

ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

Guidelines on Standards of Practice in International Arbitration

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**ICCA Task Force on
Standards of Practice in International Arbitration**

GUIDELINES ON STANDARDS OF PRACTICE IN INTERNATIONAL ARBITRATION

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INTRODUCTION

Civility in the practice of law is an essential attribute of maintaining the rule of law. The Guidelines originated from a concern that there have been repeated examples in international arbitration practice of conduct that falls below minimum civility standards and that the arbitration community should take action in response to demonstrate our shared commitment to practice international arbitration in a fair and legitimate manner. The Guidelines are not intended as mandatory rules, but as guiding principles of civility in international arbitration.

These Guidelines were developed by a Task Force of experts in the practice of international arbitration with experience from diverse jurisdictions.

The Task Force first carried out a survey of professional standards, ethical rules, and civility guidelines from a wide range of jurisdictions. The survey revealed a broad consensus as to general principles, evidencing a common acceptance of the guiding principles of civility expected before courts and arbitral tribunals. Nevertheless, an evident gap remains in the international arbitration space where there is no official instrument memorializing the principles of civility in the context of an international arbitration proceeding. As the existing instruments do not fully reflect the specific setting, blend of cultures and situations in which international arbitration is employed, the Task Force prepared these civility Guidelines.

Although many if not all of the principles may apply equally in the context of both domestic arbitration and international arbitration, they were developed for use in the specific context of international arbitration. In the unlikely event of conflict between local rules and the Guidelines, applicable mandatory rules prevail. The Guidelines are not intended to displace other rules and do not seek to regulate questions that are governed by other applicable instruments and rules, such as the circumstances that give rise to a conflict of interest or that may call into question the fundamental integrity of the arbitration, or the nature of disclosures required from participants in an international arbitration.

The Guidelines are not intended to serve as an autonomous basis for sanctions where no other basis exists and should not provide grounds for frivolous attacks on counsel or arbitrators nor to increase litigiousness or to exacerbate disputes between parties. They also are not intended to discourage fair and vigorous advocacy. Rather, the Guidelines aim to articulate prevailing expectations as to

the standards of practice in international arbitration. Whether a participant's conduct runs afoul of these Guidelines will necessarily be a fact-specific inquiry based on the circumstances at hand.

While the Guidelines are not intended as mandatory rules, they may be incorporated by parties in their arbitration agreement, adopted by arbitral institutions, or included by arbitral tribunals in a procedural order or in the terms of reference where appropriate.

The Guidelines are organized in four sections: (I) general guidelines for all participants in the international arbitration process (e.g., counsel, arbitrators, staff of arbitral institutions acting in the particular case, tribunal secretaries, witnesses, experts, court reporters, interpreters, translators, etc.); (II) guidelines for counsel and party representatives; (III) guidelines for arbitrators; and (V) guidelines for other participants. Each sub-section sets out several general principles followed by explanatory remarks. For the purpose of these Guidelines, participants in an international arbitration shall include counsel, non-counsel party representatives, arbitrators, tribunal secretaries, personnel employed by arbitral institutions who act in a particular case, witnesses, experts (either tribunal-appointed or party-appointed), professionals, and all other persons working throughout the arbitration proceedings.

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I. GENERAL PRINCIPLES APPLICABLE TO ALL PARTICIPANTS IN INTERNATIONAL ARBITRATION

Civility and professionalism in the practice of law and in the conduct of legal proceedings are essential to promotion of the rule of law. They contribute to the proper functioning of the legal system of dispute resolution and to fostering and maintaining public confidence in the justice system of which international arbitration is part.

- A. All participants in an international arbitration shall act with integrity, respect, and civility vis-à-vis other participants in the arbitral process.**

Explanation to Guideline I.A

The arbitral process cannot work effectively and fulfill its purpose unless each participant in the arbitral proceeding acts in good faith, treating each other with courtesy, respect, and civility, and adhering to basic standards of integrity, honesty, and candor. Mutual respect between these participants facilitates the administration of justice, assists in the resolution of conflict by agreement, and is in the interest of disputing parties.

Guideline I.A thus sets out a general directive applicable to all participants in the arbitral process. This Guideline finds concrete expression in the more specific guidelines set out below.

- B. All participants in an international arbitration shall respect all forms of diversity and cultural backgrounds represented in the international arbitration community and refrain from any form of discriminatory conduct.**

Explanation to Guideline I.B

International arbitration brings together individuals from diverse cultures and backgrounds to resolve cross-border disputes. Cultural, linguistic, ethnic, geographic, gender, and other forms of diversity are reflected in the practice of international arbitration. Diversity is recognized as an important factor in the maintenance of legitimacy of international arbitration as an accepted form of dispute resolution. The need to respect diversity thus is paramount in the cross-cultural environment that characterizes international arbitration.

Guideline I.B seeks to remind all participants that they should be aware and respectful of all forms of diversity that exist in the arbitral community. Mindful of the challenges that cultural differences at times may pose, Guideline I.B aims at ensuring that such differences are never used as an excuse for disrespectful or discriminatory conduct.

- C. All participants in an international arbitration shall act in order to ensure that international arbitration remains a timely and cost effective means of dispute resolution, subject to the particular circumstances of each case.**

Explanation to Guideline I.C

Guideline I.C reaffirms the duty of all participants in an international arbitration, in accordance with their respective roles, to work towards the fair and effective administration of justice. A timely and cost-effective process will contribute to achieve the fair and effective administration of justice, although what constitutes a “timely” and “cost-effective” process is highly dependent on the particular facts and circumstances of the case. Stated differently, not all arbitrations will have the same time and costs and the fact that a party advocates for a longer and/or more costly process is not, by itself, inconsistent with this Guideline.

All participants in an international arbitration should discharge their professional duties competently, with diligence and efficiency, and with a view to avoiding unnecessary expense or delay. Professionalism entails both the requisite skill and the ability and availability to dedicate the time and resources necessary to perform the required duties.

- D. All participants in an international arbitration shall respect the rights of parties and nonparties to privacy and confidentiality where applicable.**

Explanation to Guideline I.D

All participants handle a significant amount of information concerning the case, which may include personal or sensitive information of individuals, not just witnesses and experts, but also other persons who may have intervened in the facts to be analyzed.

The objective of this Guideline is to set a basic standard of conduct expected from all participants to respect the privacy of sensitive or personal information relating to individuals, which participants may have access to in the course of an arbitration and which is not relevant for the adjudication of the dispute. What should be considered private and/or confidential in a given situation will depend on the context and circumstances of the case and the applicable law.

This Guideline does not seek to regulate the data protection and privacy obligations of arbitration participants in the context of a particular arbitration proceeding (which is comprehensively examined in the ICCA-IBA Roadmap to Data Protection in International Arbitration). Furthermore, it

does not intend to set out the separate and distinct obligations of confidentiality, as may be applicable by agreement of the parties or established by the law or rules governing the arbitration.

This Guideline also does not seek to prevent the use of information where such information is relevant and necessary for the adjudication of the dispute (e.g., counsel may bring to the tribunal's attention a disciplinary proceeding brought against an expert in a professional context for purposes of challenging the expert's credibility). By contrast, respect of privacy as embodied in this Guideline may require limiting who is present in the hearing room for an oral hearing during testimony on a sensitive matter or excluding from the record an exhibit which contains private data of an individual where the use of such data is aimed solely at harassing or putting undue pressure on that individual.

- E. All participants in an international arbitration shall ensure that those individuals under their supervision follow the standards of practice expressed in these Guidelines.**

Explanation to Guideline I.E

The Guidelines apply to all participants in an international arbitration, regardless of whether they have legal training or are admitted as a member of a bar association or other professional body. This includes counsel teams and their non-counsel support staff, tribunal secretaries and other assistants, staff of arbitral institutions who act in the particular case, teams or persons supporting an expert, and others working under the guidance, direction or at the invitation of a principal participant in the proceedings.

Participants in the arbitral process who bear the principal responsibilities in an arbitration should require that persons working with them or under their supervision conduct themselves in accordance with the same principles set out in the Guidelines.

- F. All participants in an international arbitration shall disclose conflicts of interests and/or other facts or circumstances that may call into question the fundamental integrity of the arbitration process.**

Explanation to Guideline I.F

This Guideline recognizes that there is a basic standard of practice expected from all participants (not only arbitrators) to disclose any material information which, if not disclosed at the appropriate time, may jeopardize the integrity of the arbitral process or the finality of the award. The standard

of practice elaborated in this rule shall apply to individual participants, not to arbitral institutions generally.

As part of a general standard of civility, it is important that all relevant information be made available to all participants at the appropriate juncture, so as to protect the integrity of the arbitration process against challenges based on any failure to disclose. As such, this is an ongoing standard of practice, expected to be fulfilled from the commencement to the end of the arbitration.

The Guidelines do not purport to set out or elaborate on what information ought to be disclosed by participants in an international arbitration, or by particular arbitrators, nor do they purport to regulate what constitutes a conflict of interest or a violation of the fundamental integrity of the arbitral process. Those questions must be answered by reference to applicable statutory, institutional, or other legal instruments outside of these Guidelines.

II. GUIDELINES FOR PARTY REPRESENTATIVES

Because of the central role played by party representatives (i.e., counsel and non-counsel party representatives) during the course of the arbitration and taking into account counsel's duty to present the case before the arbitral tribunal, particular standards of practice apply to party representatives in addition to those applicable to all participants.

- A. Party representatives shall act cooperatively with each other and the arbitral tribunal. In doing so, party representatives shall use all reasonable efforts to comply with the arbitral tribunal's directions.**

Explanation to Guideline II. A

Guideline II.A describes the manner in which counsel and other party representatives should act towards each other and with the arbitral tribunal throughout the course of an arbitration and related collateral proceedings. Cooperation serves the interests of all participants in the arbitral process by enabling a more efficient, less costly process of dispute resolution. This Guideline is intended to apply not only in an arbitration, but also in related collateral proceedings such as before national courts as a party should not be permitted to use related collateral proceedings to circumvent the civility standards applicable in the arbitration itself.

Cooperation has wide application in the course of an arbitration, such as the principle that party representatives should aim to resolve procedural issues between the parties when practical and

refrain from bringing matters to the attention of the arbitral tribunal except when an issue cannot be resolved otherwise. Cooperation is also required vis-à-vis the arbitral tribunal, including but not limited to complying with the procedural calendar and all procedural orders, instructions and directions from the arbitral tribunal.

Other examples of cooperation are punctuality, accommodations for language differences, respect for the schedules of others, and granting reasonable schedule accommodations at the request of the other party where doing so does not prejudice the rights of a party.

The principle of cooperation is not intended to undermine zealous advocacy and its applicability will depend on the particular circumstances. This Guideline recognizes that party representatives should strive for cooperation, but that cooperation sometimes may not be possible in view of the obligations of party representatives to the parties.

- B. Party representatives shall, at all times, act with respect and courtesy, and conduct themselves in a professional manner. Party representatives shall not act offensively or with disrespect.**

Explanation to Guideline II.B

This Guideline reflects the principle that offensive or disrespectful conduct by party representatives towards any other participant in the proceeding is not acceptable.

As a general rule, an action or statement that has the purpose, in whole or in part, of insulting, humiliating, intimidating, or harassing opposing counsel, a witness, or any other participant in the proceeding is by definition offensive and disrespectful. Offensive and/or disrespectful conduct may include, *inter alia*, disparaging other participants in the arbitration on account of their personal attributes or suggesting improper motives to the other party or their counsel in their oral and written submissions, except where such matters are directly at issue.

Whether a particular course of action is offensive or disrespectful may vary depending on the circumstances, including the personal and/or cultural backgrounds of the arbitration participants. However, as a general rule, an action or statement that is likely upon reasonable consideration to have the effect of insulting, humiliating, intimidating, or harassing opposing counsel, a witness, or any other participant in the proceeding should be avoided in all cases, including despite a party's wishes to the contrary.

- C. Party representatives shall not knowingly make any false submission of fact to the arbitral tribunal. In the event that a party representative learns that he or she has previously made a false submission of fact to the arbitral tribunal, the party representative shall, subject to considerations of confidentiality and privilege, promptly correct such submission.**

Explanation to Guideline II.C

Guideline II.C concerns the obligations of counsel and non-counsel party representatives to act candidly when making submissions before arbitral tribunals.

There are two prongs to Guideline II.C. The first prong requires a party representative to refrain from making a submission of fact to an arbitral tribunal, which he or she knows is false. The second prong contemplates that a party representative shall take corrective action if he or she learns, after making a particular submission, that such submission was false, subject to any considerations of privilege and/or confidentiality that may prevent the party representative from correcting such disclosure.

- D. Party representatives shall not engage, without legitimate reasons, in activities intended to obstruct, delay, or disrupt the arbitration process or to jeopardize the finality of any award.**

Explanation to Guideline II.D

Guideline II.D seeks to prevent conduct that is designed to jeopardize the integrity of the arbitral proceeding, including the award itself, with no serious ground. It is not intended to discourage legitimate advocacy nor to limit available remedies and procedural strategies, when used in good faith. Rather, the Guideline seeks to discourage frivolous objections, challenges, and conduct that have the sole purpose of obstruction, unreasonable delay, or jeopardizing the finality of any award.

This Guideline applies to all aspects of an arbitration proceeding, including but not limited to the constitution of the arbitral tribunal, document production, timing of objections or challenges, dealings with witnesses and experts, the conduct of the hearing, and communications with the arbitral tribunal.

The Guideline does not define what type of activities may obstruct or disrupt the arbitration, or jeopardize the finality of any award. However, examples may include: attempts to disqualify an arbitrator without serious basis; challenging the jurisdiction of the arbitral tribunal without material

grounds; filing claims, defenses, requests, or post-award challenges without any good faith or serious basis; advising clients/parties to refuse to pay the advance on costs in order to delay the proceedings or obligate the counterparty to pay them; or unreasonably delaying the production of evidence requested by arbitrators.

Other examples include failing to raise objections, challenges, or other requests in a timely manner with resulting increased cost, delay, or disruption to the proceeding in a manner that harms its fair and efficient completion.

Document production is another area that is ripe for procedural abuse and offensive tactics. Among other things, party representatives should not rely on document production as a means to unreasonably delay the resolution of a dispute or to harass opposing counsel, parties or witnesses.

III. GUIDELINES FOR ARBITRATORS

Because of the unique role played by arbitrators during the course of the arbitration and taking into account their responsibility to control the arbitral process over which they preside, particular standards of practice apply to arbitrators that are distinct from those that apply to party representatives and that are in addition to those applicable to all participants.

A. Arbitrators shall address all participants in an international arbitration in a courteous and impartial manner.

Explanation to Guideline III.A

Guideline III.A describes the manner in which the members of the arbitral tribunal should address the parties, their representatives, and other participants in the arbitral process during the course of the arbitration. Arbitrators are expected to engage with all other participants in a courteous and impartial manner throughout the proceedings.

This Guideline has many applications in practice. For example, this Guideline contemplates that arbitrators will act with empathy towards the other participants in the arbitral process, understanding that different cultural backgrounds may lead to different conduct or reactions in a given situation. The obligation to act courteously vis-à-vis other participants also includes an obligation to avoid a patronizing or authoritarian attitude in dealings with the parties, counsel, witnesses, or other participants.

This Guideline is consistent with other substantive standards and duties applicable to arbitrators. For instance, the principle to act impartially (essential to fair adjudication) includes, from the civility perspective, the obligation to act so as to avoid unconscious bias. It also means that arbitrators must not apply different criteria in deciding similar requests or petitions where objective circumstances do not justify disparate treatment.

B. Arbitrators shall not employ hostile, demeaning or humiliating terms in written or oral communications with participants to an international arbitration.

Explanation to Guideline III.B

Guideline III.B derives from the general guideline applicable to all participants to act respectfully. Based on this principle, arbitrators should speak and write with courtesy and respect in all communications with counsel, parties, experts, witnesses, or other participants to an international arbitration, and exercise appropriate self-control even in stressful situations. This Guideline in particular forbids the use of offensive language and any other form of communication that may be considered offensive, such as posing questions or employing forms of questioning that may be seen as undue pressure over the parties or witnesses. In addition, arbitrators should avoid disrespectful or curt replies to questions posed to them by participants.

This Guideline is applicable also in circumstances where an arbitrator is challenged as to his or her conduct of the proceedings. For instance, where an arbitrator faces a request for disqualification, he or she should adhere to the same principles of courtesy and respect vis-à-vis the party that seeks his or her disqualification throughout the proceedings (including in the event a request for disqualification is denied).

C. Arbitrators shall ensure that all participants in an international arbitration conduct themselves in a courteous and respectful manner throughout the proceedings.

Explanation to Guideline III.C

Guideline III.C derives from the general principle that arbitrators have the obligation to maintain control over the proceedings at all times and ensure respectful conduct from all participants.

The arbitral tribunal shall notify the participants of conduct that it considers discourteous, disrespectful, or disruptive and demand its immediate termination in order to ensure a productive and fair proceeding.

It is for the arbitral tribunal to determine, on a case-by-case basis, which conduct or behavior from any participant should be considered disrespectful or disruptive, taking into account the particular circumstances and the different cultural background of the participant or participants involved. The arbitral tribunal also should decide the appropriate way to address and terminate such conduct or behavior in maintaining the order of the proceedings.

D. Arbitrators shall act efficiently.

Explanation to Guideline III.D

Guideline III.D reflects the overarching principle that an efficient process is critical to the administration of justice in international arbitration and that arbitrators play a central role in ensuring efficiency.

Efficiency is a paramount consideration throughout the arbitral proceeding, including even before the constitution of the arbitral tribunal. Accordingly, arbitrators should not accept appointments when they are not able to devote the time and attention to the arbitration that the parties are reasonably entitled to expect, taking into account the nature and complexity of the dispute.

After the constitution of the arbitral tribunal, arbitrators should acquaint themselves with the facts and arguments presented as soon as possible so that they may understand the dispute and provide suitable decisions at the appropriate time, as an expression of the duty to make all reasonable efforts to decide promptly all matters presented to them for decision.

This Guideline also includes the duty of arbitrators to make themselves available during the dates and times reserved for oral hearings, to prepare adequately for such hearings, and to act with respect and consideration for the schedules of all relevant participants when scheduling hearings, meetings or conferences.

Finally, this Guideline reflects the principle that the civil conduct of proceedings must not imply a failure or reluctance to enforce the procedural rules of the arbitration. Rather, arbitrators shall take appropriate and necessary actions to enforce the applicable rules to ensure the efficient resolution of disputes.

IV. GUIDELINES FOR OTHER PARTICIPANTS

In playing their specific role during the course of an arbitration, other participants, like experts, witnesses, tribunal secretaries, personnel of arbitral institutions, among others, are relevant to assist the arbitral tribunal in the adjudication of disputes and, therefore, their conduct falls within the scope of these Guidelines. In addition to the general standards applicable to all of them, there are particular standards that also apply.

- A. Experts and witnesses shall be honest with counsel and in their testimony before an arbitral tribunal. Experts and witnesses shall not knowingly make any false submission to the arbitral tribunal. In the event that an expert or witness learns that he or she has previously made a false submission to the arbitral tribunal, he or she shall promptly correct such submission.**

Explanation to Guideline IV.A

Witnesses and experts (either party-appointed or tribunal-appointed) play an important role in international arbitrations by assisting the arbitral tribunal in both establishing the facts of the case and providing it with technical or specialized views based on their field of expertise, relevant for deciding the case at hand. In fulfilling their obligations during the course of the arbitration, witnesses and experts should speak the truth concerning the facts that are within their knowledge, or their sincere belief regarding the opinions proffered in evidence before the arbitral tribunal.

Experts and witnesses also have the same obligation as counsel under Guideline II.C to act candidly when making any submission before arbitral tribunals. Experts and witnesses have the duty not only to refrain from making a false submission to an arbitral tribunal, but also to correct themselves as soon as they become aware of the false statement already made.

- B. Experts and witnesses shall assist the arbitral tribunal and follow its directions.**

Explanation to Guideline IV.B

Assisting the arbitral tribunal in determining the facts of the case and dealing with technical issues involved in the dispute are the key functions of witnesses and experts, respectively. Their participation in an arbitration is justified by the evidence and information they provide to the arbitral tribunal to enable it to render its award.

Therefore, in addition to the standards of practice applicable to all participants, witnesses and experts are expected to assist the arbitral tribunal and follow its instructions at all times, despite any indication received to the contrary from any other participant (including counsel or parties). Compliance with these collaborative duties is essential for experts and witnesses to perform their role effectively.

- C. Tribunal secretaries and personnel of arbitral institutions involved in a particular international arbitration shall address all participants in the arbitral process in a courteous and neutral manner.**

Explanation to Guideline IV.C

Guideline IV.C derives from Guideline III.A applicable to arbitrators and describes the manner in which tribunal secretaries – under the supervision and direction of the arbitral tribunal – and the staff of arbitral institutions who participate in any aspect of administering the case should address all participants during the course of the arbitration.

Being courteous and neutral is expected from these participants throughout the proceedings and the same principles applicable to arbitrators, adapted to the particularities of their role, should be considered applicable.