

ICCA  
CONGRESS SERIES NO. 22

INTERNATIONAL ARBITRATION CONGRESS  
HONG KONG, 5-8 MAY 2024





INTERNATIONAL COUNCIL  
FOR COMMERCIAL ARBITRATION

International Arbitration:  
A Human Endeavour

GENERAL EDITORS:  
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with the assistance of the  
Permanent Court of Arbitration  
Peace Palace, The Hague



*Published by:*

Kluwer Law International B.V.  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
E-mail: [irs-sales@wolterskluwer.com](mailto:irs-sales@wolterskluwer.com)  
Website: [www.wolterskluwer.com/en/solutions/kluwerlawinternational](http://www.wolterskluwer.com/en/solutions/kluwerlawinternational)

*Sold and distributed by:*

Wolters Kluwer Legal & Regulatory U.S.  
920 Links Avenue  
Landisville, PA 17538  
United States of America  
E-mail: [customer.service@wolterskluwer.com](mailto:customer.service@wolterskluwer.com)

*Printed on acid-free paper.*

ISBN 978-94-035-3209-7

e-Book: ISBN 978-94-035-3219-6  
web-PDF: ISBN 978-94-035-3229-5

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Printed in the Netherlands.

# Preface

We chose 'International Arbitration: A Human Endeavour' as the theme of the XXVII ICCA Congress in order to examine the importance of people in the arbitration process and to reflect on how that might change. The theme was both a statement and a question.

That theme was especially apposite in Hong Kong, a city that epitomises human enterprise, international commerce and the meeting of East and West cultural traditions.

We wanted to recognise some of the notable influencers that have shaped international arbitration as we practise it today. Dr Bryant Garth, the co-author of the landmark sociological study on the development of international arbitration, 'Dealing in Virtue', was the keynote speaker on the first day. We also acknowledged Dr Pieter Sanders, the uber-visionary, by showing an interview of him talking about his trip to New York and his 'Dutch proposal' that became the 1958 Convention. Later in the Congress, we honoured Dr Albert Jan van den Berg, who has done so much to promote international arbitration and support ICCA.

The first day focused on 'The Arbitrator': what it means to be an arbitral decision-maker. The sub-topics included: is judging and arbitrating the same; what extraneous factors most influence arbitrators; is there an ideal personality type for an arbitrator; what is expected of an arbitrator by users; and to what extent does it matter to have a person rather than a machine decide disputes? The answer to that last question was enlightening: a number of people thought that presenting their client's case to a human decision-maker was essential to the feeling that justice had been done. And that experience, intuition and wisdom were invaluable, albeit sometimes fallible, qualities.

We also considered how people make decisions and the influences of: biases (in the sense of a person's background), with an explanation of what happens in the brain when we make decisions; sociology and education; and culture, localisation and regionalism.

Informing about the New York Convention is a key aspect of ICCA's mission. At the Congress, we launched the 2nd Edition of ICCA's Guide to the Interpretation of the

Convention, in English and also a translation into Chinese. Consistent with the overall theme, we also examined the consistency of decisions by human judges and their consideration of societal factors in the application of public policy.

The second day focused on ‘The Advocate’: what makes an effective advocate; what does the science of the human brain tell us about how persuasion works; and what tools or innovations can advocates draw upon? We also explored how procedure can impact the conduct of different participants in the dispute resolution process. And how much does the language used in an arbitration shape the process and influence the outcomes (this was a recurring question).

When humans are involved, inevitably, issues of behaviour arise. We looked at inter-personal conduct and ethics with a panel discussing ICCA’s recent Guidelines on Standards of Practice in International Arbitration as they relate to our roles as advocates, arbitrators, experts, witnesses, and administrators, taking into account differing cultural perspectives and legal traditions. Arbitration is almost always confrontational, and we explored (inspired by the concept of ‘doughnut economics’): the pressures on advocates (including junior lawyers in the team); the tension of cross-examination; how to optimise expert witness engagement; and practical psychology tips to help survive and thrive in adversarial environments.

ICCA’s mission includes encouraging conciliation. We had a panel that described current initiatives tackling climate change and its impact on communities, practical experiences of designing rules for state-to-state and multi-stakeholder conflicts, and dispute resolution innovation addressing societal inequalities.

On the third day, we turned to ‘International Arbitration: An AI Endeavour’ and asked the question whether the incremental adoption of artificial intelligence across society, including in the delivery of justice, might shape assumptions not only of what is permissible but of how arbitration should be conducted. AI will impact advocacy and decision-making, access and transparency, and the skill sets needed by participants. Panellists discussed the impact this will have on the legitimacy of international arbitration.

Professor Richard Susskind, a global expert on AI’s impact on the legal profession and author of *Tomorrow’s Lawyers*, gave the closing keynote. His optimistic and cautionary outlook was that clients will still want the star-gladiators to represent them in important disputes, before the best human arbitrators.

We are very pleased that the theme, and the sub-topics, resonated with so many people. The history of arbitration and the impact of influencers, the human arbitrator, the human advocate, inter-personal conduct, and the challenges and opportunities of AI are of universal interest.

The Congress confirmed that international arbitration undoubtedly remains, at present, a human endeavour.

We are extremely grateful to ICCA for the opportunity to curate a Congress on a subject which we are both hugely invested in: what does it mean to dispense arbitral justice.

We are also grateful to the three hundred people who submitted expressions of interest asking to speak, we are sorry that we had to be selective, and to the Programme Committee for their assistance in framing the programme.

Mostly, we are grateful to all the speakers for their time and insights, many of which are included in this book.

*Chiann Bao and Audley Sheppard KC  
Programme Co-Chairs*



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## CHAPTER 33

# Guideline II(D) of the ICCA Guidelines and the Regulation of ‘Guerrilla Tactics’

*Jonathan Lim\**

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- III Three Practical Applications
- IV Conclusion

### I INTRODUCTION

Debates regarding the regulation of counsel conduct in international arbitration proceedings tend to generate more heat than light. Much has been said about the absence of a set of universal standards that can be applied uniformly to international arbitration counsel, particularly when they hail from different legal traditions and may be subject to different professional conduct rules promulgated by national bar associations.<sup>1</sup> Some have argued that this leads to an inequality of arms and might encourage

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\* Jonathan Lim is partner at Wilmer Cutler Pickering Hale and Dorr LLP. The author is grateful to his colleague Xiaohan Cai for her assistance on this chapter; He would also like to thank the following former or current colleagues: Goel Damkani, Ilan Gafni, Izaak Weaver-Herrera, Sanjana Sharma, Amila Pivic, Sviatoslav Syvakivskyi, Ashika Jain, and Gilliam Collinsworth-Hamilton. All omissions or errors belong solely to the author.

1. IBA Task Force on Conduct of Counsel in Arbitration, ‘2010 Survey: Counsel in International Arbitration’ (63% of practitioners surveyed believed they were subject to their home jurisdictions’ rules, while 27% were uncertain and 10% had no opinion or did not believe they were subject to home jurisdiction rules); C. Benson, *Can Professional Ethics Wait?* (n 4) at p. 81 (‘in any given arbitration, even counsel from the same jurisdictions may have diverging views on the extent to which their national ethical codes apply to international arbitration’); Gary Born, *International Commercial Arbitration* (2014), at 2877 (‘counsel in international arbitrations are frequently uncertain what rules of professional responsibility apply to their conduct’).

‘guerrilla tactics’.<sup>2</sup> At the same time, proposals that purport to address precisely this problem by setting forth universal guidelines specifically for international arbitration – such as the IBA Guidelines on Party Representation – have provoked equally trenchant criticism. For example, commentators have pointed out that such guidelines provide little normative guidance and fail to dispel uncertainty over applicable standards, particularly as applicable mandatory norms are likely to still apply.<sup>3</sup> Indeed, some argue that such guidelines may be counter-productive and instead add fuel to frivolous challenges against counsel.<sup>4</sup>

Against this context, this chapter considers the extent to which Guideline II(D) of the ICCA Guidelines on Standards of Practice in International Arbitration (ICCA Guidelines) meaningfully contributes to discussions about regulation of counsel conduct in international arbitration. By their own terms, the ICCA Guidelines are not intended as mandatory rules. Instead, they contain guiding principles of civility in international arbitration based on a survey of professional standards, ethical rules, and civility standards – minimum standards of conduct that are arguably common to all legal traditions. They may be capable of application either upon agreement by the parties or insofar as arbitral tribunals refer to them for guidance in procedural orders. In every case, they do not apply in isolation, but in conjunction with other applicable laws and rules.

Guideline II(D) is specifically directed at egregious conduct designed to obstruct, delay, or disrupt the arbitration process or to jeopardize the finality of any award. As discussed below, such conduct is sometimes referred to as ‘guerrilla tactics,’ but that description is vague and can obscure what kinds of conduct are in fact prohibited and subject to sanction. Guideline II(D) helps provide a more precise definition, giving both counsel and arbitrators additional practical means to address categories of conduct that may not already be expressly prohibited by existing written rules. To illustrate how this might work in specific cases, three scenarios of potential application are discussed in

- 
2. See, e.g., Cyrus Benson, ‘Can Professional Ethics Wait’, available at <https://www.gibsondunn.com/wp-content/uploads/documents/publications/Benson-CanProfessionalEthicsWait.pdf> (accessed 31 October 2025), at p. 79 (‘[the lack of clarity on what national professional rules apply in the arbitration process] might permit arbitration counsel to entertain the following conclusion: national professional rules do not apply and there are no international rules; hence, conduct of counsel and their clients is not regulated by any minimal ethical standards but rather by a Machiavellian cost-benefit analysis of what conduct can be “gotten away with without undue risk of discovery or sanction by the tribunal”’).
  3. Paragraph 1 of the General Guidelines for the Authorised Representatives of the Parties annexed to the LCIA 2020 Arbitration Rules notes that ‘[T]hese guidelines [shall not] derogate from any mandatory laws, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to an authorised representative appearing in the arbitration.’ For commentary, see, e.g., C. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 37 *Stan. J. int’l L.* 1 (2003), at 3 (‘important questions remain: Who is going to undertake the task of developing the specific content of the needed rules, and how are they going to be made binding and enforceable on attorneys in international arbitration? There are no obvious answers. No supranational bar association exists’).
  4. See, e.g., T. Landau QC and J. Weeramantry, *A Pause for Thought*, in A.J. van den Berg (ed.), *International Arbitration: The Coming of a New Age?*, 17 ICCA Congress Series (2013), 496.

further detail: frivolous applications or challenges, a party's failure to pay its share of deposits, and serious document production misconduct.

## II ICCA GUIDELINE II(D) AND GUERRILLA TACTICS

'Guerrilla tactics' is an umbrella term<sup>5</sup> that is used to describe certain disruptive behaviour by counsel in international arbitration proceedings. However, it is not a well-defined term. For example, some commentators have referred to 'guerrilla tactics' as encompassing 'ethical violations', 'criminal acts', as well as 'ethically borderline practices'.<sup>6</sup> In covering both conduct that breaches written ethical rules and laws, as well as conduct that does not clearly amount to such a breach, the term 'guerrilla tactics' is arguably overbroad – too capacious a label to provide actual meaningful guidance for counsel and arbitrators in specific cases. The bare allegation that certain conduct amounts to 'guerrilla tactics' is unlikely to of itself result in any procedural or legal sanction, unless one can invoke another rule or law that has been breached and provides a basis for such sanctions.

Guideline II(D) of the ICCA Guidelines speaks to such conduct, but it contains a very precise definition. Specifically, Guideline II.D provides that:

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.<sup>7</sup>

Guideline II(D) draws from prior standards and guidelines, but it goes further in terms of the specificity with which it describes the conduct proscribed. For example, the 2013 IBA Guidelines on Party Representation in International Arbitration stated in the preamble that they were broadly 'inspired' by the 'the principle that party representatives ... should not engage in activities designed to produce unnecessary delay or expense'.<sup>8</sup> Apart from the preamble, those set of guidelines did not contain rules that specifically proscribed such behaviour, with the exception of Guideline 13, which is limited to requests to produce and objections to such requests made for an improper purpose, such as to 'harass or cause unnecessary delay'.<sup>9</sup>

There are essentially two elements to Guideline II(D): first, counsel must not engage in activities 'intended to obstruct, delay, or disrupt the arbitration process or to

5. The term is widely attributed to Singaporean arbitrator, Dr Michael Hwang, who first coined the term 'arbitration guerrilla'. Robert Pfeiffer and Stephan Wilske, 'Chapter 1, §1.01: An Etymological and Historical Overview' in Günther J. Horvath and Stephan Wilske (eds), *Guerrilla Tactics in International Arbitration, International Arbitration Law Library* (Kluwer Law International 2013).

6. J. William Rowley, 'Chapter 1, §1.04: Guerrilla Tactics and Developing Issues,' in Günther J. Horvath and Stephan Wilske (eds), *Guerrilla Tactics in International Arbitration, International Arbitration Law Library*, vol. 28 (© Kluwer Law International; Kluwer Law International 2013), p. 21.

7. 2021 ICCA Guidelines, Guideline II(D), p. 8.

8. 2013 IBA Guidelines on Party Representation in International Arbitration, Preamble.

9. 2013 IBA Guidelines on Party Representation in International Arbitration, Guideline 13.

jeopardize the finality of any award’; and second, counsel must not do so ‘without legitimate reasons’.

The first element covers a broad range of activities that have the requisite intention – to obstruct, delay, or disrupt the process or otherwise jeopardize the award’s finality. While the ICCA Guidelines list specific examples, including frivolous attempts to disqualify an arbitrator, or filing claims or challenges without any good faith or serious basis, the list is not meant to be exhaustive. The Explanation to Guideline II(D) makes clear that it is intended to cover a wider range of conduct and activities in ‘all aspects of an arbitration proceeding’, from constitution of the arbitral tribunal to the taking of evidence and conduct at the hearing.

The second element – that there must be no ‘legitimate reason’ for the conduct – narrows the scope of Guideline II(D). It is intended to distinguish between legitimate but zealous advocacy on the one hand, and conduct undertaken with the ‘sole purpose’ of obstruction or delay on the other. That line may not be easy to draw in practice; one counsel’s zealous advocacy could be another’s ‘guerrilla tactic’, and cultural and legal backgrounds may shape perceptions. Nonetheless, in many jurisdictions, counsel is subject to an overriding duty to their clients of zeal and diligence in advocacy, and Guideline II(D) is not intended to displace or modify such ethical obligations.<sup>10</sup> Whether conduct is undertaken ‘without legitimate reasons’ will therefore depend in each case on the facts and circumstances, as well as the applicable law governing the conduct in question and the procedure in the arbitration. However, as the Explanation to Guideline II(D) elaborates, this is directed at conduct undertaken with the ‘sole purpose’ of obstruction, unreasonable delay, or jeopardizing the finality of any award – which imposes a relatively high threshold for a breach of Guideline II(D).

### III THREE PRACTICAL APPLICATIONS

To illustrate how Guideline II(D) might be applied in particular contexts, this chapter considers three scenarios of potential application.

#### 1 Frivolous Applications and Challenges

The Explanation to Guideline II(D) refers to frivolous applications and challenges as examples of the type of conduct that might be proscribed by the guideline. Specifically, this includes ‘attempts to disqualify an arbitrator without serious basis’, ‘challenging the jurisdiction of the arbitral tribunal without material grounds’, and ‘filing requests or post-award challenges without any good faith or serious basis’.<sup>11</sup> In general, ‘frivolous’ applications or challenges refer to those that are made with no knowledge or

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10. See, e.g., ABA Guidelines Rule 1.3 Diligence – Comment ([1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. [...]).

11. 2021 ICCA Guidelines, Explanation to Guideline II(D) 8.

expectation of success, and therefore further the improper collateral purpose of causing delays, unnecessary costs, or harassing the opposing party.<sup>12</sup> It may not be possible, of course, to prove the subjective state of mind of a party making an application or challenge, and therefore arbitral tribunals have found to be frivolous applications that fall below *de minimis* legal and factual standards.<sup>13</sup> In such cases, the requirements of Guideline II(D) are likely to be established where there is no ‘legitimate reason’ for the conduct.

It is easy to see how frivolous applications and challenges can delay, obstruct, or disrupt an arbitration. Take, for example, frivolous challenges to arbitrators. There are many accounts of such challenges, including, numerous consecutive challenges to the same arbitrator, challenges based on far-fetched reasoning, or challenges with suspicious timings that are likely tactically motivated.<sup>14</sup> Although the threshold for a challenge is high, and the statistics reflect a relatively low success rate of such challenges, even unsuccessful challenges can cause significant delay and disruption. There are, in fact, perverse incentives to bring such challenge, and unmeritorious challenges are often brought with the knowledge that they can exact a real cost on the arbitration and the other parties.

Statistics indicate that challenged arbitrators frequently resign before a challenge is resolved. According to the ICC, in 2020, ninety-two challenges were filed in forty-one cases, of which five were accepted.<sup>15</sup> Despite this low success rate, thirty-eight arbitrators resigned that year, although the ICC does not report whether the resignations came on the heels of a challenge.<sup>16</sup> Curiously, the ICC notes that in one case, ‘one party filed 29 successive challenges, which were all rejected, against the president of the arbitral tribunal and all three members of the tribunal’.<sup>17</sup> If one ignores that outlier, then out of sixty-three challenges in 2020 reported by the ICC, five were accepted and in the same year thirty-eight resigned. Even if one assumes that only half of the resignations were in response to challenges, that amounts to an estimated 38% of challenges resulting in a change to the composition of the tribunal.

In fact, as Table 33.1 illustrates, according to the ICC, from 2016 to 2020, challenges were made to arbitrators in 287 cases, of which twenty-nine were accepted

12. See, e.g., *GUPC v. ACP (II)* (Concrete Arbitration), Final Award (17 February 2021) (citing to party’s misuse of procedure to cause extensive delays by bringing groundless challenges as relevant for costs determination).

13. See, e.g., *MTS Technologies v. Drive* (AAA), Final Award (31 March 2010), para. 55 (finding arbitration to be ‘groundless and frivolous ... [as party] failed even to articulate a viable legal cause of action’); *Wendella v. Blount Boats* (AAA), Final Award (5 July 2017) (claims held frivolous when ‘not supported by credible material evidence’).

14. Robert Pfeiffer and Stephan Wilske, ‘Chapter 1, §1.03: The Emergence of the Guerrilla Tactics Phenomenon in International Arbitration’ in Günther J. Horvath and Stephan Wilske (eds), *Guerrilla Tactics in International Arbitration* (Kluwer Law International 2013) 18. See also *Claimant X v. Respondent Y*, LCIA Case No. 132551, para. 75 (‘The Division finds this challenge frivolous.’).

15. ICC, ‘Dispute Resolution 2020 Statistics’ (ICC 2021) 13.

16. ICC, ‘Dispute Resolution 2020 Statistics’ (ICC 2021) 13.

17. ICC, ‘Dispute Resolution 2020 Statistics’ (ICC 2021) fn 13.

(10.1%), but there were 201 resignations over that same period.<sup>18</sup> The ICC statistics do not draw a link between the resignations and the challenge, but the number of resignations over the period is significant, amounting to 70% of the challenges filed.

Table 33.1

<i>Year</i>	<i>Challenges Filed</i>	<i>Accepted</i>	<i>Replacement (Resignation)</i>
2020	92 (41 cases)	5	43 (38 resigned, 3 deaths) <sup>19</sup>
2019	52	6	58 (50 resigned) <sup>20</sup>
2018	45	7	55 (50 resigned) <sup>21</sup>
2017	48	6	37 (29 resigned) <sup>22</sup>
2016	50	5	33 (34 resigned) <sup>23</sup>

That is consistent with statistics published by ICSID in 2014. Then Secretary-General Meg Kinnear reported that out of eighty-four challenges, four challenged arbitrators were disqualified and twenty-one arbitrators resigned, resulting in the composition of a tribunal changing in approximately 30% (twenty-five out of eighty-four) of cases.<sup>24</sup>

Other types of frivolous applications and challenges can also similarly cause obstruction or delay. Another example is when proceedings are bifurcated into a prior jurisdictional and admissibility phase, and jurisdictional issues that are already resolved in a prior decision are relitigated by the losing party at a later phase. There may also be a re-litigation of issues that should have been raised and resolved in the prior phase. The doctrines of *res judicata* and abuse of process can provide a substantive basis to resolve some of these issues; however, they do not resolve the increased complexity and, consequently, increased costs of the arbitration – often unnecessarily – that are borne by the other party or parties.

One possible sanction for such conduct is cost-shifting in a final award,<sup>25</sup> but that is often of limited effectiveness in redressing the kinds of frivolous applications and challenges that fall within Guideline II(D). The final award can come many months –

18. ICC, 'Dispute Resolution 2020 Statistics' (2021) 13; ICC, 'Dispute Resolution 2019 Statistics' (2020) 12; ICC, 'Dispute Resolution 2018 Statistics' (2019) 10; ICC, 'Dispute Resolution 2017 Statistics' in ICC Dispute Resolution Bulletin (2018, Issue 2) 57; ICC, 'Dispute Resolution 2016 Statistics' in ICC Dispute Resolution Bulletin (2017, Issue 2) 52.

19. ICC, 'Dispute Resolution 2020 Statistics' (ICC 2021) 13.

20. ICC, 'Dispute Resolution 2019 Statistics' (ICC 2020) 12.

21. ICC, 'Dispute Resolution 2018 Statistics' (ICC 2019) 10.

22. ICC, 'Dispute Resolution 2017 Statistics' in ICC Dispute Resolution Bulletin (2018, Issue 2) 57.

23. ICC, 'Dispute Resolution 2016 Statistics' in ICC Dispute Resolution Bulletin (2017, Issue 2) 52-53.

24. Meg Kinnear, 'Challenge of Arbitrators at ICSID: An Overview' ASIL Proceedings (2014) 412, 416 <https://doi.org/10.5305/procannmeetasil.108.0412> (accessed 16 August 2025).

25. See, e.g., *ICC Commission Report: Decisions on costs in international arbitration* (2015) 23; *Claimant(s) v. Respondent(s)*, ICC Final Award No. 18223, paras 527, 529; *MWN Group, Inc. v. MAG USA, Inc.* (ICC), Final Award (12 June 2006), para. 54.

even years – later, when memories have dimmed, the impact of the conduct complained of has faded, and the sanction neither compensates the injured party nor deters the conduct in question. Furthermore, as a practical matter, it can also be difficult to isolate the costs associated with making or defending against a particular frivolous application or challenge.

In the author’s submission, Guideline II(D) can provide a basis for tribunals to immediately address frivolous applications or challenges made with no expectation of success, whose sole purpose is to obstruct, delay, or disrupt the arbitration process. Where there is a breach of Guideline II(D), arbitral tribunals may consider an immediate costs order or award at the point when a frivolous application or challenge is disposed of.<sup>26</sup> Most arbitration rules – for example, Article 42(2) of the UNCITRAL Rules and Article 38(3) of the ICC rules – permit ordering costs prior to a final award. Doing so will have a real effect on party behaviour, and the sanctioned party will have a strong incentive to comply, given that the tribunal has yet to resolve the merits of the dispute.

## 2 Refusal to Pay Advance on Costs

The Explanation to Guideline II(D) notes that ‘advising clients/parties to refuse to pay the advance on costs in order to delay the proceedings or obligate the counterparty to pay them’ is another example of conduct which may delay, obstruct, or disrupt the arbitration proceedings in breach of that guideline.<sup>27</sup>

The advance on costs is a deposit paid by the parties to cover fees and expenses of the tribunal and the institution’s administrative expenses. Arbitral rules generally provide that the consequence of the failure to pay advance on costs is the suspension or termination of the arbitration, or the deemed withdrawal of claims or counter-claims.<sup>28</sup> These more serious effects can generally be mitigated by other parties making substitute payments, as permitted under virtually all rules.<sup>29</sup>

However, even where there has been such mitigation, the refusal to pay an advance on costs may exact further costs on the party making substituted payment. There is, of course, the immediate financial cost of having to make the payment, as well as the opportunity cost of the lost cashflow, which can be very significant in drawn-out cases involving large sums in dispute. In some cases, a claimant will need to obtain financing to make the payment, and that may come with yet further costs, particularly

26. This is similar to what is referred to in English litigation proceedings as a ‘forthwith’ costs order. See, e.g., ‘Chapter 30: Detailed Assessment: Procedure’ in Jason Rowley and Simon Middleton (eds), *Cook on Costs* (LexisNexis 2024) (“Forthwith” orders).

27. 2021 ICCA Guidelines, Guideline II(D) 8.

28. 2021 ICC Rules, Article 37(6); 2020 LCIA Rules, Article 24(8); 2021 UNCITRAL Rules, Article 43(4); 2021 ICDR Rules, Article 39(5); 2016 SIAC Rules, Rule 34.6; 2012 PCA Rules, Article 43(4); 2023 SCC Rules, Article 51(5); 2021 Swiss Rules of International Arbitration, Article 41(4); 2024 HKIAC Rules, Article 41(4).

29. 2021 ICC Rules, Article 37(5); 2020 LCIA Rules, Article 24(6); 2021 UNCITRAL Rules, Article 43(4); 2021 ICDR Rules, Article 39(4); 2016 SIAC Rules, Rule 34.5; 2012 PCA Rules, Article 43(4); 2023 SCC Rules, Article 51(5); 2021 Swiss Rules of International Arbitration, Article 41(4); 2024 HKIAC Rules, Article 41(4).

in cases involving litigation financing. Depending on the sums involved, all this can cause prejudice to the party making the substitute payment that cannot be remedied by simple cost-shifting in a final award. Again, this creates perverse incentives that reward respondents that seek to wear down their opponents by refusing to pay their share of the deposits.

One remedy available to the affected party may be to request immediate reimbursement of the advance on costs paid on behalf of the other party.<sup>30</sup> Several arbitration rules expressly provide for immediate reimbursement in a partial award as of right, for example, the SIAC Rules<sup>31</sup> and the SCC Rules.<sup>32</sup> The LCIA Rules even provide that the substitute sums paid constitute a debt immediately due, with interest.<sup>33</sup> However, even absent such express provisions, there are compelling arguments that a failure to pay an advance of costs should be regarded as a breach of the parties' agreement to arbitrate in good faith and the obligation to desist from actions that may hamper the arbitration, and that is a sufficient basis for a partial award on costs.<sup>34</sup>

Guideline II(D) is useful for supplementing the analysis and legal basis for such a partial award. Given the obstructive effects of an intentional failure to make payment of an advance on costs, reimbursement should generally follow unless non-payment is based on a 'legitimate reason'. There can be several reasons for a party's refusal to pay their share of costs, for example, if the party has objected to the tribunal's jurisdiction or impartiality. However, unless the tribunal's lack of jurisdiction is manifest, these are not generally legitimate reasons to withhold advances on costs, particularly where respondents have raised the jurisdictional objections before the tribunal and requested the use of shared resources and tribunal time to resolve their objections. In addition, a respondent would suffer no prejudice from having to bear its equal share of the advance on costs, because costs can be reallocated in an award in the event that a respondent prevails on its jurisdictional objections.

Guideline II(D) is useful for supplementing the analysis and legal basis for a partial award on reimbursement. Given the obstructive effects of an intentional failure to make payment, reimbursement should generally follow unless non-payment is based on 'legitimate reasons.' Applying Guideline II(D), a wilful refusal to pay an advance on costs can result in immediate reimbursement to be ordered at the discretion

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30. See, e.g., *UAB Garsu Pasaulis v. The Kyrgyz Republic*, PCA Case No. 2020-59, Procedural Order No. 2, Decision on the Claimant's Request for a Separate Award on Costs, 29 June 2021, paras 52-65; excerpted in Matthew Secomb, 'Awards and Orders Dealing with the Advance on Costs in ICC Arbitration: Theoretical Questions and Practical Problems' 14(1) ICC International Ct. of Arb. Bull. (2003) 60. See also a similar discussion in Nadia Darwazeh and Simon Greenberg, 'No One's Credit Is As Good As Cash: Awards and Orders for the Payment of the ICC Advance on Costs' 31(5) *Journal of International Arbitration* (2014) 557 <https://doi.org/10.54648/joia2014027> (accessed 16 August 2025).

31. 2016 SIAC Rules, Article 27.

32. 2023 SCC Rules, Article 51.

33. 2020 LCIA Rules, Article 24 (5); 2024 HKIAC Rules contain a similar provision – Article 41.4.

34. Neil Kaplan, 'Non-Payment of Advances on Costs: No Pay, Can Play?' in David D. Caron et al (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 330; Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (OUP 2015), para. 3.33.

of the tribunal, with costs allocated in a final award to ensure there is no ultimate prejudice to either party.

### 3 Document Production

The Explanation to Guideline II(D) notes that '[d]ocument production is another area that is ripe for procedural abuse and offensive tactics'.<sup>35</sup> Examples include 'unreasonably delaying the production of evidence requested by arbitrators' or using the production phase to 'unreasonably delay the resolution of a dispute or to harass opposing counsel [or] parties'.<sup>36</sup>

The open-ended nature of document production requests, as well as the power exercised by a party over documents in its custody or control, creates opportunities for tactical abuse. For example, a requesting party can request production of numerous broad categories of documents that places a disproportionate burden on the producing party, or a producing party can produce a huge number of documents that are of little relevance or in a format that is difficult to read.<sup>37</sup> Other forms of misconduct include improper withholding of documents, improper redactions, and in some cases even deletion or spoliation of evidence.

Some existing rules and guidelines already regulate misconduct in document production. For example, the IBA Guidelines on Party Representation in International Arbitration provides that '[a] Party Representative should not make any Request to Produce or any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay'.<sup>38</sup> The IBA Guidelines also prohibit counsel from concealing documents or recommending concealing documents to their client.<sup>39</sup> Such conduct is also often in breach of the tribunal's procedural orders.

Such misconduct obviously disrupts and delays proceedings, and therefore a key issue under Guideline II(D) will be whether such conduct was intentional. For example, parties may withhold documents out of inadvertence or (more likely) out of an honestly – albeit wrongly – held view that privilege or commercial sensitivity provides grounds for withholding certain documents. A breach of Guideline II(D) will result if documents have been deliberately withheld without legitimate reasons.

In terms of remedies, cost-shifting or written warnings in a final award are arguably too little too late and do not adequately address deliberate misconduct without legitimate reason under Guideline II(D). In such cases, arbitral tribunals may consider remedies with more teeth to penalize and deter the misconduct. What remedies are appropriate may depend on how pervasive and egregious the misconduct is, as well as the degree of prejudice caused by the misconduct.<sup>40</sup>

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35. 2021 ICCA Guidelines, Guideline II(D) 8.

36. 2021 ICCA Guidelines, Explanation to Guideline II(D).

37. 'Chapter 6: Document Production Strategies' in Reto Marghitola (ed.), *Document Production in International Arbitration* (Kluwer Law International 2015) 125-126.

38. 2013 IBA Guidelines on Party Representation in International Arbitration, Guideline 13.

39. 2013 IBA Guidelines on Party Representation in International Arbitration, Guideline 16.

40. See, e.g., *Cook v. MKCI and McGivney* (AAA), Final Award (1 August 2023) para. 52.

One such remedy is the drawing of adverse inferences. An arbitral tribunal's power to draw adverse inferences is not controversial; it is provided for, for example, in Article 9(6) of the IBA Rules on Taking of Evidence,<sup>41</sup> the Prague Rules,<sup>42</sup> and most national laws.<sup>43</sup> The applicable rules in each case will depend on what rules the arbitral tribunal decides to apply, and the content and extent of the adverse inference sought will depend on the circumstances of the case. Under Singapore law, an element of deliberate intention is required for the drawing of adverse inferences. Thus, in *Ivanishvili, Bidzina v. Credit Suisse*,<sup>44</sup> the Singapore Court declined to draw the adverse inference sought because it held that the failure to comply with disclosure obligations was not deliberate, but instead a result of 'the pressures and complexities of the preparation for and conduct of the trial'.<sup>45</sup> Similarly, under English law, if there has been deliberate withholding or destruction of evidence, the Court may draw adverse inferences against a party as well as treat a party's evidence as lacking any credibility.<sup>46</sup>

In extreme cases, where the deliberate destruction of evidence has occurred such that a fair trial cannot take place, dismissal of the claim may even be warranted under English law.<sup>47</sup> This is also the case in some US jurisdictions, where dismissal of a claim is one possible remedy for spoliation of evidence, especially where the spoliation is intentional and results in significant prejudice.<sup>48</sup>

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41. 2020 IBA Rules on Taking of Evidence, Article 9(6).

42. 2018 Prague Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 10.

43. Gary Born, *International Commercial Arbitration* (3rd ed, Kluwer Law International 2022) 2497.

44. *Ivanishvili, Bidzina and others v. Credit Suisse Trust Ltd* [2023] 5 SLR 59.

45. *Ivanishvili, Bidzina and others v. Credit Suisse Trust Ltd* [2023] 5 SLR 59, paras 584-585.

46. *Rebekah Vardy v. Coleen Rooney* [2022] EWHC 2017 (QB) paras 55-57, 69, 71.

47. See, e.g., *Arrow Nominees Inc v. Blackledge* [2001] BCC 591, para. 54 ('I adopt, as a general principle, the observations of Mr Justice Millett in *Logicrose Ltd v Southend United Football Club Limited* (*The Times*, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules – even if such disobedience amounts to contempt for or defiance of the court – if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him').

48. See *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990) ('Destruction of evidence cannot be countenanced in a justice system whose goal is to find the truth through honest and orderly production of evidence under established discovery rules ... nothing less than default judgment on the issue of liability will suffice to both punish this defendant and deter others similarly tempted'); *Grange Mut. Cas. Co. v. Mack*, 270 F. App'x 372, 378 (6th Cir. 2008) (affirming default judgment because '[o]ur civil legal system hinges on voluntary discovery. Discovery abusers must be sanctioned, because "[w]ithout adequate sanctions, the procedures for discovery would be ineffectual"); *Leon v. IDX Systems Corp.*, 464 F.3d 951 (9th Cir. 2006) (finding that plaintiff's wilful spoliation of data on his employer-owned laptop supported sanction of dismissal).

**IV CONCLUSION**

The ICCA Guidelines elucidate minimum standards of conduct essential to the fair and efficient administration of proceedings, with special emphasis on civility. Guideline II(D) contains an important set of minimum standards that apply to the conduct of counsel in international arbitration proceedings. Guideline II(D) is narrowly circumscribed and requires both intention to delay or obstruct, as well as the absence of any legitimate reasons for the conduct, in order for a breach to be established. Where the conduct fits the sanction, Guideline II(D) can play an important role in addressing ‘guerrilla tactics’ that cross the line and provide both a basis for censure and sanction of such misconduct.

