

Singapore Institute of Arbitrators
Guidelines on Party-Representative Ethics
[CONSULTATION DRAFT]

1. There is a lack of consistent ethical standards governing the conduct of counsel and representatives in international arbitration. The growing complexity and volume of international arbitration proceedings conducted worldwide call for renewed efforts at harmonizing the parameters of permissible conduct.
2. International arbitration is to a certain extent an amalgam of civil and common law legal traditions, and both these traditions share core values with regard to professionalism and integrity. But the way these values are interpreted and put into practice across jurisdictions varies enormously, making it difficult to identify consensus on many specific ethical issues. International arbitration is also, equally, an institution with its own character and values. Domestic standards for ethical conduct cannot be imported wholesale, as that risks overlooking international arbitration's unique qualities.
3. The resulting lack of uniformity contributes to unnecessary delay, misunderstandings, and expense. Moreover, the application of varying ethical standards risk creating uneven playing fields, disadvantaging some parties and undermining parties' faith in the fairness of international arbitration.
4. The Singapore Institute of Arbitrators believes that guidance in this area is warranted, both to clarify existing expectations regarding ethical conduct in international arbitration, and to provide a framework for future discussion.
5. With this in mind, SI Arb has considered some of the differing expectations as to what constitutes "ethical" conduct for legal counsel representing parties in disputes, both across Asia-Pacific jurisdictions and in international arbitration in the region. SI Arb has reviewed existing bar rules and regulations / professional codes of conduct 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, and related academic commentary. SI Arb has also consulted with its own membership, and leading figures and key stakeholders in international arbitration in the region.
6. SI Arb has distilled overarching principles common to jurisdictions and now circulates the following SI Arb Guidelines on Party-Representative Ethics based on this review. The Guidelines is 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.
7. The Guidelines are not intended to replace any existing ethical standards or professional code of conduct which may apply to any Party Representative under any applicable arbitration agreement, institutional rules, professional or disciplinary rules, or mandatory laws or regulations.

I. Guidelines on Ethical Conduct for Party Representatives

Principle 1:

A Party Representative should respect the integrity of international 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.

COMMENTARY:

Guideline 1.1 deals with communications between a Party Representative and the Tribunal (which includes an Emergency Arbitrator), the Tribunal's members, or Potential Arbitrator(s).

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, owes a duty of independence and impartiality to both parties. The Tribunal must consequently avoid circumstances that would raise justifiable doubts about its independence and impartiality. *Ex parte* communications, as defined in this Guidelines, raise concerns as to both independence and impartiality of the Tribunal, and should therefore only take place in exceptional circumstances.

Guideline 1.2

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

COMMENTARY:

Guideline 1.2 refers to abuse of the arbitral process contrary to the spirit and purpose of the rules. Parties are entitled to act in their own interests in a dispute; and a Party Representative owes a duty to represent his or her client vigorously within the limits of the law. The line between legitimate and improper tactics is not always clear. SIArb takes the view, however, that any measure taken, not for the apparent purpose that is presented to the Tribunal, but for an improper objective, should

not be sanctioned. Examples, which are not exhaustive, include frivolous claims, defences, allegations, challenges of the arbitrators, deliberately timed last-minute amendments, or other applications to the Tribunal or the courts, intended solely to harass the opponent or cause unnecessary delay or disruption to the arbitral process.

Disputant Parties and their representatives should work together with the Tribunal towards the speedy and efficient resolution of their case. Abuse of process in arbitration will not only cause delay but often leads to a war of attrition that increases arbitration costs and fees for all parties.

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.

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.

COMMENTARY:

Guideline 2.1 deals with a Party Representative's duty of candor with respect to factual and evidentiary submissions to the Tribunal. A Party Representative's conduct should conform to the requirements of law. Most jurisdictions do not require lawyers to sit in judgment of their clients. If lawyers act as judges, many clients may have trouble finding representation. A Party Representative must, however, not cross the line by knowingly permitting falsehoods to be perpetuated. 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.

Guideline 2.2

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

COMMENTARY:

Guideline 2.2 deals with a Party Representative's duty of candor with respect to legal submissions to the Tribunal. 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. This would include deliberately misquoting or misrepresenting the contents of a precedent, authority or other source of law, or knowingly citing an inoperative, repealed or amended law. SI Arb recognizes that almost every case raises a contentious issue of law and it is perfectly normal for opposing Parties to take different views of the law. It is also permissible for a Party Representative to provide his own interpretation to the effect or relevance of any source of law that is cited, as long as the contents of any citation is not misquoted or misrepresented. If a case authority has been overruled or a statute repealed, it should not be cited without disclosure of its status to the Tribunal.

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.

COMMENTARY:

Guideline 2.3 deals with a Party Representative's continuing obligation to maintain the integrity of the arbitral process. While a Party Representative has the duty to argue the case of his or her client vigorously, a Party Representative must employ only fair and honest means, and must act within legal bounds to attain the lawful objectives of his or her 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.

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.

COMMENTARY:

Guideline 3.1 deals with the professional conduct of a Party Representative. A Party Representative 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 a Party Representative, in his or her professional dealings, to act in a manner, 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.

COMMENTARY:

Guideline 3.2 discourages direct communications between the Party Representative of one Disputant Party with the other Disputant Party. This is allowed in some jurisdictions and banned in others. SI Arb considers, however, that such conduct is unethical in the context of international arbitration. The rationale for prohibiting this type of communication is to avoid undue influence or attempts by the representative of one party to undermine its counterparty's advice or standing by directly communicating with its counterparty's principal. If parties are represented, communications should take place only between the Party Representatives. The exception is when the other Party Representative 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

COMMENTARY:

Guideline 3.3 reflects a common reminder by many Tribunals to witnesses who have started testifying before them to avoid discussing their evidence with anyone during any break in their

cross-examination or re-examination. This is to avoid improper influence of the witness once cross examination has started.

II. Definitions

“Disputant Party”	A party, whether claimant or respondent, who is a party to international arbitration proceedings.
“<i>Ex Parte</i> Communications”	Communications made by one party, or its representative, with a Potential Arbitrator, Tribunal, or any member of the Tribunal without the other party’s presence or knowledge.
“Guidelines”	SIArb Guidelines on Party-Representative Ethics, as may be revised or amended.
“Party Representative”	Legal counsel (which includes lawyers, solicitors, barristers, advocates, in-house counsel, or any other generally recognised legal professional) and non-legal counsel (other persons, including non-legal professionals, engaged by a party in a representative capacity with respect to a dispute) engaged by a party to represent such party in international arbitration proceedings.
“Potential Arbitrator”	An individual who is approached by either a Disputant Party, a Party Representative, or any other party (including an arbitral institution or other arbitrator(s)) to act as an arbitrator.
“SIArb”	The Singapore Institute of Arbitrators.
“Tribunal”	Includes without limitation (i) a sole arbitrator or all the arbitrators where more than one is appointed, and (ii) an emergency arbitrator.