A Guide to IBA Rules & Guidelines used in International Arbitrations

Understanding the IBA

1. What is the IBA?

The International Bar Association (the "**IBA**") is the foremost organisation for international legal practitioners, bar associations and law societies. Established in 1947, shortly after the creation of the United Nations, the IBA was born out of a conviction that an organisation made up of the world's bar associations could contribute to global stability and peace through the administration of Justice.

2. What is the Arbitration Committee of the IBA?

The Arbitration Committee sits within the Legal Practice Division of the IBA. It seeks to share information about international arbitration, promote its use as a method of resolving disputes and improve its effectiveness through the publication of various Rules and Guidelines.

3. What Rules and Guidelines are Published by the IBA?

The IBA publishes various Rules and Guidelines for use in international arbitration. This Guide focuses on the IBA's: (a) Guidelines on Conflicts of Interest; (b) Guidelines on Party Representation; and (c) Rules on the Taking of Evidence, all in the context of international arbitration.

IBA Guidelines on Conflicts of Interest

4. What are the IBA Guidelines on Conflicts of Interest?

The IBA Guidelines on Conflicts of Interest provide guidance to parties, arbitration institutions, Tribunals and the Courts in assessing the impartiality and independence of arbitrators appointed to determine a dispute, thereby protecting the independence and fairness of the arbitration procedure.

5. Why are the IBA Guidelines on Conflicts of Interest important?

The IBA Guidelines on Conflicts of Interest are important because there is a tension between: (a) the parties' right to select an arbitrator of his own choice; (b) the parties' right to a fair hearing; (c) the parties' right to disclosure of circumstances that may question an arbitrator's impartiality or independence; (d) the need to avoid unnecessary challenges to arbitral appointments that delay the proceedings; (e) the need for an

enforceable award that is untainted by bias; and (f) the need to promote arbitration as an effective and fair dispute resolution procedure.

6. How are the IBA Guidelines on Conflicts of Interest applied?

The IBA Guidelines on Conflicts of Interest use a traffic light system of red, amber and green lists. The three lists set out factual circumstances that, from the point of view of a reasonable third person, do (red), may (amber) and do not (green) give rise to justifiable doubts as to the arbitrator's impartiality or independence to determine the dispute. Particularly, that the arbitrator may be influenced by factors other than the merits of the case in determining the dispute and publishing the award.

7. What Conflicts of Interest may arise?

Facts and circumstances within the red or green lists rarely arise, because the arbitrator, the parties and their counsel are aware that the facts do or do not give rise to justifiable doubts as to the arbitrator's impartiality. Facts and circumstances within the amber list are less clear cut and arise more frequently, such as: (a) enmity exists between an arbitrator and counsel appearing in the arbitration; (b) the arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel or law firm; and (c) the arbitrator and counsel for one of the parties have acted together within the past three years as co-counsel.

8. What happens if a Conflict of Interest arises?

A party may challenge the appointment of an arbitrator. Please see our Guide to Arbitration that sets out how a party may challenge an arbitrator's appointment and how that challenge is determined.

IBA Guidelines on Party Representation

9. What are the IBA Guidelines on Party Representation?

The IBA Guidelines on Party Representation provide guidance as to counsel conduct. Particularly to ensure that party representatives act with integrity and honesty and do not engage in activities designed to produce unnecessary delay and expense or obstruct the arbitration proceedings whilst maintaining the flexibility that is inherent within, and an advantage of, international arbitration.

10. Why are the IBA Guidelines on Party Representation important?

The IBA Guidelines on Party Representation are important because, unlike domestic judicial settings that apply a single set of professional conduct rules, counsel in

international arbitration may be subject to a diverse and potentially conflicting set of rules applied within counsel's home jurisdiction, the seat of the arbitration and the place where hearings physically take place. The possibility that different sets of rules may apply to govern the conduct of counsel acting in an international arbitration can lead to confusion, friction, delay and a loss of confidence in the fairness of the arbitration procedure.

11. How are the IBA Guidelines on Party Representation applied?

The IBA Guidelines on Party Representation are guidelines rather than rules, reflecting the contractual nature of the Guidelines. The parties may adopt the Guidelines, in whole or part, within the arbitration agreement or at the start of the arbitration. The Tribunal may also apply the Guidelines, subject to any applicable mandatory rules, if they determine that they have the authority to do so.

12. What points of Party Representation are addressed?

The IBA Guidelines on Party Representation restrain counsel from communicating with arbitrators ex parte and making knowingly false submissions to the Tribunal. They direct counsel to preserve and produce relevant documents and refrain from making unnecessary or burdensome document requests. They permit counsel to assist factual and expert witnesses in the preparation of their evidence whilst ensuring that the evidence reflects the witness' own account or expert opinion.

13. What are the remedies for misconduct?

The Tribunal may admonish the party representative and/or draw an adverse inference in assessing the evidence or legal submissions and/or penalise the counsel's instructing party in costs. In determining the remedy, the Tribunal should take into account the need to preserve the fairness and integrity of the proceedings, the nature and gravity of the misconduct, considerations of privilege and confidentiality and whether counsel's misconduct was condoned or directed by the client.

IBA Rules on the Taking of Evidence

14. What are the IBA Rules on the Taking of Evidence?

The IBA Rules on the Taking of Evidence are a resource to parties and arbitrators that provide an efficient, economical and fair process for taking evidence in an international arbitration. They provide mechanisms for the presentation of documents, factual and expert witnesses, inspections and the conduct of evidentiary hearings without limiting the inherent flexibility of the arbitration procedure.

15. Why are the IBA Rules on the Taking of Evidence important?

The IBA Rules on the Taking of Evidence are important to resolve any friction between the principles of common law and civil law systems in the taking and production of evidence. For example, under many common law systems, parties are obliged to disclose all documents that are relevant to the points in dispute, whether favourable or unfavourable to the producing party's case. Under many civil law systems, parties are not obliged to produce those documents that are unfavourable. This can lead to unfairness and incompleteness in the production of documentary evidence before the Tribunal.

16. How are the IBA Guidelines on the Taking of Evidence applied?

The IBA Guidelines on the Taking of Evidence are contractual. The parties may adopt the Guidelines within the arbitration agreement or in consultation with the Tribunal at the earliest appropriate time in the arbitration, such as at the Preliminary Hearing when the Tribunal will encourage the parties to adopt the Guidelines or otherwise agree an efficient, fair and economical process for taking evidence.

17. What points of Taking Evidenced are addressed?

The IBA Guidelines on the Taking of Evidence address: (a) the requirements, procedure and format applicable to the production of documents; (b) the preparation and submission of factual witness statements; (c) the preparation and submission of expert reports; (d) the appointment by the Tribunal of independent experts to the Tribunal; (e) the inspection of any site, property, machinery or documentation; (f) the conduct of the evidentiary hearing; and (g) the admissibility and assessment of evidence.

18. What are the remedies for breach?

If a document is not produced or factual or expert witness is not made available for examination at the evidentiary hearing then the Tribunal may infer that such document, factual evidence or expert opinion would be adverse to the interests of the party failing to produce the document or make the witness available. If the Tribunal determines that a party has failed to conduct the taking and production of evidence in good faith, then it may take that failure into account when determining and assigning the costs of the arbitration between the parties within the Final Award.