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Levelling the playing field? – IBA Guidelines on Party Representation in International Arbitration

On 25 May 2013, the Arbitration Committee of the International Bar Association (IBA) adopted the IBA Guidelines on Party Representation in International Arbitration (the Guidelines).

The Guidelines seek to address a problem perhaps unique to international arbitration, where the professional and ethical rules applicable to the legal representatives involved may differ significantly from those in the seat of the arbitration and as between the lawyers themselves.

The problem was identified as far back as 2001: *"To the question: What are the professional rules applicable to an Indian lawyer in a Hong Kong arbitration between a Bahraini claimant and a Japanese defendant represented by NY lawyers, the answer is no more obvious than it would be in London, Paris, Geneva and Stockholm. There is no clear answer"*[1].

The issue is not only a concern for the lawyers involved, but for clients as well. Where, for example, a lawyer subject to higher standards of ethical conduct is constrained in a particular way and his opponent is not, this can manifest as a material disadvantage to the client. The imbalance between the parties can potentially offend the fundamental principle in arbitration of equal treatment of the parties[2]. In certain circumstances, this can jeopardise the integrity of the entire arbitration process and lead to an award being overturned on appeal.

Examples of conflicting ethical standards that can result in an imbalance are:

1. Communication with witnesses – lawyers from common law jurisdictions may communicate with witnesses before they give evidence; in other jurisdictions this is often forbidden.
2. Preparing witnesses for oral evidence – US lawyers are permitted to do more to prepare a witness for examination than their counterparts practising in England and Wales.
3. Employees – contacting employees of an opposing party to give evidence is permitted as a matter of course for English lawyers, but is not permitted in the US.

1 V.V. Veeder QC, Goff Lecture 2001.

2 Enshrined in Article 18 of the Model Law and Article 15 of the UNCITRAL Rules and many other institutional rules.

4. Evidence and authority – where evidence is on record or an authority exists which is material to an issue that the Tribunal must determine, differing standards apply as to whether a lawyer is obliged to disclose it.
5. Disclosure – lawyers from common law jurisdictions are generally required to conduct a reasonably diligent search for documents which a Tribunal has ordered to be produced. This does not apply to lawyers from some civil law jurisdictions.
6. Cogent evidence to found an allegation of fraud or criminal conduct – a higher standard is required under English rules than may apply in other jurisdictions.

The extent to which these differences prevent lawyers from acting effectively is evidenced by a 2010 IBA survey, which showed *"a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration"*[3].

Prior to the advent of the Guidelines, Tribunals tended to muddle their way through these conflicts by applying fairly nebulous principles such as the overriding need to safeguard the integrity of the arbitral process. This did not make for a uniform and transparent solution[4].

IBA Guidelines

The Guidelines seek to "level the playing field" by allowing the parties to adopt a minimum set of standards that will apply regardless of the home jurisdiction of the lawyers involved, the seat of the arbitration or any other competing rules.

The Guidelines do not displace mandatory laws or professional rules. Rather, they fill the gaps where such rules apply for one party's representative but not the other.

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Where breaches of the Guidelines occur, the Tribunal can impose remedies on the parties, not their counsel. Remedies could include cost consequences and drawing appropriate inferences when considering evidence or submissions[5].

To avoid one party from obstructing the application of the Guidelines, a Tribunal can, after consultation with the parties, determine that they ought to apply to ensure the integrity and fairness of the proceedings.

Not every ethical disparity between the jurisdictions is addressed and some of the Guidelines mirror professional rules that are in any event commonly found in the rules of most of the practitioners operating in this field.

The key Guidelines are:

1. Prohibitions against acting when the Arbitration Tribunal is already constituted and there is a conflict of interest between a newly appointed representative and an existing member of the Tribunal (Guidelines 4–6).
2. Not engaging in ex-parte communications with an Arbitrator (except to determine the Arbitrator's availability, expertise, conflicts of interest and other limited circumstances) (Guidelines 7 and 8).
3. Prohibitions against making a knowingly false statement of fact to the Tribunal, including the presenting of evidence by a lay or expert witness that the lawyer knows or later discovers to be false (Guidelines 9–11).
4. A duty on legal representatives to assist their client in taking objectively reasonable steps to preserve and search for and produce documents which a party has an obligation to disclose (Guidelines 12-17).
5. The ability to meet and interact with witnesses and experts to discuss and prepare their testimony (Guidelines 18-25).

This last provision is considered in more detail below by way of illustration of a potential gap in the Guidelines.

3 Preamble to IBA Guidelines

4 Doak Bishop's address at the 2010 ICCA conference in Brazil and his reference to three ICSID cases where this was applied.

5 Guidelines 26 and 27

Witness interaction

The ability of legal counsel to engage with witnesses prior to a hearing can be a fundamental part of trial preparation. Common law jurisdictions scrupulously ensure against contact with a witness that could cause them to tailor their evidence.

In England, the Bar's Code of Conduct states (para. 705): *"A barrister must not ...rehearse, practise or coach a witness in relation to his evidence."*

Bar Council Rules in Australia contain similar provisions which forbid the coaching or encouraging of the witness to give evidence different from the evidence which the witness believes to be true[6].

In contrast, the American approach to witness preparation states that: *"...[a] lawyer may invite the witness to provide truthful testimony favourable to the lawyer's client.*[7]"

Guideline 24 permits legal representatives to interact with witnesses and experts. This right is balanced by provisions aimed at preserving the integrity of the evidence. Guideline 19, for example, requires the legal representative to inform a witness of their right to seek their own legal representation and to discontinue the interaction if the witness so chooses. Guidelines 20 and 21 require any witness statement or expert report to reflect the witness or expert's own account or opinions.

Guideline 24 is a broad right that allows for interactions *"in order to discuss and prepare ... prospective testimony"*. Clearly this would conflict with the English Bar's Code of Conduct to the extent that it permits counsel to rehearse, practise or coach a witness in relation to his evidence.

The commentary to the Guidelines states that if a lawyer is subject to a higher standard than that prescribed in the Guidelines, the lawyer may address the situation with the other side and the Tribunal.

Should the Tribunal decide to order that the higher standard should apply so as to maintain the integrity and fairness of the proceedings, it has no express power to do so. In this respect, the Guidelines are arguably incomplete.

Even if such a power were provided for, it would result in a Tribunal ordering that all parties be subject to the same disadvantage (e.g. no contact with a witness or no coaching). As one writer notes, it is not entirely satisfactory to restrict a party from conducting itself in a particular way simply because the other side elected to engage counsel subject to more stringent rules[8].

One proposed solution is to adopt uniform home jurisdiction rules for lawyers acting in international arbitration, or to allow the ethical rules of the home jurisdiction to exclude lawyers involved in international arbitration, which is similar to the French or Swiss codes.

Achieving uniformity across every jurisdiction may, of course, prove to be impossible but proposals are being considered for a default set of ethical rules to apply to practitioners. The proposal is that the ethical rules specified by the Tribunal would apply to the practitioner, failing which the rules of the practitioner's home jurisdiction would apply[9].

It seems possible that the jurisdictions providing the most frequent users of international arbitration (including the US, UK, EU, HK and Singapore) would be able to agree on such a default set of home rules.

Conclusions

The Guidelines are non-binding unless agreed to by the parties or a Tribunal determines that they ought to apply in order to ensue the integrity and fairness of the proceedings. They offer a practical compromise between a mandatory and a voluntary set of standards.

The Guidelines are not a panacea, and understandably do not attempt to address every potential ethical conflict or problem which arises. However, by empowering Tribunals to "level the playing field" in a transparent way, they should give users of the arbitral process more confidence.

However, the Guidelines do have two key potential shortcomings:

1. They do not address cases where higher ethical rules apply to legal representatives than those set out in the Guidelines. The proposed solution of a uniform set of home rules would resolve this. It is ambitious but should not be impossible to implement.
2. In the event of breach, the Tribunal has limited power to penalise a party as the focus is upon the client rather than its legal representatives.

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6 Rule 44 and 45 of Victorian Bar Council Rules. The Rules do, however, permit the questioning and testing in conference of the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence.

7 Restatement (Third) of the Law Governing Lawyers, §116, Comment b, American Law Institute, 2001 at 206.

8 James Freeman, PLC Arbitration – England & Wales "Ethical Issues for Counsel in International Arbitration".

9 Drafted by Professors Laurel Terry and Catherine Rogers

Anti-suit injunctions receive support from UK Supreme Court

The anti-suit injunction is a useful tool for ensuring that parties honour their arbitration agreements. In the recent UK Supreme Court case of *Ust-Kamenogorsk Hydropower Plant JSA v AES Ust-Kamenogorsk Hydropower Plant LLP* (12 June 2013), an ambitious attack was made on the English Courts' jurisdiction to grant anti-suit injunctions, on the basis that to do so is contrary to the terms, scheme, philosophy and parliamentary intention of the English Arbitration Act 1996 (the Act). The Supreme Court rebutted this attack. It also provided a helpful analysis of the relevant provisions of the Act.

Anti-suit injunctions

There can be a number of reasons why a party fails to comply with an agreement to arbitrate. These may be strategic: the prospects of success may be better in front of a home court. Or they may be less calculating: a party may consider that the dispute is not covered by the arbitration clause, or may not be directly party to the contract (for example where an insurer has paid out an insured's claim and pursues rights of subrogation against the insured's counterparty).

The New York Convention provides a remedy for this in Article II: each contracting State is to recognise arbitration agreements and its courts are obliged, if requested by one of the parties, to refer a dispute to arbitration unless it finds the agreement is null and void, inoperative or incapable of being performed. This is enacted into English law by Section 9 of the Act.

If a contract contains an arbitration clause providing for arbitration with its seat in England and one of the parties brings proceedings elsewhere, the other party should be confident that the courts in question will enforce the arbitration clause. However, they sometimes decline so to do.

To combat this, the English courts have for over a century exercised their general power to grant an anti-suit injunction under what is now section 37 of the Senior Courts Act 1981 (SCA). Failure to comply with such an order is a contempt of court, the penalties for which include a fine, sequestration of assets and committal to prison. Since The *Angelic Grace* [1995] 1 Lloyd's Rep 87, it has been held that the courts should not feel diffident about granting such injunctions, if sought promptly, *"on the simple and clear ground that the defendant has promised not to bring [the proceedings]"*.

To the dismay of the international arbitration community (in London at least), the European Court of Justice significantly restricted the scope of this remedy in the *Front Comor,* [2009] AC 1138, by holding that it was incompatible with Council Regulation (EC) No. 44/2001. Anti-suit injunctions are now not available where proceedings are brought in breach of an arbitration clause in an EU or original EFTA country.

The *Ust-Kamenogorsk* Decision

The Respondent (AESUK) had a concession to operate a hydroelectric plant in Kazakhstan. The Appellant (JSC) was the owner of the plant and grantor of the concession. The contract contained a London arbitration clause. JSC claimed to be entitled to certain information from AESUK and brought proceedings in Kazakhstan. The Kazakh Court dismissed AESUK's application to stay the proceedings. AESUK therefore sought and obtained an anti-suit injunction in the English Court but did not commence any arbitration proceedings itself. JSC's appeal to the Court of Appeal was dismissed and JSC appealed to the Supreme Court.

JSC's submissions

JSC argued that the Courts' general power under SCA Section 37 had been superseded by the Act, or should no longer be exercised. It argued that such relief is now only available where arbitral proceedings are on foot, and only under the terms of the Act. The following provisions of the Act were potentially relevant:

- Section 30: a tribunal may rule on its own jurisdiction (subject to the possibility of appeal to or review by the Court).
- Section 32: the Court may determine any question as to the substantive jurisdiction of the tribunal.
- Section 44: the Court has the same powers as in relation to legal proceedings in a number of matters, including the granting of an interim injunction.
- Section 67: parties to arbitral proceedings may apply to the Court to challenge the award of a tribunal as to its substantive jurisdiction
- Section 72: a person who takes no part in the proceedings may apply to the Court questioning matters concerning the jurisdiction of the tribunal.

JSC submitted that these provisions constituted *"a complete and workable set of rules for the determination of jurisdictional issues"*. AESUK's remedy therefore was to appoint a tribunal so that the arbitrators could rule on their jurisdiction under Section 30. Their ruling could be tested under Sections 32, 67 and/or 72 and the Court could in the meantime be asked to give interim relief under Section 44.

The decision

The Supreme Court rejected these submissions. Its reasoning, in outline, was as follows:

1. An agreement to arbitrate disputes has positive and negative aspects. Positively, the parties undertake to seek any relief in arbitration. Negatively, they agree not to seek relief in any other forum. This negative obligation is not merely ancillary to current or intended arbitral proceedings and does not depend on them being on foot or proposed.

It would have been a major diminution of the protection afforded by English law to parties entering into arbitration agreements if JSC had succeeded.

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2. Before the Act, if the negative obligation was breached by the commencement of proceedings elsewhere, the aggrieved party was entitled to an anti-suit injunction. Jurisdiction to grant such an injunction derived from SCA Section 37 and did not depend upon there being an actual arbitration.
3. The Act is not an exhaustive code. This was clear from the Report on Arbitration of the Departmental Advisory Committee 1996 and from Section 81 of the Act itself.
4. Sections 30, 32, 44 and 72 of the Act are inapplicable because they relate to circumstances where an arbitration is on foot or contemplated. They have no bearing on whether Section 37 empowers the Court to restrain foreign proceedings in the light of an arbitration agreement under which neither party wishes to commence an arbitration.
5. The detailed provisions of Section 44 of the Act, in particular, are the successor of Section 12(6) of the Arbitration Act 1950. They relate to matters which could require the Court's intervention during actual or proposed arbitral proceedings. They are for the purposes of and in relation to arbitration proceedings. They are different in character from an order to enforce the right not to have to face foreign proceedings, which may be required where there are no arbitration proceedings.
6. The power to make anti-suit injunctions derives from Section 37 of the SCA and is not abrogated or made ineffective by the Act. Section 37 of the SCA and the power to grant a stay under section 9 of the Act are opposite sides of the same coin.

The Supreme Court made some comments on the exercise of the power to grant anti-suit injunctions. Where arbitration is on foot or proposed, it should be exercised sensitively and with all due regard to the scheme and terms of the Act. The Court could grant an interim (rather than a final) injunction pending the outcome of current proposed arbitration proceedings. In certain circumstances it might be appropriate to leave the foreign court to recognise and enforce the parties' agreement on forum (in the first instance at least).

Turning to Section 1(c) of the Act, which provides that *"in matters governed by... Part [1 of the Act] the court should not intervene except as provided by this Part",* the Supreme Court noted that the use of the word "should" rather than "shall" was a deliberate departure from the UNCITRAL Model Law. Whilst the Court should be cautious about intervening, there was no absolute prohibition on it doing so. The principal focus of Part 1, however, is on the commencement, conduct, consequences and court powers with regard to an actual or proposed arbitration and there was no such arbitration in this case.

The Supreme Court specifically noted that the order in this case was a final one. The first instance Court and the Court of Appeal had therefore also made a final decision that there was a binding arbitration agreement. This decision created an issue estoppel in favour of AESUK. It would not be possible for JSC to challenge the jurisdiction of the tribunal before the arbitrators under Sections 30, 32, 67 and 72 of the Act.

Conclusion

The Supreme Court's decision is welcome, although few will have been surprised by it. One reason for passing the Act was that the previous regime had been criticised for allowing too much court interference into a dispute resolution procedure subject to party autonomy. JSC's arguments were effectively to use the policy in favour of international arbitration in London to frustrate an arbitration clause, an irony which the Supreme Court noted. It would have been a major diminution of the protection afforded by English law to parties entering into arbitration agreements if JSC had succeeded.

The Supreme Court's clarification that Sections 30, 32, 67 and (perhaps particularly) 44 of the Act relate to the conduct of arbitrations which are on foot or contemplated, with Section 44 being mainly concerned with procedural rights in the arbitration, is also helpful.

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The Black Hole in Australian arbitration law

Significant changes to arbitration legislation in Australia since 2010 could have unexpected consequences for parties to international arbitration with Australian arbitration clauses in their contracts.

Domestic arbitration in Australia has been transformed by the new Commercial Arbitration Acts (CAAs)[1]. Essentially, they bring Australia's domestic arbitration laws in line with its international arbitration laws. These form part of Australia's federal legislation and are set out in the International Arbitration Act 1974 (Commonwealth) (IAA). The IAA was itself amended in 2010, to promote Australia as a major centre for international dispute resolution.

Under the old IAA, parties had the choice of opting out of the UNCITRAL Model Law, allowing them to have their disputes referred to arbitration under the applicable state CAA. Since the amended IAA came into force on 6 July 2010, the choice to opt out has no longer been available[2]. International arbitration agreements made after this date are unlikely to be affected.

One of the key changes to the CAAs is that they now apply exclusively to domestic arbitrations[3]. An arbitration is "domestic" where the parties have their places of business in Australia, they have agreed that any dispute will be settled by arbitration, and it is not an arbitration to which the UNCITRAL Model Law applies. On the other hand, an arbitration is "international" where the parties to an arbitration agreement have their places of business in different countries[4]. This means that the new CAAs cannot apply to arbitrations where one of the parties does not have its place of business in Australia.

If arbitration was commenced after 6 July 2010 but before the relevant new CAA had come into force, it is questionable whether the opt out would be valid.

The Black Hole

The effect of the changes to the CAAs is to create what has recently been described as a "Black Hole"[5].

Consider a scenario where parties (one of whom does not have its place of business in Australia) entered into an arbitration agreement before 6 July 2010 and opted out of the UNCITRAL Model Law by selecting the CAA of a state in which a new CAA is now in force.

What happens if a dispute arises between the parties? If arbitration was commenced before 6 July 2010, the arbitration agreement would remain valid and the relevant CAA would apply.

However, if arbitration was commenced after 6 July 2010, but before the relevant new CAA had come into force, it is questionable whether the opt out would be valid. The Court of Appeal of Western Australia considered this issue in the leading case of *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*[6], in which HFW acted for Rizhao Steel.

If the new CAA was already in force when arbitration commenced, it appears that no arbitration statute would be applicable.

Some parties have tried to deal with this scenario by including in their contracts wording to allow for any future amendments to the relevant CAA. However, since the new CAAs apply exclusively to domestic arbitration, this may not be sufficient.

Clauses referring to repealed legislation

If parties have agreements with arbitration clauses containing provisions which conflict with the requirements laid down in statute, or the clauses refer to repealed legislation, they need to act.

Significant changes to arbitration legislation in Australia since 2010 could have unexpected consequences for parties to international arbitration with Australian arbitration clauses in their contracts.

1 Commencement dates: New South Wales (1 October 2010), Victoria (17 November 2011). South Australia (1 January 2012), Northern Territory (1 August 2012), Queensland (17 May 2013), and Western Australia (7 August 2013). No bill has been introduced to the Parliament of the Australian Capital Territory, however this is expected in due course.

2 Section 21 IAA: *"if the Model Law applies to an arbitration the law of a State or Territory relating to arbitration does not apply to that arbitration"*.

3 E.g. Section 1 (1) Commercial Arbitration Act 2012 (WA).

4 Article 1, "*UNCITRAL Model Law on International Commercial Arbitration*" (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) and Section 16(2) IAA.

5 A. Mochino and L. Nottage, "*Blowing hot and cold on the International Arbitration Act*", LSJ 56, May 2013.

6 (2012) 262 FLR 1.

This is a major issue facing parties who, perhaps pressed for time, choose to cut and paste stock arbitration clauses into their contracts.

Consider the example of a contract between a Western Australian company and an international company, where the parties selected the CAA 1985 (WA) "or any statutory modification," with certain reservations as to its application, such as providing leave for appeal to the Supreme Court of Western Australia in a wide range of circumstances.

The new CAA came into force in Western Australia on 7 August 2013 (and has repealed the old CAA). A number of problems could now arise for the parties in the above example. First, despite the specific reference to "any statutory modification," the CAA cannot now apply to international arbitrations. Second, even if the new CAA were to apply, the specific reservations as to its application would be questionable. Under the new CAA, there is an extremely limited appeal from an arbitration award, regardless of any separate agreement by the parties. Third, and most importantly, if a dispute arises the parties would be left in a difficult position as to how to agree a method of resolution. This would be a real disadvantage for the claimant.

Parties would also be well advised to carry out an audit of all existing contracts subject to Australian arbitration laws to check whether they may be affected by the legislative changes.

How can parties protect themselves?

First, parties should resist the temptation to cut and paste their stock arbitration clauses into new contracts. At the very least, they should check the wording of their clauses and confirm that they take account of the new CAAs.

Parties would also be well advised to carry out an audit of all existing contracts subject to Australian arbitration laws to check whether they may be affected by the legislative changes. If they are, consideration should be given to entering into a contractual addendum, so that all parties can be certain that if a dispute were to arise, the matter would still be capable of referral to arbitration.

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Conferences & Events

International Arbitration Workshop
HFW Perth
30 October 2013
Presenting: Nick Longley, Julian Sher, Chris Lockwood

International Arbitration Seminar
HFW London
January 2014

For more information about either of these events, please contact events@hfw.com

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