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## **International Guidelines Aim to Ensure Fairness**

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When parties and counsel in international arbitration are from different jurisdictions and legal cultures, and are subject to different ethical rules and norms – there is a real risk that one side will be materially disadvantaged.

To address these issues, the International Bar Association last May adopted the *IBA Guidelines on Party Representation in International Arbitration*. While the guidelines are focused on international arbitration, those involved in domestic arbitration in Canada may find some them useful, particularly those which address matters not addressed by rules of professional conduct, bar association guidelines and jurisprudence.

The rules and norms that could apply to the representation of parties in international arbitration may include those of each counsel's home jurisdiction, the seat of the arbitration, and location in which the hearings take place.

Parties may adopt the guidelines in their arbitration agreement or at a preliminary stage of the arbitration, and an arbitral tribunal may use them as an aid where it determines that it has authority to rule on matters of party representation. Whether the tribunal has authority may depend on the parties' arbitration agreement and the law at the arbitration's seat.

### **Party representatives**

Guidelines 4 - 6 concern the identification of party representatives (counsel) and changes to representation.

Once the arbitral tribunal has been constituted, Guideline 5 provides that a party should not add a representative who would create a conflict of interest with an arbitrator. This is important because it protects the legitimate expectations of both parties that tribunal remain impartial. In determining a potential conflict, the tribunal may refer to the IBA guidelines on conflicts of interest in international arbitration.

### **Ex parte communication**

Guidelines 7 and 8 restrict *ex parte* communication with arbitrators, except regarding the appointment of prospective arbitrators.

In comments, the guidelines outline topics that are appropriate for discussion when assessing the credentials and willingness of a prospective arbitrator. These topics include the prospective arbitrator's publications, professional activities, law firm and a general discussion about the nature of the dispute.



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The comments provide that *ex parte* communications are permissible where the opposing party fails to participate or where necessary to obtain an urgent interim measure. The latter provision concerning interim measures is important in light of 2006 amendments to the UNCITRAL Model Law empowering tribunals to make *ex parte* preliminary orders (which amendments have been not yet been adopted in Canada but are recommended by the Uniform Law Conference of Canada for the proposed new *Uniform International Arbitration Act*).

### **Submission of evidence**

Guidelines 9 - 11 assert that party representatives should not knowingly make false submissions or introduce lay witnesses or experts who will deliver false evidence. If a party representative discovers he or she has submitted false evidence, the representative should take measures to correct the evidence, subject to confidentiality and privilege.

While substance of these guidelines will be familiar to Canadian counsel, they may not be the standards applicable in some jurisdictions.

### **Production of documents**

Guidelines 12 - 17 outline appropriate conduct during the document production process.

These guidelines supplement the IBA Rules on the Taking of Evidence in International Arbitration, articles 3 and 9, which define the scope of documents a party is obliged to disclose. The party representative must explain the party's responsibility to retain, collect and produce relevant documents, and conscientiously oversee the document production process to ensure that it is reasonable and proportionate.

There are two points to note. First, these obligations may be familiar to Canadian counsel but may not be the standards applicable in some jurisdictions. Second, the scope and manner of document production in international arbitration, and in particular under the IBA rules, differ from those under Canadian court rules.

### **Witnesses**

Guidelines 18 - 25 pertain to interactions with fact and expert witnesses. Guideline 24 confirms the right of party representatives to meet with witnesses in advance of testimony, so long as the discussion does not undermine the principle that witness testimony should reflect the witness's personal account of the relevant facts. Party representative may offer to pay reasonable expenses, compensation or fees to fact and expert witnesses.

### **Remedies for misconduct**

Guidelines 26 and 27 contain a non-exhaustive list of remedies for misconduct by party representatives, and outline factors that an arbitral tribunal should consider when determining the appropriate remedy. "Misconduct" includes breaches of the guidelines and other conduct contrary to a party representative's duties.

The remedies include: admonishing the party representative; drawing appropriate (adverse) inferences in assessing evidence or legal arguments; considering the misconduct in apportioning costs of the arbitration; indicating, if appropriate, how and in what amount the representative's misconduct led to a different apportionment of costs; and taking any other appropriate measure to preserve the proceedings' fairness and integrity.

The guidelines, available at [www.ibanet.org](http://www.ibanet.org), are a welcome addition to existing law, rules and 'soft law' to enhance the fairness and integrity of international arbitration proceedings.

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