

# How to train your arbitration counsel

The conduct of legal representatives in international arbitration is increasingly being regulated. **Ben Giaretta** and **Michael Weatherley** explain what this means for commercial parties.

## The ethical debate

The growth of international arbitration has led to increasing discussion in recent years about whether formal regulation should be put in place to govern the conduct of arbitrators and counsel, in the same manner as codes of ethics found in national courts. Regulation provides certainty for users, and a common standard for the diverse participants in arbitration across the globe.

Regulation was first applied to arbitrators, with the International Bar Association (IBA) issuing guidelines on arbitrators' potential conflicts of interest,<sup>1</sup> and various arbitration institutions issuing codes of ethics for arbitrators appointed under their rules.<sup>2</sup>

Attention has now turned to the regulation of counsel in arbitration. There has been some opposition. Unlike arbitrators, counsel are already regulated in the countries where they are qualified, and there is the potential for confusion between national bar rules and international standards imposed in arbitration. Also, many people are concerned that more rules and regulations will constrict arbitration rather than promote efficiency. Finally, questions have been raised as to how such standards would be policed, and in particular whether tribunals would have the power or standing to issue sanctions against counsel.

## Turning tide

However, the tide now seems to be turning in favour of formal regulation of counsel. The IBA last year issued Guidelines on Party Representation in International Arbitration (the IBA Guidelines).<sup>3</sup> Now, the London Court of International Arbitration (LCIA) has issued its own code of conduct for counsel. The new LCIA Rules were issued on 26 July 2014, and will come into force on 1 October 2014. They require parties to ensure that their legal representatives agree to comply with general conduct guidelines.<sup>4</sup>

It seems as if such codes of conduct are here to stay, and it is possible that other arbitration institutions will introduce similar provisions in future revisions of their rules. It is likely also that tribunals will increasingly be influenced – consciously or unconsciously – by the IBA Guidelines, even in arbitrations where no formal code of conduct applies.

## What is covered?

There are five main areas that the IBA Guidelines and the LCIA Rules cover:

- **Control by the tribunal over changes to counsel.** Once a tribunal is constituted, it can prevent a party changing its counsel if the change would create a conflict issue for any arbitrator.
- **Unilateral contact with arbitrators.** Arbitrators are already forbidden in their codes of conduct from communicating with one party alone. There is now an express prohibition against this for counsel as well. The only exception is when the tribunal is being appointed: for example, counsel may communicate with a party-nominated arbitrator when a presiding arbitrator is being selected.
- **False or misleading evidence.** Counsel must not knowingly make any false statement to the tribunal, present false evidence, or conceal or destroy any document that a party has been requested to produce. Under the IBA Guidelines, counsel must also advise clients to preserve relevant documents and to produce any requested documents that may come to light after the document production stage of an arbitration has been completed.
- **Obstructive behaviour.** Counsel must not engage in activities intended to obstruct the arbitration or jeopardise the finality of the award, such as repeated challenges to an arbitrator's appointment, or excessive requests for documents.
- **Preparation of witnesses.** The LCIA Rules permit counsel to interview witnesses; while the IBA Guidelines go further, and allow counsel to help witnesses and experts prepare for cross-examination – so long as the evidence that is given remains the witness's own account of the relevant facts, or the expert's own analysis or opinion.

It is important to note that these codes of conduct supplement, but do not replace, the rules that already apply to individual counsel in the jurisdictions where they are qualified. The rules in some countries set more detailed standards on how counsel must behave.

### How does it affect you?

If a code of conduct applies and is breached by your counsel, there are a number of ways that this may affect you, including:

- **Adverse inferences against your case.** Misconduct by counsel has always reflected badly on a party's arguments. Under the IBA Guidelines tribunals are now expressly empowered to draw adverse inferences against a party's case from this. Generally, even if no specific sanction is applied, misconduct by counsel is likely to lose you the sympathy of the tribunal.
- **Award of costs against you.** A tribunal might take into account counsel's misconduct when deciding on the costs of the arbitration, and it might order you to pay all or part of the costs, even if you are successful overall in the arbitration.
- **Exclusion of counsel from the arbitration.** While a written reprimand or caution is more likely, in extreme cases a tribunal might remove the counsel from the arbitration. This will mean that the party will have to engage new counsel, and the presentation of its case will be damaged.

### Practical tips

- Be aware of the impact of these codes of conduct on international arbitration, and how they develop, as such codes become more prevalent under institutional rules.
- Employ experienced international arbitration counsel who will comply with these codes – particularly in arbitrations under rules such as the LCIA Rules, where there are express sanctions against misconduct.
- Incorporate codes of conduct into engagement letters for counsel, so that you have recourse against them if your case suffers adversely or you incur costs as a result of misconduct (in addition to any recourse as a result of breach of applicable national standards).
- If there is no code of conduct in the rules, apply to the tribunal to incorporate the IBA Guidelines into the procedural order for the arbitration. This will ensure that there is a level playing-field on both sides and will equip the tribunal to deal with any misconduct.

#### Notes

- 1 The IBA Guidelines on Conflicts of Interest in International Arbitration are available [here](#).
- 2 The SIAC, for example, has a Code of Ethics for Arbitrators, which can be found [here](#).
- 3 The IBA Guidelines on Party Representation in International Arbitration are available [here](#). See our full briefing on this [here](#).
- 4 Article 18.5 of the new LCIA Arbitration Rules. The General Guidelines for the Parties' Legal Representatives are contained in an Annex. The LCIA Arbitration Rules are available [here](#).

### Further information

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