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International Arbitration ADVISORY ■

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New IBA Guidelines Greatly Limit Interviewing an Arbitrator Before Appointment

On the heels of mounting data that indicates practitioners are increasingly interviewing prospective party-nominated arbitrators about the substance of their arbitration, the International Bar Association (IBA) is trying to bring the practice to a stop with its recently published Guidelines on Party Representation in International Arbitration (the "Guidelines").

Pre-Appointment Interview of Arbitrators on the Rise

As both the IBA Arbitration Committee and the Task Force on Counsel Conduct (the "Task Force") acknowledged in the Comments to the Guidelines, *ex parte* communications with arbitrators prior to appointment is on the rise.

For example, the 2012 International Arbitration Survey, conducted by the School of International Arbitration (the "Survey"), found that a significant number of respondents essentially interview potential arbitrators about a whole host of topics before appointing them. Such topics include the potential arbitrator's position on legal questions relevant to the case; whether the potential arbitrator is a strict constructionist or instead influenced by the equities of the case; and any prior views the potential arbitrator has expressed on a particular issue.

Taking it one step further, an overwhelming majority of Survey respondents believe that party-appointed arbitrators should be allowed to exchange views with their appointing party regarding the selection of the chair of the tribunal.

All of these seemingly harmless communications are now prohibited under the new Guidelines, which were "inspired by the principle that party representatives should act with integrity and honesty." Likewise, the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes imposes a similar bar instructing that a prospective arbitrator "should not permit [a party] to discuss the merits of the case" in

conjunction with a canon focused on arbitrators avoiding impropriety or the appearance thereof when communicating with parties.

Need to Opt-In

It is worth noting that the Guidelines are just that—guidelines. For them to be controlling, parties would have to incorporate the Guidelines into their agreement to arbitrate. And even if incorporated, the parties may revise the Guidelines or adapt them to their particular circumstances.

Off Limits

If the parties do adopt the Guidelines, then "a Party Representative should not engage in any Ex Parte Communications with an Arbitrator concerning the arbitration" unless the other parties agree and subject to a few exceptions.

For example, a Party Representative may communicate with a prospective party-nominated arbitrator to "determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest" or for the purpose of the selection of the presiding arbitrator. Nevertheless, the Guidelines make clear that any communications with a prospective party-nominated arbitrator or presiding arbitrator "should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute."

Fair Game

The Guidelines provide several suitable discussion topics in pre-appointment communications for assessing the prospective arbitrator's expertise, experience, ability, availability and willingness, as well as the existence of potential conflicts of interest.

Those include (a) the prospective arbitrator's publications, including books, articles and conference papers or engagements; (b) any activities of the prospective arbitrator and his or her law firm or organization within which he or she operates that may raise justifiable doubts as to the prospective arbitrator's independence or impartiality; (c) a description of the general nature of the dispute; (d) the terms of the arbitration agreement, and in particular, any agreement as to the seat, language, applicable law and rules of the arbitration; (e) the identities of the parties, party representatives, witnesses, experts and interested parties; and (f) the anticipated timetable and general conduct of the proceedings. Moreover, the Guidelines acknowledge that *ex parte* communication would be appropriate if in connection with an application for interim measures (if permitted in the arbitration) or where a party fails to participate in a hearing or proceedings and are not represented.

While not explicitly stated in the Guidelines, there is nothing inherently wrong with the parties jointly interviewing arbitrators, as such contact would not be *ex parte*, a suggestion echoed by the Chartered Institute of Arbitrators (CIA) practice guidelines on the topic. In fact, the CIA goes a step further and recommends that either a tape recording or a detailed arbitrator's file note should be made of the interview and disclosed to the other side, as well as to the appointing body, at the earliest available opportunity.

However, such a suggestion lacks popular support, with only 12 percent of respondents agreeing, while there was not a consensus on whether a practitioner or an arbitrator should at least notify the other parties that an interview was going to be, or was, conducted.

Moreover, the Guidelines do not prohibit a party from interviewing an arbitrator before a dispute arises; however, such interviews might be general and abstract and not particularly helpful.

Do Your Homework

While the Guidelines significantly limit a practitioner's ability to take the arbitrator out for a test drive—where the parties have agreed to be bound by them—they do not preclude a practitioner from kicking the tires. Practitioners and their clients will simply need to be more creative when doing due diligence on a potential arbitrator.

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