA's Observations the word "shall" was eliminated from most of the provisions and replaced by "should" or "may", the Guidelines remain prescriptive, directing Party Representatives what to do or not do. The directions, in substance, sit somewhere between the "anodyne and the highly controversial";[2] many of them would seem self-evident[3] or trivial.[4] Others are most problematic, not least the ones addressing once again … document production.

To give a flavour of the more offensive provisions in the Guidelines, one example suffices, found in the section on "Information Exchange and Disclosure". This section deals with a matter which is already regulated in the IBA Evidence Rules, so one would have thought that there was no need to regulate it also in the Party Representation Guidelines. But the Guidelines expand the scope of document production beyond the Evidence Rules. In particular Guideline 12 requires a Party Representative to inform "the client of the need to preserve, as far as reasonable possible, Documents [a very widely defined term, including electronic data of any kind] that would otherwise be deleted …". This "need" is postulated not only when document production has been agreed or ordered but even when the arbitration is "likely to involve" such a step. Hence, under the guise of regulating party representation, this "guideline" expands the scope of the obligations of the parties themselves and introduces an obligation of document preservation (or "litigation hold")!

But the objections which must be raised against the Guidelines go beyond some problematic provisions. It is the regulation itself which causes mischief.

One notes first of all that the alleged problem for which the Guidelines announce a solution is not resolved but aggravated. In their introduction they

---

2 Paul Key and Jessica Wells in ICCA Newsletter, August 2013.

3 Guideline 9: "A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal."

4 Guideline 4: "Party Representatives should identify themselves to the other Party or Parties and the Arbitral Tribunal at the earliest opportunity."

explain that there is a "range of rules and norms applicable to the representation of parties in international arbitration", adding that a preparatory survey "revealed a high degree of uncertainty among the respondents regarding what rules govern party representation in international arbitration". In fact, even if such uncertainty existed and caused serious problems, the Guidelines hardly reduce it; on the contrary, they simply add another set of rules to existing ones. Indeed, as the introduction to the Guidelines states "rules and norms developed for domestic judicial litigation" exist; they may well be "ill adapted to international arbitral proceedings"; but if and to the extent that they apply in international arbitration, having a new set of different rules, issued by a body different from, and with no authority over those which are responsible for the existing rules, is likely to increase uncertainty and confusion, rather than resolve the issue.

At the origin of this misconception is the amalgamation in the Guidelines between rules of professional conduct and rules regulating the arbitration procedure. While the latter may be regulated by the parties to an arbitration and by the arbitral tribunal appointed by them, the former fall within the responsibility of those professional bodies that regulate the exercise of the legal profession.[5] The IBA has no power to interfere with these professional regulations, nor do the parties and arbitral tribunals. This gives rises to difficulties which are reflected in several provisions of the Guidelines.

First, as to their application, the Guidelines provide that they "shall apply where and to the extent that the Parties have so agreed"; the agreement of party representatives, i.e. those directly concerned, seems to be presumed. The arbitral tribunal may rely on the Guidelines if it so "wishes" and if it has "determined that it has the authority to rule on matters of Party representation"; but this is qualified by the words "to ensure the integrity and fairness of the arbitral proceedings" and by the statement that the Guidelines "are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules …". This aspect alone opens a wide field for argument.

Second, difficulties will inevitably arise with respect to "Remedies for Misconduct". Misconduct is defined not only as the "breach of the present Guidelines" but far more generally as "any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative". The "remedies" – the term "sanctions" would seem more appropriate –

[5] However, the Guidelines apply not only to lawyers but to "any person who appears in an arbitration, including a Party's employee, who appears in an arbitration on behalf of a Party and makes submissions, …"

include admonitions, inferences, cost sanctions and "any other appropriate measure in order to preserve the fairness and integrity of the proceedings"; Guideline 6 even provides for the possibility of the "exclusion" of a Party Representative.

If the Guidelines are taken seriously and are widely adopted in arbitration practice, there will be plenty of room for applications to and lengthy arguments before arbitral tribunals on this new subject: motions of alleged misconduct coupled with applications for sanctions risk to become a frequent new feature in international arbitration. Parties dissatisfied with the procedure, or any step in it, not to mention parties wishing to obstruct the proceedings, will be most grateful for this new opportunity to disrupt the proceedings.

Of course, the objectives pursued by the Guidelines require that these "have teeth" and provide for sanctions. Many of the sanctions for misconduct provided by the Guidelines may be available to arbitrators already today as part of an arbitrator's duty and power to ensure the "integrity and fairness of the arbitral proceedings", as specified in Guideline 1. Occasionally such powers may have been recognised or even used in the past. However, once they are spelled out in guidelines and widely publicised, they raise the appetite of litigators and motions for their application risk to become ordinary tools in the proceedings, causing additional waste of time and money and contributing further to the disenchantment of the users with international arbitration as widely practiced today.

The role of counsel in international arbitration is of critical importance and it deserves special attention by those concerned with the process. ASA has recognised this importance, for instance by its Advocacy Prize and the Charter on which it is based.[6] However, regulating the conduct of party representatives as the IBA now has done is the wrong answer and one can only hope that the IBA Guidelines on Party Representation quickly fall into oblivion or, better, never are applied.

Geneva, August 2013

MICHAEL E. SCHNEIDER

[6] See www.arbitration-ch.org/pages/en/asa/asa-advocacy-prize/index.html

SAVE THE DATES

ASA Conference & General Meeting
4 October 2013 – *Confidential and Restricted Information in International Arbitration: Questions of Principle, Answers in Practice*, Berne

_____

ASA Below 40 Conference
8 November 2013 – Dolder Grand Hotel, Zurich

_____

ASA Annual Conference
31 January 2014 – 10 Years of Swiss Rules of International Arbitration, Basel

_____

For more information see www.arbitration-ch.org