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Regulation of Counsel and Professional Conduct in International Arbitration

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1. While the conduct of counsel in national court proceedings is subject to standardised local regulation, enforceable by disciplinary action before local authorities and courts, the conduct of counsel in international arbitration does not similarly lend itself to a uniform system of substantive rules, and there is no supra-national regulatory body to enforce any such rules on an international level.[1]

2. As such, the existing regulatory framework for international arbitration counsel is a patchwork of various potentially conflicting rules,[2] and the consequences for breaching these rules remain unclear.[3] As one commentator put it, "[o]ne might as well ask 50 arbitration practitioners to describe the professional conduct principles applied by them and one would receive 50 different answers".[4] Indeed, a 2010 International Bar Association ("IBA") Survey revealed a "high degree of uncertainty" among respondent practitioners "regarding what rules govern party representation in international arbitration".[5]

3. There has been an ongoing debate amongst academics, practitioners and other stakeholders about what, if anything, should be done about this state of affairs.[6] Arbitral institutions and organisations like the IBA have also paid more attention to these issues in recent years. This chapter provides an overview of these developments and covers:

a. the issues with the existing regulation of counsel and professional conduct in international arbitration;

b. proposals that have been suggested to resolve these issues; and

c. recent developments by arbitration organisations and arbitral institutions.

A. Issues with Existing Regulation

4. The existing structures for the regulation of counsel and professional conduct in international arbitration raise a number of potential issues.

5. ***First***, it can be unclear which rule or rules of professional conduct apply to counsel in any given arbitration, who may need to take into account not just the rules of professional conduct in his/her own jurisdiction, but also the rules of the arbitral seat.[7] The uncertainty can be exacerbated by the lack of clarity about whether professional conduct rules at the seat apply to foreign counsel in arbitrations sited there, or about whether professional conduct rules apply to arbitrations outside the jurisdiction where counsel is qualified.[8] This uncertainty creates scope for an ethical race to the bottom, where counsel adopt a "Machiavellian cost-benefit analysis" to determine what conduct can be "gotten away with without undue risk of discovery or sanction by the tribunal".[9]

6. ***Second***, international arbitrations frequently involve counsel qualified or resident in different jurisdictions, and the different rules of professional conduct that could apply to different counsel in the same proceedings create the risk of an uneven playing field.[10] This can be concerning in light of the well-established principle that parties should be treated with equality and given a full opportunity to present their case.[11]

7. Witness examination is a common example. Traditionally, civil law systems disallow pre-trial witness communication in court proceedings, while common law systems consider such communication legitimate, and indeed, essential.[12] Even between common law jurisdictions, there are noticeable differences in approach to the issue of witness preparation.[13] Witnesses in the same set of proceedings may be subject to differing levels of preparation depending on the jurisdictions in which counsel involved are qualified.

8. Document disclosure presents another example: while many common law jurisdictions have well-developed rules detailing counsels' obligations during document production and exchange, civil law codes in non-adversarial systems are generally silent on this issue.[14] In an international arbitration where differing rules might be at play for counsel from different jurisdictions, this may result in some counsel (and parties) being less restricted in the conduct of his/her case – for example, counsel from non-disclosure jurisdictions may not consider themselves under a duty to preserve relevant documents, or to search for and disclose documents that fall within disclosure requests or orders.[15]

9. ***Third***, counsel may be simultaneously subject to more than one set of professional conduct rules, either because they are members of more than one bar association, or because the professional code of conduct of both their home jurisdiction and the arbitral seat will be held to apply.[16] In such circumstances, there is at least a theoretical possibility that such rules may be in conflict with each other, and put the counsel in the invidious position of being in breach, whatever course of action he or she takes.[17] It is also unclear whether, in event of conflict, counsel would be held to the higher or lower standard of conduct.[18]

10. ***Fourth***, there is considerable uncertainty about the appropriate mechanism for the enforcement of any professional rules of conduct that may be held to apply. Local courts and bar authorities are not well-placed to detect and enforce breaches that occur in private arbitral proceedings outside their territory, and such institutions often have little familiarity with international arbitration and its procedures.[19] Further, while arbitral tribunals are probably best placed to detect counsel misconduct and administer sanctions, their jurisdictional competence to apply and enforce rules of professional

conduct against counsel has been doubted.[20] Quite aside from the issue of jurisdictional competence, arbitrators may lack investigative powers with respect to issues other than the dispute submitted to them for decision, and may not be well-placed or willing to play a policing role against the very counsel who are responsible for their appointment.

B. Proposals to Address These Issues

11. There has been a wide range of proposals suggested to deal with the issues identified above. Despite the amount of attention given to these issues, no consensus has yet emerged on how best to address them, if at all.

1. Universal International Code of Conduct

12. The proposal for a universal international code of conduct for international arbitration counsel[21] has been mooted in various fora as a potential solution to these issues,[22] including in successive International Council for Commercial Arbitration ("ICCA") Keynote Addresses.[23] Advocates of an international code of conduct argue that it would set out clear and uniform standards for all counsel in international arbitration, which would address the existing ambiguity on the applicable standards of professional conduct.[24] They argue that the development of *sui generis* standards for international arbitration would be desirable, given that domestic rules may not transpose well to the international arbitration context, which has developed its own unique procedures and norms.[25]

13. Formulating standards of universal application that override local standards and enforcing such standards would be challenging. There is always some risk that standards alleged to be universal reflect particular local and regional preferences. It is not clear which arbitral body or international organisation would be best placed to develop a universal code, or whether any existing institution has the authority or jurisdiction to sanction non-compliance.[26] As discussed further below, efforts to set up such a global standard-setting and enforcement body have not met with success.[27]

14. Another possible approach is to formulate a universal set of rules or guidelines that can be freely adopted or referenced by parties on an *ad hoc* basis, rather than a codified set of rules that require implementation and enforcement by a supra-national body. This approach has been adopted in other areas of arbitration, for example the IBA's Rules on the Taking of Evidence in International Arbitration have received broad acceptance and are widely used. The IBA's effort to formulate guidelines on professional conduct is discussed further below.[28]

15. A number of practitioners have cautioned against over-regulation through universal codification, warning that it might "suffocate and imperil" certain cherished features of the arbitration system, such as flexibility and party autonomy.[29] They argue that universal codes or guidelines would either be an abstract, banal restatement of what is uncontroversial, or an attempt to shoehorn legitimate local differences into a one-size-fits-all code purporting to apply to all arbitrations in all circumstances,[30] which is inappropriate where such differences reflect particular conceptions of morality, history and public policy that cannot simply be "papered over".[31]

2. Improvements to Conflict-of-Laws Rules

16. Another approach focuses on clarifying the international conflict-of-laws principles that determine the applicable professional conduct rules in any given case. In emphasising "procedural coordination" over "substantive harmonisation", this recognises that the cacophony of ever-multiplying substantive rules calls for coherent choice-of-law rules to select between them.[32] This includes clarification on whether the rules at the seat or rules of a lawyer's home jurisdiction apply, as well as when international ethics rules displace, as opposed to merely supplement, national ethics rules.[33] One suggestion has been for an international "model" choice-of-law rule that can be adopted by various national authorities.[34]

17. However, a key difficulty with this proposal lies in getting different bar associations and national courts to agree on a uniform conflict-of-laws approach. Different authorities currently adopt inconsistent approaches to the issue of applicable professional conduct rules,[35] and it is difficult to see how this can be reconciled in the short or medium term without coordination between local regulators, or in the absence of a supra-national authority. Furthermore, a conflict-of-laws approach is inherently flexible and fact-specific, and therefore it does not resolve the problems of double-deontology or an unequal playing field.[36]

18. An alternative approach is to focus on facilitating better coordination between home jurisdiction authorities and arbitral tribunals.[37] This may include empowering the arbitral tribunal to report or refer incidents of misconduct to the relevant bar authorities,[38] as is already possible under the rules of international criminal tribunals.[39] Arbitral tribunals could also provide assistance to bar authorities in pursuing complaints of alleged misconduct in arbitral proceedings.[40] However, commentators have pointed out the difficulties with imposing reporting powers or obligations on arbitral tribunals, including the absence of jurisdiction, potential abuse by parties and potential breaches of confidentiality.[41]

3. Ethical Checklists

19. The use of ethical checklists at the outset of arbitration has also been suggested as an *ad hoc* method for dealing with conflicting ethical obligations in individual cases.[42] The checklist would be employed at the outset of a case to enable parties, their counsel and the tribunal to discuss, and seek to reach agreement on, various ethical standards that might apply in the course of arbitration.[43] Failing agreement, the tribunal would decide on the appropriate standard.[44] These checklists could be incorporated into a tribunal's initial procedural order or the relevant terms of reference.[45]

20. Ethical checklists have been lauded by some as an attractive solution, given doubts as to whether a uniform code of conduct for counsel is achievable (or even desirable) in the foreseeable future.[46] However, it is not clear whether the agreement of the parties or an order by the tribunal adequately addresses the problem – such agreement or order would arguably not override local professional conduct rules, particularly if they are viewed as mandatory, and one criticism is that this checklist approach only adds another layer of rules to an already confusing state of affairs.[47] Moreover, the use of such checklists in individual cases does little to further the development of standardised and uniform international standards that would provide guidance and clarity in all cases. An extensive dialogue about ethical standards at the outset of an arbitration would also increase costs, as well as open the door to abuse and delay by disruptive parties.

4. No Change with Localised or Market Solutions

21. Finally, it is worth nothing that there is a sizeable constituency that believes that the current system has worked relatively well, and that systemic reforms of any sort are unnecessary, creating more

problems than they solve. On this view, there is wider consensus on ethical obligations than assumed.[48]

22. Proponents of this view have championed localised and flexible solutions by tribunals in particular cases.[49] They advocate promulgating "local" rather than universal regulation that reflects regional cultural norms, cultivating broad and flexible guidance rather than prescriptive rules, structuring of specific and binding sanctions appropriate to the context of individual tribunals and institutions.[50] On this view, the solution lies in remedies by tribunals in particular cases, exercising their inherent powers to preserve the integrity of proceedings where necessary to sanction misconduct.[51]

23. This localised approach, however, poses a number of difficulties. While attractive in its regard for flexibility and context-specificity, it arguably does not address the problem of an unequal playing field.[52] Additionally, the reliance on flexible rules may be impractical given the increasingly globalised practice of international arbitration, with new entrants coming from disparate jurisdictions less experienced in arbitration, who do not necessarily subscribe to the same implied rules.[53] Others have doubted whether the inherent powers of tribunals extend to the power to sanction counsel's misconduct.[54]

24. Some advocates for keeping the *status quo* have suggested a market-based approach to the issue of professional conduct, focusing on the role arbitral institutions can play. Specifically, if arbitral institutions choose to amend their rules to include additional professional conduct requirements for counsel, then ultimately it will be up to the users to determine if they wish to adopt such a set of rules.[55] Furthermore, counsel will have to decide whether they are willing to be hired for cases that are conducted under such rules. Multiple advantages to this approach have been suggested, including preservation of confidentiality and the fact that institutions can impose meaningful penalties on counsel.[56]

C. Recent Developments

25. In recent years, a number of international organisations and arbitral institutions have taken the initiative to address some of the issues relating to the regulation of counsel and professional conduct in international arbitration.

1. 2013 IBA Guidelines on Party Representation

26. In May 2013, the IBA adopted Guidelines on Party Representation in International Arbitration (the "IBA Guidelines"). This was not the first attempt to formulate an international statement of professional conduct rules.[57] The IBA Guidelines are, however, the first attempt to deal with the issue in the context of international arbitration.[58] There are 27 Guidelines in total, and they deal with issues ranging from witness preparation (Guideline 20) to "knowingly false" submissions (Guideline 9) to duties relating to document production and preservation (Guidelines 12–17).

27. The IBA Guidelines have provoked considerable debate since their publication. While some have welcomed them as "useful guidance" to practitioners;[59] other practitioners have argued that the Guidelines do more harm than good, expressing the hope that the IBA Guidelines "quickly fall into oblivion or, better, never are applied".[60]

28. The drafters themselves acknowledge that the IBA Guidelines are the product of negotiated compromise.[61] The IBA Guidelines leave some issues open to interpretation and create some practical uncertainties, including: their uncertain scope for application by the arbitral tribunal in the absence of party agreement;[62] and the lack of clarity on whether and how they would apply if there is a conflict with national rules.[63] Critics also argue that the IBA Guidelines would encourage tactical challenges aimed at disrupting proceedings.[64]

29. Others have described the IBA Guidelines as a "welcome step in the right direction".[65] They point out that the underlying intention of the IBA Guidelines was not to establish a universally applicable international code of conduct, but to build some consensus on international best practices.[66] Supporters argue that the IBA Guidelines offer a number of modest but not insignificant benefits, such as: educating new entrants to international arbitration from less-sophisticated jurisdictions with less-developed professional conduct standards;[67] and strengthening the hand of arbitral tribunals in their discretion to apply the IBA Guidelines and ability to sanction counsel misconduct.[68] Supporters also point out the versatility of the IBA Guidelines, which may be used as a checklist of issues at the outset of proceedings,[69] or as evidence of general expectations and practice to aid interpretation of national standards of professional conduct in the context of arbitration proceedings.[70]

2. Revisions to Arbitration Rules

30. The revised LCIA Arbitration Rules (the "2014 LCIA Rules") came into effect on 1 October 2014. The 2014 LCIA Rules include two noteworthy amendments on the issue of professional conduct: a more-detailed Article 18 regulating the conduct of legal representatives; and an Annex entitled "General Guidelines for the Parties' Legal Representatives" (the "Annex"), which sets out seven standards for counsel conduct that are applicable to LCIA arbitrations.

31. Article 18.5 of the 2014 LCIA Rules provides that "each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation".[71] This provides a mechanism to bind parties' "legal representatives" to the standards set out in the Annex, and expressly grants the arbitral tribunal the competence to rule on and sanction errant behaviour in breach of those standards.

32. The 2014 LCIA Rules place primary responsibility on the arbitral tribunal to identify, address and remedy ethical breaches.[72] In the event of breach, Article 18.6 of the 2014 LCIA Rules provides for an extensive range of sanctions, including "a written reprimand", "a written caution as to future conduct in the arbitration", potentially a "reference to the legal representative's regulatory and or professional body", and "any other measure necessary to maintain the general duties of the Arbitral Tribunal under Articles 14.4(i) and (ii)".

33. The revisions in the 2014 LCIA Rules represent the first major initiative, at the institutional level, to establish a written ethical framework governing counsel conduct with standards expressly enforceable by the arbitral tribunal.[73] The response to the revisions has, however, been mixed. The guidelines in the LCIA Annex are obvious statements of principle framed at a very high level of abstraction,[74] and do not address or resolve more difficult areas of divergence in ethical standards on witness preparation or document production. Some commentators believe that Article 18 and the Annex in the 2014 LCIA Rules will distract the tribunal from its main task of deciding the case on the merits, and that they can be abused by parties who wish to disrupt proceedings or challenge members of the tribunal.[75]

34. The 2014 International Centre for Dispute Resolution ("ICDR") Arbitration Rules (the "2014 ICDR Rules") have also sought to address issues of professional conduct, providing at Article 16 that

"the conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject".[76] The ICDR has issued "Standards of Conduct for Parties and Representatives" (the "ICDR Standards").[77] Again, these standards appear to deal with the ethical obligations of counsel at a very high level of abstraction, stating, for example, that the parties shall not "engage in … tactics that the AAA or the arbitrator determines are frivolous, filed for the purposes of harassment, or primarily intended to cause unnecessary delay or increased costs".[78]

35. The ICDR Standards arguably have less bite than the LCIA Annex, given that the only sanction for non-compliance is that it "may result in the AAA declining to further administer a particular case or caseload".[79] It is not clear that this is a sanction with any real deterrent effect or that it would reduce the potential for abuse of the ICDR standards, particularly if one party is intent on delaying or derailing proceedings.

36. Other institutions have followed suit. The Australian Centre for International Commercial Arbitration released new rules in January 2016 (the "2016 ACICA Rules") that refer specifically to the IBA Guidelines. Rule 8.2 provides that "[e]ach party shall use its best endeavours to ensure that its legal representatives comply with the International Bar Association Guidelines on Party Representation in International Arbitration in the version current at the commencement of the arbitration".[80] The Lagos Chamber of Commerce International Commercial Arbitration Centre also issued new rules in November 2016 (the "2016 LACIAC Rules"), which incorporate the IBA Guidelines in an Annex. Article 7.3 of the 2016 LACIAC Rules provides that if a party representative commits a "Misconduct as defined in the [IBA Guidelines], the arbitral tribunal, may, at its discretion, deal with such allegation in the manner set out in the aforesaid IBA Guideline, or may report such allegation to the LACIAC court."[81] Article 7.4 requires the LACIAC Court to review any report of misconduct from the tribunal and permits it to report any such misconduct to "an appropriate professional regulator".[82]

37. This trend does not necessarily reflect a consensus. In the most recent revisions to their arbitration rules, the SIAC, HKIAC and ICC did not include provisions addressing the issue of professional conduct. There has instead been a preference for progressive development on the topic through non-binding guidelines. For example, on 1 March 2017, the ICC published a practice note that stated that arbitral tribunals, parties and their representatives are "expected to abide by the highest standards of integrity and honesty" and that parties and arbitral tribunals are "encouraged to draw inspiration from, and where appropriate, to adopt" the IBA Guidelines.[83]

3. A Global Arbitration Ethics Council

38. In late 2014, the Swiss Arbitration Association called for the creation of a transnational body, the Global Arbitration Ethics Council, comprising appointees of all the major arbitral institutions and arbitration associations, to whom issues of allegedly unethical conduct by arbitration counsel would be referred.[84] A panel of decision-makers drawn from the members of the Global Arbitration Ethics Council would be constituted for each referral, taking into account the circumstances of each case.[85] To confer disciplinary powers upon the panel, participating associations and institutions would modify their rules or articles of association, including a provision similar to Article 18.5 of the 2014 LCIA Rules, and counsel would execute a document by which they agree to subject to such disciplinary powers.[86] The panel will apply a set of core international standards, while taking reference to rules and guidelines that are applicable and appropriate in the circumstances of the case.[87]

39. The proposal received an ambivalent reception after its announcement. Some lauded it for devising a "truly global solution" that took into account arbitration-specific considerations and avoided the problems associated with having arbitral tribunals or local bar councils rule on allegations of ethical misconduct.[88] Other commentators viewed it as a "step too far", creating an additional regulatory layer of bureaucracy and rigidity, with the potential for abuse.[89] Still others said that it was infeasible because it was unlikely that parties and arbitral institutions would submit to an overarching regulatory structure.[90]

40. In October 2016, after soliciting feedback from practitioners, arbitral institutions and arbitration associations, the ASA working group on counsel ethics decided that the "time ha[d] not yet come" for the creation of a Global Arbitration Ethics Council, although the idea might be revisited in the future.[91] The working group noted that empirical data collected from bar councils suggested there were "extremely few complaints" made in relation to international arbitration, and that many issues that are labelled as issues of "counsel ethics" are questions about admissibility and weighing of evidence, or the independence and impartiality of arbitrators, for which satisfactory solutions already exist.[92]

D. Conclusion

41. The regulation of counsel and professional conduct is a particularly thorny issue given the lack of clarity on applicable rules, and the absence of consensus on whether the issue should primarily be resolved by parties, tribunals, bar councils, arbitral institutions or some other transnational organisation. This state of affairs has serious implications for the legitimacy of the arbitral process.[93] The international arbitration community has, over the years, proven itself capable of generating creative, contextual solutions to a variety of problems. Now that it is fully attentive to the potential issues associated with the regulation of counsel in international arbitration, there is no reason to doubt that those involved will eventually find the best way to deal with these issues, whether this is achieved by wide-ranging, systematic reforms or incremental improvements to the *status quo*.

Endnotes

1. *See* V.V. Veeder, *The Lawyer's Duty to Arbitrate in Good Faith*, 18(4) Arb. Int'l 431, (2002), at pp. 431–433.
2. *See* 2013 IBA Guidelines on Party Representation, Preamble, at p. 1. ("Unlike in domestic judicial settings, in which counsel are familiar with, and subject, to a single set of professional conduct rules, party representatives in international arbitration may be subject to diverse and potentially conflicting bodies of domestic rules and norms. The range of rules and norms applicable to the representation of parties in international arbitration may include those of the party representative's home jurisdiction, the arbitral seat, and the place where hearings physically take place.")
3. *See e.g.* D. Bishop and M. Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, in A.J. van den Berg (ed.), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, Vol. 16, 2011, 391, at p. 405 ("the sanctions that inappropriate – or unethical – counsel conduct may invite from tribunals are far from clear").
4. C. Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 Disp. Resol. Int'l 78, 79 (2009).

5. *See* 2013 IBA Guidelines on Party Representation, *supra* note 2, Preamble, p. 1.

6. Once described as "uncharted territory" many years ago, the issue of professional ethics has recently received more attention within the arbitration community. It has now become a topic of discussion at various high-profile fora, as well as a key agenda item for international organisations and arbitral institutions. *See* J. Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 Am. Rev. Int'l Arb. 214, (1992), at p. 215. ("This is largely uncharted territory.") The issue has more recently been discussed at the International Council for Commercial Arbitration ("ICCA") Congress, with consecutive keynote addresses in both 2010 and 2012 dedicated to the issue. *See* D. Bishop, *Ethics in International Arbitration*, Keynote Address at 2010 Rio ICCA Congress; S. Menon, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, Keynote Address at 2012 Singapore ICCA Congress. The 17th Annual IBA Arbitration Day in Paris on 13–14 February 2014, which had the highest attendance in IBA history, was titled "Advocates' Duties in International Arbitration: Has the time come for a set of norms?" See "*Arbitration: what does the future hold?*", IBA Global Insight, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=16a5fa49-45dc-402e-bd79-6908ff8a0216.

7. G. Born, *International Commercial Arbitration*, 2014, at p. 2,871–2,879.

8. 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?*, *supra* note 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"); G. Born, *International Commercial Arbitration*, 2014, at p. 2877 ("counsel in international arbitrations are frequently uncertain what rules of professional responsibility apply to their conduct").

9. *See e.g.* C. Benson, *Can Professional Ethics Wait?*, *supra* note 4, 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").

10. V. V. Veeder, *The Lawyer's Duty to Arbitrate in Good Faith*, *supra* note 1, at p. 435 ("diversity can unbalance the arbitral process"); C. Rogers, *The Ethics of Advocacy in International Arbitration*, in D. Bishop, *The Art of Advocacy in International Arbitration*, 2nd ed., 2010, 49, at p. 55 ("when attorneys who are bound by different ethical rules participate in a single international proceeding, the proceedings may be structurally unfair").

11. *See e.g.* UNCITRAL Model Law on International Commercial Arbitration, Article 18.

12. Some civil law systems, such as France and Switzerland, now permit such communications with witnesses in the context of international arbitration. *See* G. Born, *International Commercial Arbitration*, 2014, at p. 2861.

13. M. Moses, *Ethics in International Arbitration*, Loy. U. Chi. Int'l L. Rev 10(1), at pp. 77–78 (observing that "full-blown American 'preparation of the witness'…may include extensive time in mock examination and cross-examination", while such "coaching" of a witness to rehearse his testimony is prohibited in England, Australia and New Zealand).

14. C. Benson, *Can Professional Ethics Wait?*, *supra* note 4, at p. 84.

15. J. Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 Am. Rev. Int'l Arb. 214, (1992), at p. 214, ("in cases where counsel come from two different countries where standards are quite inconsistent on a given point, does the client whose lawyer is subject to the lowest standard have an unfair advantage"); M. Moses, "*Ethics in International Arbitration*", 10(1) Loy. U. Chi. Int'l L. Rev 73, at p. 75.

16. D. Bishop and M. Stevens, *The Compelling Need for a Code of Ethics*, *supra* note 3, at p. 398.

17. C. Rogers, *The Ethics of Advocacy in International Arbitration*, in D. Bishop, *The Art of Advocacy in International Arbitration*, 2nd ed., 2010, 49, 54. ("An attorney may be licensed in more than one jurisdiction or otherwise be subject to the regulatory power of more than one jurisdiction, for example the rules of both the jurisdiction where an attorney is licensed and the jurisdiction where that attorney has an office or is appearing before a tribunal. In these instances, the different rules may impose obligations that are impossible to comply with simultaneously and the attorney is faced with the prospect of professional discipline regardless of what action he takes.")

18. J. Paulsson, *Standards of Conduct for Counsel*, *supra* note 14, at p. 214 ("are lawyers who are members of more than one bar… to be held to whichever standard is higher? Or whichever is lower? Or does the answer depend on the place of arbitration? On whether opposing counsel is a fellow member of one of the relevant bars?").

19. C. Rogers, *Guerrilla Tactics and Ethical Regulation, in Guerrilla Tactics in International Arbitration*, eds. G. Horvath and S. Wilske, 2013, 313, at p. 316 ("counsel in international arbitration are almost systematically exempt from local professional regulation and out of reach of their home regulation"); I.G. Caytas, *Transnational Legal Practice: Conflicts in Professional Responsibility*, 1992, 3 ("it is fairly rare that misconduct 'abroad' results in all too serious consequences 'at home'…sanctions remain essentially local"); G. Born, *International Commercial Arbitration*, 2014, at p. 2,888.

20. *See e.g.* J. Paulsson, *Standards of Conduct for Counsel*, *supra* note 14, at p. 215 ("[a]rbitrators are named to resolve disputes between parties, not to police the conduct of their representatives, and therefore do not rule on complaints of violations of codes of conduct"). While in notable cases arbitral tribunals have ordered sanctions against counsel, based on an expansive view of arbitral authority based on an "inherent power" to "preserve the integrity of the proceedings", case law and practice on the issue is still limited. *See Hrvatska Elektropirvreda v Slovenia*, Tribunal's Ruling in ICSID Case No. ARB/05/24 of 6 May 2008, at para. 33. *See also Fraport AG Frankfurt Airport Servs. Worldwide v Republic of the Philippines*, Decision on Application for Disqualification of Counsel in ICSID Case No. ARB/03/25 of 18 September 2008, at para. 37; *Libananco Holdings Co. v Turkey*, Decision on Preliminary Issues in ICSID Case No. ARB/06/8 of 23 June 1008, at paras. 78–80; G. Born, *International Commercial Arbitration*, 2014, at pp. 2,881–2,885.

21. *See* C. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Attorney Conduct for International Arbitration*, 23 Mich. J. Int' L. 341 (2002).

22. D. Bishop and M. Stevens, *The Compelling Need for a Code of Ethics*, *supra* note 3, at p. 414; G. Born, *International Commercial Arbitration*, 2014, at p. 2,889. ("Some commentators have suggested the development of an international code of conduct for counsel in international arbitrations. There is much to recommend in this approach to

the subject…"); S. Menon, *Some Cautionary Notes for An Age of Opportunity*, Keynote Address at Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013, at p.16; G. Born, *International Commercial Arbitration*, 2014, at p. 2,877 ("the best eventual resolution of the choice of applicable rules of professional conduct would be through uniform international rules of professional conduct, applicable to counsel in international arbitral proceedings").

23. D. Bishop, *Ethics in International Arbitration*, Keynote Address at 2010 Rio ICCA Congress; S. Menon, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, Keynote Address at 2012 Singapore ICCA Congress.

24. D. Bishop and M. Stevens, *The Compelling Need for a Code of Ethics*, *supra* note 3, pp. 414–415. ("In the longer run, such a code would contribute to uniformity in arbitral jurisprudence, the fairness of outcomes and above all it would enhance the credibility and legitimacy of the international arbitration process as a whole.") G. Born, *International Commercial Arbitration*, 2014, at p. 2,890; C. Rogers, *Fit and Function*, *supra* note 27, at p. 378. ("An established code of ethics will resolve these and other conflicts up front, sharpen parties' ability to understand the consequences of their choice to arbitrate, and permit them to direct the procedures for the resolution of their disputes.")

25. V.V. Veeder, *The Lawyer's Duty to Arbitrate in Good Faith*, *supra* note 1, at p. 447. ("International arbitration is different from state and national practice: it is sui generis, and, in its different forms, it is a much more varied and flexible procedure which requires its own guide.") Born, *International Commercial Arbitration*, 2014, at p. 2876, *fn.* 220. ("These [international] standards make fundamentally good sense, given the particularities of international arbitration and the international arbitration bar.")

26. *See* 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 p. 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").

27. *See below*, at paras. 38–40.

28. *See below*, at paras. 26–29.

29. *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?*, ICCA Congress Series, Vol. 17, 2013, 496.

30. *Id.*, at pp. 502–507.

31. *Id.*, at pp. 501–502.

32. C. Rogers, *Cross-border Bankruptcy as a Model for the Regulation of International Attorneys*, in P.H. Bekker *et al.* (eds.), *Making Transnational Law Work in a Global Economy: Essays in Honour of Detlev Vagts*, 630, at pp. 650–651.

33. C. Rogers, *Ethics in International Arbitration*, 2014, at para. 6.160.

34. C. Rogers, *Ethics in International Arbitration*, 2014, at para. 10.24.

35. *Id.*, at pp. 2,876–2,878.

36. *See e.g.* G. Born, *International Commercial Arbitration*, 2014, at p. 2,879. ("Some issues of professional conduct may be subject to both the rules of a lawyer's home jurisdiction and the rules of the arbitral seat. Matters such as conflicts of interest and compensation can materially affect both the integrity of the legal profession and the conduct of particular proceedings. In these circumstances, a conflict-of-laws analysis could suggest permitting concurrent regulation by both the rules of the lawyer's home jurisdiction and rules prescribed by the arbitral tribunal or arbitral seat.")

37. C. Rogers, *Cross-border Bankruptcy as a Model*, *supra* note 44, at p. 652.

38. C. Rogers, *Cross-border Bankruptcy as a Model*, *supra* note 44, at p. 652 (tribunals "could receive complaints locally and, as appropriate, refer them to the disciplinary authority of an attorney's home jurisdiction"). Some commentators argue that this should be done even despite arbitrators' obligations of confidentiality. *See* Stephan Wilske, *Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough*, in Christian Kalusegger *et al.* (eds.), *Austrian Yearbook on International Arbitration*, 2011, at pp. 331–332.

39. *See e.g.* International Criminal Tribunal for the former Yugoslavia Code of Professional Conduct for Counsel Appearing Before the International Tribunal 2009, Art 47; International Criminal Court Code of Professional Conduct for Counsel 2005, Article 42.

40. C. Rogers, *Cross-border Bankruptcy as a Model*, *supra* note 44, at p. 653.

41. M. Wittinghofer, *No Risk, No Fun – A Counsel's Remarks on Integrity*, in Jörg Risse, Günter Pickrahn, *et al.* (eds), SchiedsVZ | German Arbitration Journal, 2017, at p. 113; M. Scherer, *Inherent Powers to Sanction Party Conduct*, in F. Ferrari and F. Rosenfeld (eds.), *Inherent Powers of Arbitrators*, 105–131, 2019, at p. 127.

42. C. Benson, *Can Professional Ethics Wait?*, *supra* note 4.

43. *Id.*, at p. 85.

44. *Ibid*.

45. G. Born, *International Commercial Arbitration*, 2014, at p. 2,892.

46. *Ibid*.

47. M. Wittinghofer, *No Risk, No Fun – A Counsel's Remarks on Integrity*, in Jörg Risse, Günter Pickrahn, *et al.* (eds), SchiedsVZ | German Arbitration Journal, 2017, at p. 112.

48. D. Rivkin, *Ethics in International Arbitration*, 2014 Seoul Arbitration Lecture, 9 December 2014.

49. 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?*, ICCA Congress Series, Vol. 17, 2013, 496, at p. 515.

50. *Id.*, at pp. 515–516.

51. *Id.*, at pp. 518–519. *See also* D. Rivkin, *Ethics in International Arbitration*, 2014 Seoul Arbitration Lecture, 9 December 2014, at p. 20.

52. *See e.g.* D. Bishop, *Safeguarding the Fair Conduct of Proceedings*, in A.J. van den Berg (ed.), *International Arbitration: The Coming of a New Age?*, ICCA Congress Series, Vol. 17, 2013, 465, at pp. 466–468.

53. "*Arbitration: what does the future hold?*", IBA Global Insight, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=16a5fa49-45dc-402e-bd79-6908ff8a0216. ("There are those that consider no more guidelines or rules are required and that arbitration should be allowed to function the way it is… Zuleta believes it depends on whether counsel see 'a globalised world where you need to consider everyone else' or instead regard arbitration as something which is 'used by a small group of practitioners'.")

54. M. Scherer, *Inherent Powers to Sanction Party Conduct*, in F. Ferrari and F. Rosenfeld (eds.), *Inherent Powers of Arbitrators*, 105–131, 2019.

55. *See e.g.* C. Brower and S. Schill, *Regulating Counsel Conduct Before International Arbitral Tribunals*, *supra* note 7, at p. 509. ("The most appropriate institutions to develop precise, binding and uniform rules of counsel conduct in international arbitration, however, are arbitral institutions themselves.") C. Rogers, *Context and Institutional Structure in Attorney Regulation*, *supra* note 26, at pp. 28–29.
56. M. Hwang and J. Hon, *A New Approach to Regulating Counsel Conduct in International Arbitration*, 33 ASA Bulletin 658 (2015), at pp. 669–670.
57. *See e.g.* 1956 IBA International Code of Ethics; 2005 Union Internacionale des Avocats "Turin Principles"; 2006 Council of Bars and Law Societies of the European Community Code of Conduct.
58. 2010 International Law Association Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals.
59. J. Waincymer, *IBA Guidelines on Party Representation in International Arbitration*, Kluwer Arbitration Blog, 10 July 2013.
60. M. Schneider, *Yet Another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation*, 31 ASA Bull. 497 (2013), at p. 499.
61. C. Benson, *The IBA Guidelines on Party Representations: An Important Step in Overcoming the Taboo of Ethics in International Arbitration*, Paris J. Int'l Arb. 47 (2014) p. 50. For instance, while Guideline 24 allows counsel to "discuss and prepare" with a witness their prospective testimony, the Preamble to the Guidelines and Guideline 3 leaves open the concurrent application of national rules, which may impose a higher or lower standard. This effectively leaves lawyers from different jurisdictions free to engage in different approaches to witness preparation.
62. *See* 2013 IBA Guidelines on Party Representation, Comments to Guideline 1-3, at p. 5. ("These Guidelines do not state whether Arbitral Tribunals have the authority to rule on matters of Party representation and to apply the Guidelines in the absence of an agreement by the Parties to that effect. The Guidelines neither recognise nor exclude the existence of such authority.") G. Born, *International Commercial Arbitration*, 2014, at p. 2,855.
63. G. Born, *International Commercial Arbitration*, 2014, at p. 2,855. ("By their terms, the Guidelines do not purport to supersede otherwise applicable rules of national law regarding the professional conduct of lawyers (or other party representatives) … these provisions leave the scope and applicability of the Guidelines uncertain.") For example, it is unclear if Guideline 24, which allows extensive pre-trial discussions with witnesses, would apply to permit such behaviour if counsel are simultaneously subject to home jurisdiction rules that prohibit such behaviour.
64. M. Schneider, *Yet Another Opportunity*, *supra* note 60, at p. 499.
65. S. Menon, *Some Cautionary Notes for An Age of Opportunity*, Keynote Address at Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013, at p. 16; C. Benson, *The IBA Guidelines*, *supra* note 61, at pp. 47, 52.
66. C. Benson, *The IBA Guidelines*, *supra* note 61, at pp. 52–53 ("the Guidelines are the product of an international effort to build consensus on the best practices in counsel conduct… the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules or agreed arbitration rules. It recognises that the difficulty with the scope of any regulation of ethical conduct is that when party representatives step into the area of international arbitration, they do not shed the ethical regulation to which they are subject").
67. "*Arbitration: what does the future hold?*", IBA Global Insight, *supra* note 43. ("Zuleta and his Committee Co-Chair Paul Friedland, of White & Case's New York office, emphasised throughout the conference that the new Guidelines were 'not intended to educate' sophisticated arbitrators. Instead they are aimed at less-developed nations, said Zuleta, where the local rules of the bar are 'not to the same standard' … [the utility of the Guidelines] depends on whether counsel see 'a globalized world where you need to consider everyone else' or instead regard arbitration as something which is 'used by a small group of practitioners'… 'The key point is that these Guidelines may not be needed by experienced arbitrators,' claimed Friedland, 'but they may be highly appreciated by those relatively less experienced or newcomers to the field.")
68. 2013 IBA Guidelines on Party Representation, Guideline 1, at p. 4, (allowing an arbitral tribunal to apply the Guidelines at its discretion, so long as it determines that "it has the authority to rule on matters of party representation to ensure the integrity and fairness of the arbitral proceedings"); G. Petrochilos, *The Power of Arbitral Tribunals to Address Parties' Procedural Conduct*, at Cyprus Arbitration and Mediation Centre Conference, Limassol, 14 October 2013, at p. 7; 2013 IBA Guidelines on Party Representation, Guideline 26, at p. 16.
69. C. Benson, *The IBA Guidelines*, *supra* note 61, at p. 53, ("[the Guidelines] provide a practical starting point for open discussion, recognition and resolution of the most significant issues that may arise… The Guidelines are designed to be adopted in whole or in part, and it is important for counsel to consider them and to identify areas where higher standards than those in the Guidelines may apply or where a particular Guideline may conflict with their ethical obligations. The essential aspect for the process to capture is that all players in arbitration engage in discussion and ideally agree to a common set of standards to be followed by all counsel for purposes of that arbitration").
70. G. Born, *International Commercial Arbitration*, 2014, at pp. 2,879.
71. 2014 LCIA Arbitration Rules, Article 18.5.
72. 2014 LCIA Arbitration Rules, Annex, at para. 7.
73. There are only isolated provisions in other arbitration rules that address the issue, and these have a more limited scope. For instance, Article 28.4(b) of the 2010 LCIA India Arbitration Rules provides that the arbitral tribunal may take into account, for the purposes of its orders on arbitration and legal costs, any "undue delays or unnecessary expense caused by or attributable to a party or its representatives".
74. For example, para. 3 states that a legal representative "should not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court" and para. 4 states that a legal representative "should not knowingly conceal or assist in the concealment of any document (or part thereof) which is ordered to be produced by the Arbitral Tribunal". *See* 2014 LCIA Arbitration Rules, Annex.
75. M. Hwang and J. Hon, *A New Approach to Regulating Counsel Conduct in International Arbitration*, 33 ASA Bulletin 658 (2015), at pp. 659–660.
76. 2014 ICDR Rules, Article 16.
77. AAA/ICDR Standards of Conduct for Parties and Representatives, available at: https://www.icdr.org/sites/default/files/document_repository/AAA_ICDR_Standards_of_Conduct_Parties_and_Representatives_1.pdf.
78. *Id.*
79. *Id.*
80. 2016 ACICA Rules, Rule 8.2.
81. 2016 LACIAC Rules, Article 7.3.

82. 2016 LACIAC Rules, Article 7.4.
83. ICC, "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", dated 1 March 2017, at paras. 47–48.
84. *See* E. Geisinger, *"Soft Law" and Hard Questions: ASA's Initiative in the Debate on Counsel Ethics in International Arbitration*, in ASA Special Series No. 37, 17, at pp. 18, 26.
85. *Id.*, at p. 27.
86. *Id.*, at pp. 27–28.
87. *Id.*, at pp. 29–30.
88. A. C. Cremades, *The Creation of a Global Arbitration Ethics Council: a Truly Global Solution to a Global Problem*, Kluwer Arbitration Blog, 24 November 2015.
89. D. Rivkin, *Ethics in International Arbitration*, 2014 Seoul Arbitration Lecture, 9 December 2014, at p. 20.
90. M. Hwang and J. Hon, *A New Approach to Regulating Counsel Conduct in International Arbitration*, 33 ASA Bulletin 658 (2015), at p. 660.
91. ASA, *ASA Working Group on Counsel Ethics Releases Latest Findings*, 3 October 2016.
92. ASA, *ASA Working Group on Counsel Ethics Releases Latest Findings*, 3 October 2016.
93. C. Brower and S. Schill, *Regulating Counsel Conduct Before International Arbitral Tribunals*, in P.H. Bekker *et al.* (eds.), *Making Transnational Law Work in a Global Economy: Essays in Honour of Detlev Vagts*, 2010, 488, 491. ("At issue may ultimately be the legitimacy of the international arbitral system as a whole.") D. Bishop and M. Stevens, *The Compelling Need for a Code of Ethics*, *supra* note 3, at p. 406. ("This goes to the heart of the legitimacy of the international arbitral system.")

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