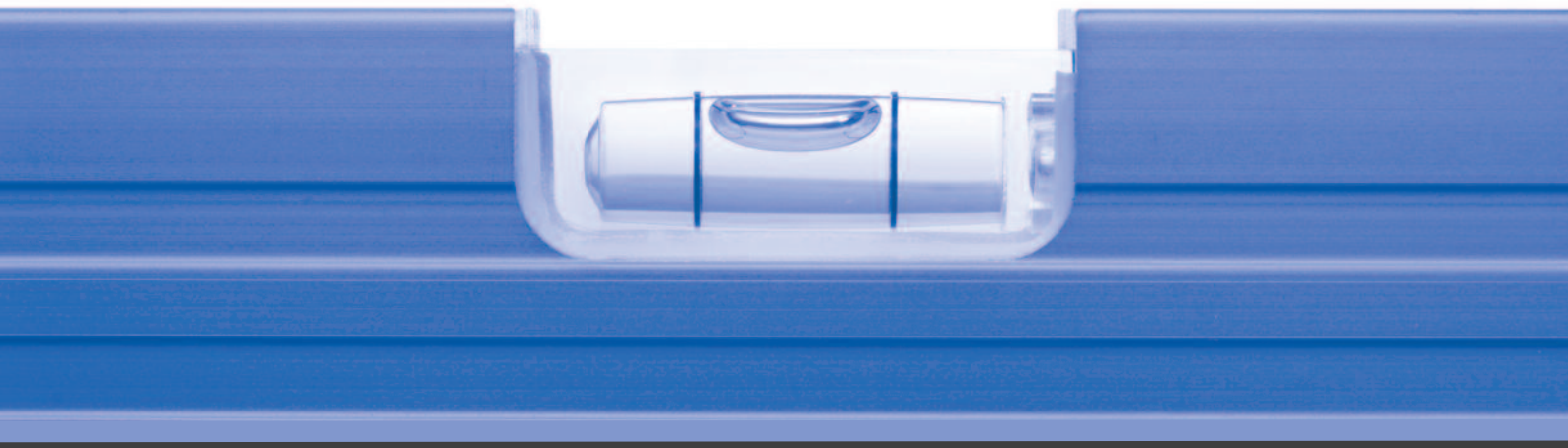

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Recent Developments in the Regulation of Counsel and Professional Conduct in International Arbitration

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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 considerable debate recently about what, if anything at all, should be done about this state of affairs.[6] Some have urged the implementation of a universal code of professional conduct for international arbitration counsel, suggesting that the absence of such a code is threatening the very legitimacy of the arbitration system.[7] Others have counselled against sweeping reforms, suggesting a more measured and incremental approach, involving localised solutions by arbitral institutions and arbitral tribunals, and/or more limited regulation through the clarification of conflicts-of-law rules and the use of ethical checklists. Still others take the view that the existing state of affairs works well enough, and that the proposed changes would be worse than the risks that they purport to address.

I. 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*, international arbitration frequently involves counsel qualified or resident in different jurisdictions, and the potentially conflicting rules of professional conduct that could apply to different counsel in the same proceedings creates the risk of an uneven playing field.[8]

6. A common example of potentially conflicting standards is that of witness preparation. Traditionally, civil law systems disallow pre-trial witness communication in court proceedings, while common law systems consider such communication legitimate, and indeed, essential.[9] Even between common law jurisdictions, there are noticeable differences in approach to the issue of witness preparation.[10] 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.[11] In an international arbitration where differing rules may 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 instance, 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.[12]

7. *Second*, it can be unclear which applicable rules of professional conduct may apply to counsel in any given arbitration.[13] Counsel 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.[14] Some commentators have suggested that 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".[15]

8. *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]

9. *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 are fundamentally very different from judges in many respects (including how they are appointed, their investigative powers, and their powers to regulate conduct of counsel), and most importantly, their willingness to play such a policing role against the very counsel who are responsible for their appointment.

II. Recent Proposals

10. There have recently been a number of proposals suggested to deal with the issues identified above.

A. Universal International Code of Conduct

11. 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 in 2010 and 2012.[23]

12. Advocates of an international code of conduct argue that it would set out clear and uniform standards of professional conduct for all counsel in international arbitration, and 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. A key challenge is making such an international code of conduct both uniformly applicable and enforceable. It is not clear which arbitral body or international organisation would be best placed to develop and apply such a code, or indeed whether any of the existing institutions has the authority or jurisdiction to do so. In addition, it is not obvious how such standards would become enforceable, given that there is no existing supra-national bar authority that can sanction non-compliance by international arbitration counsel, unlike in the domestic litigation context where a local bar authority can take disciplinary action against non-compliance.[26] In any case, there are many who believe that the creation of such a supra-national authority (even if this were somehow practicable) would be antithetical to the arbitral ideal of a system based on the private consent of parties to resolve a dispute between them without recourse to court litigation.

14. As a potentially workable alternative to the creation of a supra-national authority, some advocates of the codification approach have supported the incorporation of an international code of conduct into the rules of the main arbitration institutions, thus making the ethical standards therein applicable by party agreement, and enforceable by arbitral tribunals.[27]

15. Another possible approach is to formulate a universal set of rules, that can be freely adopted or referenced by parties on an *ad hoc* basis (as rules or just as guidelines), 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 by the IBA through its Rules on the Taking of Evidence in International Arbitration.[28]

B. Localised Solutions by Arbitral Tribunals and Institutions

16. A number of practitioners have argued against the codification approach and cautioned against over-regulation, warning that it might "suffocate and imperil" certain cherished features of the arbitration system, such as flexibility and party autonomy.[29] They argue that it would be both unfeasible and inappropriate to shoehorn existing local differences into a one-size-fits-all code purporting to apply to all arbitrations,[30] and stress that legitimate differences between rules variously reflected local conceptions of morality, history and public policy, which could not be simply "papered over".[31]

17. Some of those who oppose a universal code of conduct instead champion localised and flexible solutions.[32] They argue for a way forward founded on three core propositions: first, the re-focusing from universal to "local" regulation, with guiding ethical rules and principles developed by particular tribunals or institutions; second, the cultivating of predictable standards through broad and flexible guidance rather than prescriptive rules; and third, the structuring of specific and binding sanctions appropriate to the context of individual tribunals and institutions.[33]

18. 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.[34] Additionally, the reliance on flexible rules may be impractical given the increasingly globalised practice of international arbitration, with new entrants coming from disparate and less-sophisticated jurisdictions, and not necessarily subscribing to the same implied rules.[35]

C. Conflict-of-Laws Approach

19. 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.[36]

20. However, a key difficulty 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,[37] 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 regulator. Furthermore, a conflict-of-laws approach is inherently flexible and fact-specific, and suffers from the same weaknesses as the localised approach outlined above – it does not resolve the problems of double-deontology or an unequal playing field.[38]

21. An alternative approach is to focus on facilitating better coordination between home jurisdiction authorities and arbitral tribunals.[39] This may include empowering the arbitral tribunal to report or refer incidents of misconduct to the relevant bar authorities,[40] as is already possible under the rules of international criminal tribunals.[41] Arbitral tribunals could also provide assistance to bar authorities in pursuing complaints of alleged misconduct in arbitral proceedings.[42]

D. Ethical Checklists

22. 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.[43] 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.[44] Failing agreement, the tribunal would decide on the appropriate standard.[45] These checklists could be incorporated into a tribunal's initial procedural order or the relevant terms of reference.[46]

23. Ethical checklists have been lauded by some as an attractive interim solution, given doubts as to whether a uniform code of conduct for counsel is achievable (or even desirable) in the foreseeable future.[47]

24. However, the use of such checklists in individual arbitrations does little to further the development of standardised and uniform international standards that would provide guidance for future cases. Further, an extensive dialogue about ethical standards at the outset of an arbitration might increase costs substantially, particularly if this is used as an opportunity for disruptive tactics.

E. No Change

25. Finally, it is worth nothing that there is a sizeable constituency that believes that the current system has worked relatively well, and that imposed changes of any sort are unnecessary, and may even create more problems than they solve. Some advocates for keeping the *status quo* have suggested a market-based approach to the issue of professional conduct. 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.[48] Furthermore, counsel will have to decide whether they are willing to be hired for cases that are conducted under such rules.

III. Recent Developments

26. Recently, 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.

A. 2013 IBA Guidelines on Party Representation

27. In May 2013, the IBA adopted Guidelines on Party Representation in International Arbitration (the "Guidelines"). This was not the first attempt to formulate an international statement of professional conduct rules.[49] The Guidelines are, however, the first attempt to deal with the issue in the context of international arbitration.[50] 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).

28. The Guidelines have provoked considerable debate since their publication. While some have welcomed them as "useful guidance" to practitioners;[51] other practitioners have argued that the Guidelines do more harm than good, expressing the hope that the Guidelines "quickly fall into oblivion or, better, never are applied".[52]

29. The drafters themselves acknowledge that the Guidelines are the product of negotiated compromise.[53] The 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;[54] and the lack of clarity on whether and how they would apply if there is a conflict with national rules.[55] Critics also argue that the guidelines would encourage tactical challenges aimed at disrupting proceedings.[56]

30. Others have described the Guidelines as a "welcome step in the right direction".[57] They point out that the underlying intention of the Guidelines was not to establish a universally applicable international code of conduct, but to build some consensus on international best practices.[58] Supporters argue that the Guidelines offer a number of modest but not insignificant benefits, by educating new entrants to international arbitration from less-sophisticated jurisdictions with less developed profession conduct standards;[59] and strengthening the hand of arbitral tribunals in their discretion to apply the Guidelines and ability to sanction counsel misconduct.[60] Supporters also point out the versatility of the Guidelines, which may be used as a checklist of issues at the outset of proceedings to facilitate dialogue and agreement on ethical standards,[61] or as evidence of general expectations and practice to aid interpretation of national standards of professional conduct insofar as they apply to particular arbitration proceedings.[62]

B. 2014 LCIA Arbitration Rules

31. In February 2014, the Drafting Committee of the LCIA Court released a "final draft" of the new 2014 LCIA Arbitration Rules (the "draft Rules"),[63] which update the current 1998 LCIA Arbitration Rules. The draft Rules have not been finalised, although this is expected to happen this year.

32. On the regulation of counsel and professional conduct, the draft Rules include two noteworthy amendments: a more-detailed Article 18 regulating the conduct of legal representatives, and an Annex entitled "General Guidelines for the Parties' Legal Representatives" (the "draft Annex"), which sets out seven standards for counsel conduct that are applicable to LCIA arbitrations.

33. Article 18.5 of the draft Rules provides that "each party shall ensure that all its legal representatives have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of appearing by name before the Arbitral Tribunal".[64] This provides a mechanism to bind parties' "legal representatives" to the standards set out in the draft Annex, and expressly grants the arbitral tribunal the competence to rule on and sanction errant behaviour in breach of those standards.

34. The draft Rules place primary responsibility on the arbitral tribunal to identify, address and remedy ethical breaches.[65] In the event of breach, Article 18.6 of the draft 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)".

35. Notably, this would be the first initiative, at the institutional level, to establish a written ethical framework governing counsel conduct with standards expressly enforceable by the arbitral tribunal against counsel.[66] There is one related recent development – the new 2014 International Centre for Dispute Resolution ("ICDR") Arbitration Rules, which provide at Article 16 that "the conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject." However, the ICDR has not issued any guidelines on professional conduct, and is reported to be still studying the issue,[67] while the 2014 ICDR Arbitration Rules, as they stand, do not elaborate on what sanctions would be available for non-compliance with such rules.

IV. Conclusion

36. International arbitration has shown a remarkable versatility over the years, and the arbitration community has proven itself capable of generating innovative and contextual solutions to a variety of problems. Now that the arbitration community has shown itself to be fully attentive to the potential issues concerning the regulation of counsel and professional conduct, there is no reason to doubt that those involved will eventually find the best way forward to deal with these potential issues, whether this is achieved by wide-ranging reforms or the maintenance of the *status quo*.

Endnotes

1 *See e.g.* 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 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.").

8 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").

9 Although 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.

10 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).

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

12 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.

13 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").

14 G. Born, *International Commercial Arbitration*, 2014, at p. 2,871-2,879.

15 *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").

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," the case law goes both ways and is arguably inconclusive. *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 D. Bishop and M. Stevens, *The Compelling Need for a Code of Ethics*, *supra* note 3, at p. 415; G. Born, *International Commercial Arbitration*, 2014, at p. 2,888; 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. 17.

28 The IBA is also seeking to do something similar in the sphere of professional conduct, through its publication of the 2013 Guidelines on Party Representation.

29 See, for example, 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. 6-15.

31 *Id.*, at pp. 6-7.

32 *Id*., at p. 34.

33 *Id*., at p. 22.

34 *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.

35 "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'.").

36 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.

37 *Id.*, at pp. 2,876-2,878.

38 *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.").

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

40 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.

41 *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, Art. 42.

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

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

44 *Id*., at p. 85.

45 *Ibid.*

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

47 *Ibid.*

48 *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.

49 *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.

50 2010 International Law Association Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals.

51 J. Waincymer, *IBA Guidelines on Party Representation in International Arbitration*, Kluwer Arbitration Blog, 10 July 2013.

52 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.

53 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.

54 *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.

55 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.

56 M. Schneider, *Yet Another Opportunity, supra* note 60, at p. 499.

57 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.

58 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.").

59 "*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").

60 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.

61 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.").

62 G. Born, *International Commercial Arbitration*, 2014, at pp. 2,879.

63 Final Draft of 2014 LCIA Arbitration Rules.

64 Final Draft of 2014 LCIA Arbitration Rules, Article 18.5.

65 Final Draft of 2014 LCIA Arbitration Rules, Annex, at para. 7.

66 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".

67 "ICDR amends its Mediation and Arbitration Rules: tackling some familiar issues and providing some novel solutions", Herbert Smith Freehills Arbitration Notes, 25 April 2014, available at http://hsfnotes.com/arbitration/2014/04/25/the-icdr-amends-its-mediation-and-arbitration-rules-tackling-some-familiar-issues-and-providing-some-novel-solutions/.

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