Singapore Institute of Arbitrators
Guidelines on Party-Representative Ethics
Consultation paper

I. Introduction

1. The Singapore Institute of Arbitrators ("**SIArb**") Working Group on Party-Representative Ethics ("**Working Group**") has completed its first draft of the Guidelines on Party-Representative Ethics ("**Guidelines**").

2. SIArb is pleased to announce the commencement of the public consultation process. SIArb invites SIArb members and all interested practitioners to review the draft Guidelines and send in their comments during the consultation period (which ends on **31 January 2018**). SIArb welcomes all suggestions on the contents of the draft Guidelines, as well as any other issues and/or areas not provided in the draft. The draft Guidelines are annexed to this Consultation Paper and are also available on the SIArb website. Comments may be sent to (secretariat@siarb.org.sg, subject "Guidelines on Party-Representative Ethics"), or in hard copy to Singapore Institute of Arbitrators, 6 Eu Tong Sen Street, #05-07, Singapore 059817, FAO Working Group on Party-Representative Ethics.

II. Methodology and General Comments

3. In designing the draft Guidelines, the Working Group has considered existing professional codes of conduct with respect to legal counsel's ethical obligations in court proceedings in various Asia-Pacific jurisdictions, existing rules for counsel's ethics for international arbitration (*i.e.* International Bar Association and the London Court of International Arbitration ethical rules) and other arbitral institutional rules generally, as well as relevant academic commentaries. The sources reviewed and relied on by the Working Group are listed in Appendix 1 (the Working Group has otherwise omitted citations to specific academic commentary in this note).

4. Based on this review, the Working Group has drafted Guidelines to largely reflect the minimum standard for ethical conduct as recognised between all or the majority of the different jurisdictions under study. The Working Group also considered the addition of certain rules which are reflective of widely accepted principles of common sense that would further add value to the international arbitration community.

5. The Working Group has generally taken the following approach with respect to the proposed Guidelines.

    a. The Working Group proposes that the Guidelines provide only guidance as to ethical conduct (based on clearly identified general principles) rather than a proscriptive set of mandatory rules. Moreover, it is the Working Group's view that international norms with respect to ethical conduct are still developing. As such, the Guidelines should be directed at identifying only a minimum standard of conduct for the time being, rather than seeking to provide exhaustive guidance or rules.

    b. The Guidelines are stated to apply to both legal counsel (including lawyers, solicitors, barristers, advocates and in-house counsel, amongst others) and non-legal counsel (including non-legal professionals) engaged by parties to represent them in international arbitration proceedings.

    c. In terms of substance, the Guidelines mirror in some areas the International Bar Association ("IBA") *Guidelines on Party Representation in International Arbitration* (25 May 2013) and the London Court of International Arbitration ("LCIA")'s *General Guidelines for the Parties' Legal Representatives*. It is intended that the Guidelines, where it can, both build on these existing guidelines and also complement them. Having said that, the Working Group notes certain objections raised by the Association Suisse de l'Arbitrage to the approach taken in the

IBA Guidelines in an open letter dated 4 April 2014, while agreeing with the LCIA approach of defining minimum standards.

d. There is clearly no consensus on if or how ethical norms with respect to international arbitration should be legally enforced. The Working Group has not therefore proposed any enforcement mechanism in the draft Guidelines. The Working Group considers that, while the Tribunal may have certain indirect powers to encourage good behavior, the regulation of counsel is largely a matter for the professional body or home jurisdiction to which a counsel belongs. The Working Group also notes that SIArb members and panel arbitrators are expected to keep to the highest standard of ethical conduct, which would include adherence to this Guidelines.

III. **Overview of Principles and Further Comments**

6. The draft Guidelines are based on the overarching principle that Party Representatives, in advising and representing their client, should at all times act with honesty, integrity and professionalism, both with respect to their client and the Tribunal. The Working Group considers that acting with honesty, integrity and professionalism, is a core value not only for lawyers (both at common law and civil law) in many jurisdictions, but also of other types of professionals. Further, if arbitration is to be an effective process for doing justice between disputant parties, it is self-evident that Party Representatives, as well as parties and arbitrators, approach arbitration with the same core values.

7. Under this overarching principle, the draft Guidelines have been structured to describe three specific principles for ethical conduct, and then provide more detailed guidance based on those principles. The principles and guidance contained in the draft Guidelines, and a summary of the Working Group's research and views which underlie these, are described below.

Principle 1:

A Party Representative should respect the integrity of arbitration proceedings, including the independence of the Tribunal, the Tribunal's members, and any Potential Arbitrator(s).

Guideline 1.1

Other than with the agreement of the Disputant Parties, and subject to such parties' arbitration agreement and any applicable laws or institutional rules, or otherwise in exceptional circumstances, a Party Representative should not communicate *ex parte* with the Tribunal, any of its members, or any Potential Arbitrator(s), save in the following circumstances:

i. with a Potential Arbitrator, solely for, and to the extent necessary, to provide the Potential Arbitrator with a brief summary of the dispute, to determine his or her experience or expertise, to confirm his or her availability and willingness to accept an appointment as an arbitrator, and / or to confirm whether the Potential Arbitrator has any potential conflict of interest;

ii. to the extent necessary, for the purposes of appointing the chairman or presiding arbitrator (or similar position); or

iii. where *ex parte* communications are permitted by applicable law.

8. *Ex parte* communication is when a party's representative communicates with a Tribunal, its members, or a Potential Arbitrator without the other party's presence or knowledge.

9. An independent and impartial Tribunal is indispensable to the effective and fair resolution of a dispute. Every arbitrator, whether nominated by a party or appointed independently, must carry out their duty for the benefit of both parties. "Independence" and "impartiality" are two distinct but interrelated concepts. An arbitrator may fail to be independent because of a relationship with one of the parties, which gives the appearance of a personal interest in the result of the arbitration. An arbitrator may fail to act impartially by favouring one of the parties, or by having pre-conceived prejudices about the issues in dispute. To ensure equality between parties, each party must also be given substantively equal opportunity to present their case and respond to any claims, defences, or arguments made against them in the arbitration.[1] For instance, most jurisdictions impose duties on lawyers to ensure a fair trial and proper procedure.[2]

10. *Ex parte* communications have the potential to conflict with both principles of independence and impartiality (amongst others) and, more generally, also raise conflict of interest concerns and prejudices the impartiality of the entire proceeding. Given this, the Working Group believes that both parties and Party Representative should generally not participate in *ex parte* communications with any arbitrators.

11. There are, however, exceptions to this general rule. For example, Article 8 of the 2013 IBA Guidelines provides for certain situations in which direct *ex parte* communication with an arbitrator would not be improper. One instance is where a Party Representative wishes to determine whether any potential conflicts of interest exist. Further, as the Honourable Chief Justice Menon of the Singapore Supreme

[1] UNCITRAL Model Law, Article 18.

[2] *See e.g.*, Basic Rules on The Duties of Practicing Attorneys (Japan), Article 74; Code of Conduct of Lawyers[律师执业行为规范] (China), Article 6 and; specific to this sub-principle, Law of the People's Republic of China on Lawyers [中华人民共和国律师法] (China), Article 40(8); Kod Etik Advokat (Indonesia), Pasal 7(c).

Court has noted, different legal cultures may have different views on *ex parte* communication.[3] For example, a 2013 study noted a significant divergence on the views of Swedish and US lawyers in relation to pre-appointment *ex parte* communications with arbitrators.[4] The Working Group therefore considers that, at present, it is generally accepted by the international arbitration community that communications with potential arbitrators should be permitted, but recognise that this is a developing area and pre-appointment e*x parte* communications ought to be conducted with care.

12. In some jurisdictions and under some rules, it is permissible for applications to be made to the courts without notice to the other side and *ex parte* in the case of urgency, or where conservatory measures are sought and notice to the other side would potentially defeat the purpose of such measures. At present, the Working Group does not believe that *ex parte* applications are widely accepted and so have not included such an exception in the draft Guidelines (although the draft Guidelines do permit *ex parte* communications in "exceptional circumstances" which could potentially cover such situations where the rules or law of the seat allow *ex parte* applications).

Guideline 1.2

A Party Representative shall not abuse the arbitral process or its procedures.

13. The Working Group considers that it is unethical for counsel to abuse or wrongfully use the arbitral process, including by means of the various types of conduct listed in the Commentary to Guideline 1.2 in the draft Guidelines. Abuse of process in arbitration will not only cause delay but it also tends to increase arbitration costs and fees, and undermine the development of arbitration as an alternative method of efficiently resolving disputes. The concept of abuse of process is difficult to pin down, and can often involve conduct which is not illegal, but can nonetheless cause significant prejudice to innocent counterparties and can undermine the fair and orderly resolution of disputes by international arbitration.

14. With respect to changes in counsel, it is understood that parties in some cases have attempted to change counsel in the middle of an arbitration or late in the proceedings in order to create an artificial conflict of interest with one or more of the arbitrators. The new counsel for the party will then initiate challenges to the arbitrators with the sole intention of causing unnecessary delay or disruption to the arbitral proceedings. The Working Group considers that it is also unethical for a Party Representative to advise their client to engage in or to knowingly facilitate such behavior.

Principle 2: A Party Representative should act honestly and with integrity in all of his or her dealings with the Tribunal and parties involved in the arbitration proceedings.

15. Most jurisdictions that have formal rules regulating the professional conduct of lawyers impose ethical obligations on them to act with honesty. This obligation cuts across both legal traditions – civil[5] and common law[6]. Certain jurisdictions even provide for the conduct of overseas work. One example is the

[3] Menon, Sundaresh, "Some Cautionary Notes for an Age of Opportunity" (Keynote Address, Chartered Institute of Arbitrators International Arbitration Conference Penang, 22 August 2013), 79 Arb. 393, 6.

[4] Elofsson, Niklas, "Ex Parte Interview of Party-Appointed Arbitrator Candidates: A study Based on the Views of Counsel and Arbitrators in Sweden and the United States" 30 Journal of International Arbitration 230.

[5] *See e.g.*, Articles of Association of Japan Federation of Bar Associations (Japan), Article 5; Code of Conduct for Lawyers 律师执业行为规范 (China), Article 6.

[6] *See e.g.*, Legal Profession (Professional Conduct) Rules 2015 (Singapore), Rule 5(2)(a); Australian Solicitors' Conduct Rules (Australia), Rules 4.1.2 and 19.1.

UK Solicitors Regulation Authority's Overseas Rules 2013, which set standards of conduct for solicitors who are practicing overseas.

Guideline 2.1

A Party Representative should not knowingly deceive or mislead the Tribunal.

In particular, a Party Representative shall not knowingly:

i. falsify or assist in falsifying documentary or witness evidence;

ii. persuade or assist a witness to give false evidence;

iii. assist any party to destroy any document or other evidence which is material and relevant to an issue in dispute or assist any party to breach any direction which a Tribunal has made to produce any documents or evidence; or

iv. submit any documentary or witness evidence, or make any submission in connection with such evidence, which is false.

16. A Party Representative's conduct should conform to the requirements of law. Guideline 2.1 imposes a restriction against false submissions of fact. Guideline 2.1 also restricts a Party Representative from encouraging, assisting, consenting, or condoning a witness to make false submissions. A Party Representative should immediately correct and rectify any false submissions made to the Tribunal. It is unethical for a Party Representative to knowingly submit false statements to the Tribunal; and the Party Representative should not create false evidence or pass-off erroneous information as true to the Tribunal. The concept of "knowledge" varies from jurisdiction to jurisdiction and according to the context, but this Guideline is referring to actual knowledge or at least willful blindness, rather than mere suspicion.

17. With respect to Guideline 2.1(ii), whether preparation of witnesses by legal counsel is allowed differs across legal traditions. Under US rules, it is common practice to rehearse proposed lines of direct or cross-examination in detail, provided the witness is not improperly influenced to adopt certain testimony. Under UK rules, coaching or rehearsals cannot be done, although some level of contact with witnesses is permitted including, for example, meetings to discuss the evidence or to enable witness statements or affidavits to be prepared.[7]

18. The line is unclear / untested in most civil law jurisdictions. Civil law systems have traditionally permit little if any contact with witnesses prior to trial. That said, a number of European civil law countries have now included express carve-outs to their national ethical codes to permit some contact and discussions between lawyers and witness in the context of international arbitration.

19. Notwithstanding the lack of consensus with respect to witness preparation generally, the Working Group considers that there is an overall consensus that, at a minimum, Party Representatives should not seek to, or assist in, the falsification of witness evidence. This is reflected, for example, in paragraphs 11 and 5 of the IBA and LCIA ethical guidelines, and the Working Committee has proposed making the same point in Guideline 2.1(ii).

20. With respect to Guideline 2.1(iii), the Working Group has considered the extent to which the draft Guidelines should impose ethical guidelines with respect to document production. Civil law codes of conduct, where document disclosure is largely alien to the adversary process, have no rules governing

[7] Rudin, Brad& Hutchings, Betsy, "England & U.S.: Contrasts in Witness Preparation Rules" (New York Legal Ethics Reporter, March 2006); Asborno, Erin, "Ethical Preparation of Witnesses for Deposition and Trial" (ABA Section of Litigation: Trial Practice, 13 December 2011).

a lawyer's professional obligation in terms of ensuring that documents required to be disclosed are searched for diligently and, to the extent found, produced. Canada, on the other hand, requires lawyers to explain to the client the necessity of making full disclosure and to assist the client in doing so.[8] US federal court practice requires lawyers to make a reasonable inquiry and certify that disclosure is complete and correct.[9]

21. The Working Group considers that, in an international arbitration context, there is consensus that parties and their representatives should not deliberately destroy evidence or assist in the breach of any direction by the Tribunal on document production. This position is reflected in the draft Guidelines. But there is no clear consensus as to whether or to what extent any document production process must be supervised by legal counsel (e.g. whether a party can themselves conduct searches for documents, and make initial decisions as to whether any document is "relevant").

22. There is also a lack of clarity around legal privilege and questions of ethical duties, not the least because not all jurisdictions recognise the concept of "legal privilege" and, where they do, the scope of that privilege may differ considerably. For example, it is unclear whether in an international arbitration context a party and its representatives, if they withhold a document for privilege, must indicate this to the Tribunal or the other side. It is also unclear whether, if a party inadvertently discloses an obviously privilege document to the other side, can the other side and its representatives make use of that document or should instead not review the document further and notify the disclosing party of its error.

23. With respect to Guideline 2.1(iv), jurisdictions vary in whether it is ethically permissible to make submissions to a Tribunal which counsel or other representatives know have no basis in fact or are purely speculative in nature. US, UK and German rules do not allow lawyers to make a statement to the Tribunal as to what the facts are or will be demonstrated to be if such statement is not supported by any known evidence.[10] This conduct, however, is allowed in Mexico and Saudi Arabia. The Working Group believe that, in an arbitration context, Party Representatives should not knowingly submit any documentary or witness evidence, or make any submission in connection with such evidence, which is false. This would be to knowingly permit a falsehood to be perpetuated.

Guideline 2.2

A Party Representative should not knowingly make any false submission of law to the Tribunal.

24. A Party Representative's conduct should conform to the requirements of law. It is unethical for a Party Representative to knowingly submit false legal statements and authorities to mislead a Tribunal as described in the Commentary to Guideline 2.2. This principle is one of the fundamental duties that a lawyer has to the adjudicator, and can be found in most jurisdictions, for example in China, India,[11] Singapore,[12] Thailand,[13] and others.

25. It is unclear whether legal counsel (or, indeed, non-legal representatives) have any obligation to bring pertinent adverse legal authority to the attention of the Tribunal if the opposing party or their representatives fail to do so. In the US, UK and other common law jurisdictions, a lawyer is required

8 Code of Professional Conduct (Canada), Chapter IX.

9 United States Federal Rules of Civil Procedure, Rule 26(g).

10 *See* American Bar Association Model Rules of Professional Conduct (USA), Rule 3.1; Solicitors' Code of Conduct (England & Wales), Rule 11.01; The Bar Standards Board Handbook (England & Wales), Rule C9.1.b.

11 Standards of Professional Conduct and Etiquette to be Observed by Advocates (India), Article 3.

12 Rule 9(2)(f) of the Legal Profession (Professional Conduct) Rules 2015 (Singapore).

13 Regulation of the Law Society of Thailand on Lawyer's Ethics B.E. 2529 (AD 1986) (Thailand), Article 7.

to do so in court proceedings, and there is an argument that this duty may extend to a Tribunal.[14] Civil law jurisdictions do not have the same rule. The Working Group does not consider that there is a clear practice on this issue at present.

Guideline 2.3

Where a Party Representative becomes aware that his or her client or a witness for his or her client will give or has given false evidence to the Tribunal, the Party Representative (after advising his or her client of the situation and the need to take appropriate remedial measures, and consistent with any other applicable ethical or legal duties):

i. may cease to act for the client; or

ii. if he or she continues to act for the client, must conduct the case in a manner that does not perpetuate the falsehood.

26. A Party Representative is expected to assist in the just, fair, and efficient resolution of a case. As noted in the Commentary to Guideline 2.3, while a Party Representative has the duty to argue the case of his client vigorously, a Party Representative must employ only fair and honest means, and to act within legal bounds to attain the lawful objectives of his client. A Party Representative must not knowingly assist in the perpetuation of a falsehood before the Tribunal.

Principle 3: A Party Representative should treat the Tribunal and other parties with respect and act with the highest degree of professionalism.

27. Most jurisdictions hold the legal profession in high regard, and often provide for rules protecting the dignity of the profession by requiring lawyers to act respectfully and in a professional manner. For example, the Indonesian Code of Ethics for Advocates requires lawyers to "be respectful of others" and to "defend the rights and honour of the profession."[15] In a similar vein the Australian Solicitors' Conduct Rules require lawyers to be "courteous in all dealings in the course of legal practice."[16] The Singapore International Commercial Court requires every registered foreign lawyer appearing before it to be "always courteous to the Court and to every other person involved in those proceedings."[17]

[14] For instance, USA, Model Rules of Professional Conduct, Rule 3.3; Australia, Model Rules of Professional Conduct & Practice, Rules 14.6, 14.8; Canada, Code of Professional Conduct, Chapter IX.

[15] Kode Etik Advokat (Indonesia), Pasal 3(h).

[16] Australian Solicitors' Conduct Rules, Rule 4.1.2.

[17] Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014, paragraph 14(2) Schedule A.

Guideline 3.1

A Party Representative should not engage in threatening or abusive conduct, and shall conduct himself or herself with courtesy towards the Tribunal, its members, opposing Party Representatives, parties, and witnesses.

28. As noted in the Commentary to Guideline 3.1, Party Representatives must maintain order and decorum in the arbitral proceedings, remain dignified and courteous to the Tribunal, opposing counsel, parties, and witnesses. It is unethical for Party Representatives, in his professional dealings, act or use language which is abusive, offensive, or otherwise improper.

Guideline 3.2

A Party Representative should not directly correspond with or contact any other Disputant Party, or any expert engaged by the other Party, where the Party Representative is aware that the Disputant Party has appointed a representative (in which case all communications relevant to the arbitration proceedings with the Disputant Party should be directed to that Disputant Party's representative), unless this has otherwise been agreed by the Disputant Parties.

29. Guideline 3.2 deals with Party Representatives attempting to communicate information or opinions about an arbitral proceeding directly to the other party involved. Such communications are allowed for legal counsel in some jurisdictions and banned in others. Some jurisdictions, like Singapore, disallow such contact by legal counsel on the ground that it is discourteous.[18] Others legal systems, like China where direct contact with represented parties is not unusual, are silent on the issue altogether.

30. The Working Group considers that, in the context of international arbitration, such conduct is unethical where a Party Representative knows that the other party is represented, that the representative most likely would want to handle all forms of information that is presented to their client regarding the specifics of the arbitral proceeding, and the representative would have an interest in monitoring the communications that the opposing Party Representative has with their client. The exception is when the counterparty consents to such communication.

Guideline 3.3

A Party Representative must not, except with the leave of the Tribunal, interview or discuss with a witness whom the Party Representative has called in proceedings before the Tribunal, the evidence given or to be given by that witness or any other witness, at any time from the cross- examination of that witness until he or she is released by the Tribunal.

31. It is a rule in many common law jurisdictions that a witness should not discuss his or her evidence with anyone once cross- examination has begun until release by the Tribunal, including during any breaks in their cross-examination and / or re-examination. This is to avoid improper influence of the witness once cross examination has started. It is common practice for Tribunals to similarly warn such witnesses not discuss their evidence. This practice is reflected in the above guideline.

[18] The Law Society of Singapore v Thirumurthy Ayernaar Pambayan [2014] SGDT 11 at 28.

Appendix A: Reference List

Articles

ASA (4 April 2014), *Comments and Recommendations by the Board of the Swiss Arbitration Association (ASA) on the IBA Guidelines on Party Representation in International Arbitration*

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