

Articles

Towards a Workable Approach to Ethical Regulation in International Arbitration

Jane Wessel & Gordon McAllister*

“The purest treasure mortal times afford is spotless reputation”

Richard II, (I,i,177-8)

Lawyers who litigate disputes before their national courts typically operate under clearly defined rules governing acceptable ethical conduct. Often the relevant domestic regulator sets out these rules in codes of conduct, which can be very detailed. For counsel in international arbitration, the situation is less straightforward, as it may not be clear which ethical rules apply. Identifying which rules govern his or her conduct is frequently a complex and challenging task.

Even when the seat of the arbitration is outside the lawyer’s home jurisdiction, the relevant conduct rules of his or her home bar often continue to govern that lawyer’s conduct. This alone can cause problems, as it is not unusual for arbitration specialists to be qualified in a number of jurisdictions, and determining which ‘home jurisdiction’ conduct rules apply, or how to resolve any conflicts between them, can require considerable analysis.

This article considers the extent to which this problem affects the practice of international arbitration, looks at two recent initiatives, which provide approaches to dealing with ethical conduct, and concludes by suggesting that a somewhat different approach should be considered.

Changing Perspectives on Ethical Regulation

A lawyer acting as counsel in an arbitration taking place outside his or her home jurisdiction may also be subject to the conduct rules of the seat of the arbitration. Professor Catherine Rogers observes that “[o]ne of the premier accomplishments of the New York Convention was to liberate arbitral proceedings from most local law.”¹ This is undoubtedly correct, with the notable exception of national laws governing the conduct of arbitration, but Professor Rogers’ observation may have no application in circumstances where an obligation to adhere to local rules of conduct is imposed by the lawyer’s home jurisdiction. In the case of European lawyers, both EU Directive 98/5/EC² and the Code of Conduct for European Lawyers produced by the Council of Bar and Law Societies of Europe impose a requirement to adhere to the conduct rules of the seat of any arbitration within the European Union.³ A similar approach is taken in those U.S. states which have adopted the American Bar Association’s Model Rules of Professional Conduct.⁴

It is a confusing and wholly unsatisfactory situation when a lawyer needs to be concerned with potentially competing and contradictory ethical regulations when conducting an international arbitration. The adoption of a clearer regulatory framework has been debated for decades,⁵ and many prominent members of the arbitration community have grown uneasy with this *status quo*. This is evident

Vers une solution viable pour la réglementation déontologique de l’arbitrage international

Jane Wessel & Gordon McAllister*

La réglementation de la conduite des avocats dans l’arbitrage international fait l’objet d’un vif débat. Les praticiens ont exprimé leur préoccupation à l’égard des obligations déontologiques souvent imprécises, voire contradictoires, régissant la conduite des avocats dans le cadre d’un arbitrage international. Non seulement l’imprécision de ces règles augmente-t-elle le risque d’y contrevenir par inadvertance, mais elle peut avantager les praticiens prêts à exploiter cette incertitude en employant des « tactiques de guérilla ». Cependant, certains praticiens craignent par ailleurs que l’introduction d’une réglementation additionnelle contribue à accroître inutilement la complexité d’un domaine où la clarté fait déjà cruellement défaut. L’article qui suit examine la mesure dans laquelle les préoccupations à l’égard de la situation actuelle sont justifiées, et les mesures qui, le cas échéant, devraient être prises pour s’assurer que le risque de conduite contraire à la déontologie ne mine pas la viabilité de l’arbitrage comme méthode prééminente de règlement des différends internationaux. Les auteurs évaluent les tentatives précédentes de régler ce problème, et concluent sur une nouvelle solution : soumettre la conduite des avocats à la législation du pays où a lieu l’arbitrage.

*Jane Wessel est associée et membre du groupe Litige chez



from the increasing prevalence in recent years of calls for the introduction of more formal or binding codes of conduct – setting out in one place the ethical obligations of counsel in international arbitration.⁶

In 2014, the Institute for Regulation and Ethics (“IRE”) was founded by Queen Mary’s College of the University of London with a view to improving ethical practices and regulation across all areas of commercial law, including international arbitration. The IRE’s inaugural conference in September 2014 was a timely intervention in the debate, providing practitioners, academics and others with a forum for examining the utility and desirability of introducing a more robust ethical framework for international arbitration. There was also considerable debate about recent proposals for tackling the *status quo*: the IBA Guidelines on Party Representation in International Arbitration (“IBA Guidelines”), which were published in 2013, and the London Court of International Arbitration’s 2014 Arbitration Rules (“LCIA Rules”).⁷

At the conference, Gary Born argued that the once laxly regulated sphere of counsel’s conduct in international arbitration can no longer be described as an “ethical no man’s land.”⁸ Instead, he posited, the current framework with competing rules, regulations, and guidelines – the application and interplay of which are not always clear, but are unlikely to be without conflict – is more akin to a “teenager’s bedroom.”⁹ Yet he appeared unpersuaded by the current IBA and LCIA attempts to resolve this problem, cautioning that the proposed “cure” of the adoption of further regulation may be worse than the “disease” it is supposed to treat.¹⁰

Mr. Born expressed the concern that adding additional regulations may stifle the practice of international arbitration. Further regulation, he suggested, runs the risk of creating challenges to final awards on the basis of alleged breaches of ethical conduct as a pretext to resisting enforcement.

One possible solution, which we discuss further below, would be for individual regulators to agree that the law of the seat should take precedence in terms of applicable ethical regulation in any circumstances where there may be a conflict between different potentially applicable rules. We are conscious, though, that there may be some resistance to this approach, especially where it is considered that the ethical standards of the seat are appreciably lower than international best practice.

This issue is currently the focus of considerable debate within the international arbitration community. International arbitration was consciously established as a dispute resolution forum outside national court systems and therefore to some extent beyond the reach of the ethical standards that are an intrinsic part of the national litigation process. Consequently, the ethical standards applicable to litigation were not necessarily applicable to international arbitration, save only for those imposed on lawyers by their home state regulatory bodies. Inevitably, therefore, arbitration counsel’s conduct was informed by their preconceptions of such standards in their home jurisdictions, in whose traditions they had been educated, and in which they practice.¹¹

For many years the vast majority of the international arbitration

Shepherd and Wedderburn LLP, à leurs bureaux de Londres. Elle est spécialisée dans l'arbitrage commercial international, l'arbitrage entre investisseur et État, les litiges en matière de concurrence, les litiges commerciaux et la médiation. Jane est membre du Chartered Institute of Arbitrators et médiatrice accréditée du Centre for Effective Dispute Resolution (CEDR). Courriel : Jane.Wessel@shepwedd.co.uk

Gordon McAllister est solicitor-advocate et partenaire des bureaux londoniens de Crowell & Moring, où il est membre des groupes du Règlement des différends internationaux et du Recouvrement antitrust. Gordon représente des clients en arbitrage commercial et en arbitrage de l'investissement; sa pratique touche une grande diversité de litiges commerciaux, notamment des procédures de réclamation antitrust. Courriel : gmcallister@crowell.com

community was concerned with limited types of disputes and businesses, based predominantly in North America and Europe. It naturally followed that parties’ counsel were drawn from these jurisdictions. With a relatively homogenous group, ethical conduct could conceivably be regulated by a mutually recognised, although unspoken, code between opposing counsel.

It remains true that counsel from the United States, the United Kingdom and continental Europe continue to dominate in terms of number of instructions in major international arbitrations, both commercial and investor-state. However, even within these jurisdictions, there is a range

of attitudes towards ethical conduct. Prescient commentators have noted that, with the major economic centres continuing to shift from these locations to South America, Africa, and Asia, it is only a matter of time before key arbitration centres, as well as counsel appointments, also shift.¹² As this shift gathers pace, there will likely be an even broader range of ethical attitudes brought to bear by arbitration counsel based on their own national norms.

Given that transition, the lack of uniform, binding ethical standards is becoming problematic, at least in theory, as parties' counsel are drawn from an increasing number of jurisdictions, and are bringing with them disparate notions of what constitutes ethical conduct. Of course, most counsel who participate regularly in arbitral proceedings are likely to share broadly similar notions of appropriate ethical conduct. Few, if any, reputable practitioners would argue that notions of honesty, integrity and fairness should not inform conduct in international arbitration. However, while these may seem of near-universal application, counsel inevitably have different ideas of how these ethical principles should apply in practice.

As a starting point, practitioners will view even these high-level concepts through very different cultural lenses. For many advocates, the framework of their home jurisdiction prescribes a primary obligation to the court,¹³ for others, this obligation will be secondary to their duty to the client.¹⁴ For yet others, there may be no obligation to the court at all.

This can result in vastly differing approaches, even where agreement on high-level standards can be

reached. So a practitioner whose home jurisdiction prescribes that an advocate's primary duty is to the court could reasonably be assumed to be more likely to insist on the production of a harmful document than one with only a secondary or no duty to the court.¹⁵ And yet, regardless of the lens through which they view their obligations, surely in adhering to the ethical standards of their own jurisdictions, all of these practitioners would consider they were acting honestly, and with integrity.

Broadly, two concerns emerge from the present situation: the use of "guerrilla tactics" and the absence of a level playing field for counsel appearing before tribunals in international arbitration.

The Use of "Guerrilla Tactics" and an Uneven Playing Field

So-called "guerrilla tactics" are employed by counsel seeking – in an ethically questionable manner – to gain an advantage over their opponents, or to impede, delay or sabotage proceedings entirely. Presumably as a result both of the high financial stakes of much international arbitration, and the "Rubik's cube" – or "teenager's bedroom" – of applicable ethical obligations, counsel have reported experiencing guerrilla tactics with concerning frequency. One of the few empirical studies of this phenomenon is a recent survey, conducted by Edna Sussman, in which 68% of respondents reported having experienced such tactics.¹⁶

The tactics identified by respondents to Ms. Sussman's survey included the following:

- Excessive use of discovery, either by insisting on leaving no

stone unturned, or by concealing relevant documents within large volumes of other documents,

- Delaying tactics,
- Creating conflicts by changing counsel during the course of the arbitration,
- Frivolous challenges to arbitrators,
- Last minute surprises, including introducing new arguments, documents or witnesses on the eve of the hearing,
- Using court procedures inappropriately to challenge arbitration proceedings,
- *Ex parte* communications with arbitrators,
- Witness intimidation,
- Lack of respect towards the tribunal or opposing counsel, and
- Frustrating the orderly conduct of the hearing, either by attempting to use up all available time, or by making multiple applications for reconsideration, or by various other forms of subterfuge and bluffing techniques.

As Ms. Sussman points out, concern with guerrilla tactics has been a feature in an increasing number of international arbitration conferences.¹⁷ In fact, at least one conference has included a helpful guide to potential guerrilla tactics which counsel might experience when conducting an international arbitration.¹⁸

The starting point for those seeking to reduce the prevalence of these practices is to reach a consensus of where the line should be drawn between vigorous prosecution of a client's claim and unacceptable guerrilla tactics. Many practitioners could consider a number of the tactics listed

above outside the scope of acceptable conduct. Others, in contrast, are likely to consider some, or indeed all of them, to be legitimate tools in a counsel's arsenal, at least to some degree to be wielded for his or her client's advantage.

Legitimate concerns exist that this ambiguity, an inescapable product of the current ethical framework, fails to provide a level playing field, giving an unfair advantage to those with less rigorous ethical standards. As noted above, this is seen as a problem which will intensify as counsel are selected from an increasingly diverse set of jurisdictions. It is no longer sufficient, it is argued, that a tacit understanding of the notion of "fairness" can constitute the prevailing framework prescribing the conduct of parties' counsel in some of the world's largest and most complex disputes.¹⁹

Three examples are typically cited to demonstrate this point and the risk of undermining the parties' expectation and right of equality of arms.

First, lawyers from distinct legal traditions will have differing notions of the proper scope of document production, now an increasingly common feature of international arbitration. Informed by their own national standards, counsel from different jurisdictions will have vastly divergent notions of the appropriate scale for such production. US lawyers, for example, are more likely to advocate for wide-ranging document production. In contrast, a Continental lawyer would be accustomed to overseeing disclosure of only those documents on which his or her client intended to rely, and may therefore be disinclined to agree to what they might consider excessive or in

some cases "outrageous" production requests.²⁰ Indeed, in some cases this contrast may go even further; Bernardo Cremades has suggested that a "Latin American jurist [...] feel[s] legitimately proud of retaining those [documents] which in one way or another may harm him."²¹

Second, there is no universal approach to the preparation of witnesses. Although the thorough preparation of witnesses may not necessarily constitute a guerrilla tactic, it can certainly reflect the uneven playing field, and is a cause of concern.

For example, barristers from England and Wales are expressly prohibited, under both the Code of Conduct in the Bar Standards Board's Handbook and the common law, from coaching or preparing witnesses.²² Conversely, U.S. lawyers will be well used to extensive witness preparation before trial, and, while witness coaching is prohibited, failure adequately to prepare a witness can lead to sanctions.²³ Various other jurisdictions seek to find a middle ground between these two approaches. In Switzerland, for example, Article 7 of the Swiss Professional Rules for Lawyers prohibits any action by counsel that would "influence" witnesses, although a carve-out exists for international arbitration.²⁴ Here, the Swiss Rules of International Arbitration apply, which expressly permit the interviewing of witnesses under Article 25.2, which of course may be done without in any way influencing the thrust of the witness's evidence.

This middle ground is generally accepted in current arbitral practice,²⁵ and is reflected in many institutional rules,²⁶ as well as the IBA Rules on Taking Evidence in International Arbitration.²⁷ Of course, such rules

do not take precedence over any conflicting national rules that may apply by virtue of a particular counsel's applicable regulatory body – to the extent they apply to that counsel's practice in international arbitration either within or outside that counsel's territory of admission to practice.

Consider, though, the position of the English barrister, acting without the assistance of solicitors in an LCIA arbitration seated in New York. He or she is prohibited from preparing witnesses by the Code of Conduct, but their US opponents are able, both under their own professional rules, and the applicable institutional rules, to do exactly that. As noted above, failure adequately to prepare a witness to give evidence may even be seen as a breach of an American lawyer's professional obligations. Indeed, the predicament is perhaps compounded by the fact that neither the institutional rules nor national arbitration laws clearly delineate what kind of witness preparation is permitted, and so the barrister cannot even be certain to what extent he or she is disadvantaged by the present ethical framework.

Third, *ex parte* communications perhaps demonstrate most acutely the problems associated with the lack of a level playing field. At its simplest, lawyers from many jurisdictions would be unlikely to tolerate *ex parte* communications with any members of the arbitral tribunal, and would view such communications as grounds to seek to remove an arbitrator. Other lawyers are quite comfortable with such communications and would expect to be able to liaise with their client's appointed arbitrator in this way. This leaves scope for an inequality of arms between the parties' respective counsel.²⁸

As these examples show, the current system fails to address numerous concerns. Indeed, as the arbitration community becomes ever more international in nature, these concerns will undoubtedly grow. At best, the present situation leads to uncertainty, and at worst, it means parties may be handicapped in their selection of counsel. To level the playing field, many have noted, would benefit both counsel and the parties.²⁹ To an extent, a more level playing field would also benefit tribunals, as they would be better able to review and possibly sanction counsel's conduct.

In order to remain a viable method of dispute resolution, international arbitration must continue to command the confidence and respect of all participants. By promoting procedural fairness, high ethical standards can work to the benefit of all parties: counsel, tribunals, arbitral institutions and, of course, disputants themselves. This would maintain, and even increase, the legitimacy of arbitration – both real and perceived – as a relevant and effective method of dispute resolution.

One could ask whether the alternative could prove a self-fulfilling prophecy: without a more formal ethical framework, might further procedural unfairness creep into the process? Were this to become a more prevalent feature, might this, itself, serve to lower the standard of counsel's conduct? If so, all members of the arbitral community would need to be cognisant of the potential damage to the standing of arbitration around the globe, which no one would benefit from.³⁰

Professor Catherine Rogers, one of the most prominent proponents of a formal framework of

self-regulation, draws the conclusion that: "International arbitration cannot continue to operate with uncertain, unwritten, and culturally variable assumptions about what constitutes proper conduct for attorneys."³¹

Addressing the Problem

However, while many acknowledge the problems of the current ethical framework, there is no consensus on how to address them, if at all. Practitioners in international arbitration recognise all too clearly the difficulties in defining the basis for the applicable ethical rules.³² There is no doubting the reality of these difficulties, but are they predominantly a theoretical concern, or a more concrete problem worthy of the creation of a regulatory layer of ethical rules to iron out those differences? And if the answer to that question is that a remedy of some sort is to be preferred, then is there a feasible method of regulating the behaviour of party representatives that would be practical and effective, without undermining the very advantages of international arbitration?

In response to these questions, various solutions have been proposed. Most prominent and concrete among them are the IBA Guidelines and the LCIA Rules.

As the Preamble to the IBA Guidelines makes clear, the Task Force which proposed the first draft guidelines was specifically mandated "to focus on issues of counsel conduct and party representation in international arbitration that are subject to, or informed by, diverse and potentially conflicting rules and norms."³³ As such, the Guidelines explicitly recognise their role in the framework of ethical regulation, but

do not profess to be a comprehensive solution to the problems of differing standards of ethical conduct. Rather, they presumably constitute suggested remedies for those problems most frequently encountered by the Task Force.

The IBA Guidelines deal with common areas of concern, including communication with arbitrators (Guidelines 7-8), the veracity of submissions to the tribunal, including witness statements and expert reports (Guidelines 9-11),³⁴ and information exchange and disclosure (Guidelines 12-17). The Guidelines also provide for remedies for misconduct (Guidelines 26-27), which include cost sanctions.³⁵

While the IBA Guidelines represent a pragmatic solution to the problem of differing ethical standards, their efficacy is, perhaps, limited. The Preamble notes that "[t]he use of the term guidelines rather than rules is intended to highlight their contractual nature. The parties may thus adopt the Guidelines or a portion thereof by agreement." The application of the IBA Guidelines is not mandatory. So, in situations where counsel from one jurisdiction consider their less proscriptive ethical rules confer an advantage in the conduct of the arbitration, they may advise their client not to agree to their adoption. This is, of course, only possible where the IBA Guidelines are not expressly incorporated in the relevant arbitration agreement.

The LCIA Rules, which came into force on 1 October 2014, represent the first serious attempt by a major arbitral institution to regulate the ethical conduct of counsel. The rules contain an annex entitled General Guidelines for the Parties' Legal



Representatives. These Guidelines are “intended to promote the good and equal conduct of the parties’ legal representatives.”³⁶ The Annex is made up of seven paragraphs which state among other things that:

- A legal representative should not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court. (Paragraph 3)
- A legal representative should not knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court. (Paragraph 4)
- “During the arbitration proceedings, a legal representative should not deliberately initiate or attempt to initiate with any member of the Arbitral Tribunal [...] any unilateral contact relating to the arbitration or the parties’ dispute, which has not been disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal (if comprised of more than one arbitrator) and the Registrar [.]”

The sanctions for transgressions of the Annex are contained in Article 18.6, and provide that the Tribunal has discretion to order “any or all of the following sanctions against the legal representative (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal [.]”

Like the IBA Guidelines, the LCIA Rules do not profess to provide a solution for all the existing ethical problems. However, they have one major advantage over the IBA

Guidelines, namely that they will apply to all arbitrations conducted under the auspices of the LCIA which are commenced on or after 1 October 2014. As one would expect from an Annex of only seven paragraphs, the “general guidelines” provide a high-level overview of the required standards, however they do address some of the specific concerns set out above in a more concrete fashion, particularly in laying down exacting procedures for communication with tribunal members.

The Problems with Regulation

Both the IBA Guidelines and the LCIA Rules represent attempts to address the recognised problems with the current ethical framework. However, a broader question exists of whether these problems really give rise to a need for ethical regulation.

Do the tactics identified in Ms Sussman’s survey truly merit a new ethical regime? While 68% of respondents to the survey reported having experienced such tactics, 31% – including some well known international arbitration practitioners – reported that they had never encountered guerrilla tactics, and those who identified incidences of such tactics mostly acknowledged that these were rare.³⁷ As we have seen, some practitioners and commentators, and now institutions, take the view that further regulation is required.³⁸ On the other hand, one could argue that adding a layer of ethical regulation, such as the IBA Guidelines or the LCIA Rules, does little to remedy the situation, and may indeed lead to various unintended consequences.

Dr. Stephan Wilske supports a more circumspect approach, and has suggested that the inclination to use

questionable approaches in international arbitration is dangerous for any professional representative, who would thereby risk damaging his or her reputation in the international arbitration community, where “your reputation of today is tomorrow’s business.”³⁹ Gary Born, as noted, has raised concerns that the adoption of regulations may involve a cure that is worse than the disease that they are intended to remedy.⁴⁰ Professor Park has questioned whether the adoption of ethical rules for arbitration practitioners will make arbitration better or worse, and suggested that only time will tell as the issue is “awaiting further light.”⁴¹

One of the major attractions of international arbitration is its relative informality when compared with national court litigation, and the opportunity to ensure that disputes are resolved in a neutral environment, where neither party has any home court advantage. It is precisely this advantage of international arbitration which gives rise to the potential for uneven application of ethical rules while in court litigation the lawyers with rights of audience will inevitably be bound by the same ethical rules as each other.

Detailed rules such as those proposed in the IBA Guidelines are admirable in their range and ambition, and it would be difficult to see how any principled arbitration practitioner could take issue with their content, at least from the perspective of North American and European practitioners. Given that these are intended to be guidelines to be adopted by agreement between the parties to the arbitration, rather than a proposal for mandatory ethical rules, they may prove to be a useful addition to the terms of reference or other procedural

order adopted by a particular tribunal. In such cases, the tribunal might consider how it intends to ensure compliance by the parties with those rules, and any sanctions it intends to apply in cases of non-compliance might be spelled out in some detail to ensure the position is quite clear to all concerned.

The IBA Guidelines have been criticised for their North American and European focus.⁴² Of the twenty three members of the Task Force charged with drafting the IBA Guidelines, only six were from countries outside that narrow scope.⁴³ One may question whether the Task Force will have succeeded in creating guidelines that will prove to be universally acceptable when the views of practitioners from the Middle East, the Far East, China, India, and great swathes of South America and Africa were not represented on the Task Force. The result, it could be argued, is a failure adequately to consider approaches taken in these jurisdictions to ethical regulation. It is also possible that ethical problems only – or more acutely – felt in those jurisdictions were left unconsidered. As noted by Professor Lew, “we need to be conscious of our own lack of diversity in discussing these standards before we apply them to everybody else.”⁴⁴

By contrast to the IBA Guidelines, the principles set out in the Annex to the 2014 LCIA Rules are mandatory – to the extent that they do not conflict with other laws or regulations – and the arbitration tribunal is explicitly given the power to sanction arbitration counsel who act contrary to the principles set out in the Annex.⁴⁵ Only time will tell whether LCIA tribunals are able to exercise these powers in a manner that will discourage the sort of misconduct

that the Annex is designed to address.

One very real danger of adopting strict ethical rules applicable to the representatives of the parties in arbitration, is that it may lead to all manner of satellite litigation, which may itself add to the armoury of those inclined towards adopting guerrilla tactics. One can very easily imagine a situation where a tribunal reprimands or otherwise sanctions a party representative for conduct which is regarded as contrary to the ethical rules that were adopted, and that party then uses this as a pretext to challenge the tribunal or its subsequent award for apparent bias. In other words, by attempting to address the perceived problem of inequality of arms, new obstacles will have been put in the place of the certainty and finality of arbitration awards.

And who is to decide? International arbitration tribunals are selected for the specific role of resolving the parties’ substantive dispute. Their task is not to embroil themselves in questions of potential sanctions relating to the ethical misconduct of those who appear before them. This added responsibility would distract the tribunal from its primary task. National court judges typically consider the conduct of the parties’ representatives only in terms of potential costs awards, and otherwise would refer the lawyer concerned to his or her regulating body in the case of potentially unethical conduct. And consider, for example, Article 58 of the ICSID Convention, which provides that a challenge to an arbitrator shall be determined by the other members of the tribunal. This provision has not been universally welcomed. Practitioners have remarked that arbitrators tend to be reluctant even to sanction misconduct

of party representatives by way of costs.⁴⁶ Of course, arbitrators will be aware that particularly tough stances on ethical violations may not be universally welcome, and could reduce the prospect of further appointments. It is therefore unlikely that they will take on a more active role in the regulation of the behaviour of party representatives than national court judges, even if it were appropriate for them to do so.

The Swiss Arbitration Association (“ASA”) has proposed that a truly transnational body should be created to police the ethical conduct of party representatives. This body would be made up of members of the major arbitration associations and institutions, which would agree to submit to its jurisdiction. This organ would create a set of “core principles” derived from existing codes of conduct, representing those points of ethical conduct that are regarded as representing “truly international public policy” in counsel ethics.⁴⁷ The proposal is not without its own difficulties. One questions whether it will be possible to achieve unanimity among the international arbitration institutions concerning the creation of such a transnational body, or the core principles that are proposed. Furthermore, it is difficult to conceive how such a body could go about sanctioning a party representative who was found to have breached the core principles concerned.

A Proposal

We have endeavoured to describe the circumstances in which the different ethical standards of arbitration counsel may give rise to difficulties in international arbitration, and the reasons for the present groundswell of interest in adopting a regulatory



approach to resolving these problems. The question remains whether these circumstances merit additional regulation.

On balance, we remain unconvinced that there is any strong evidence that a universal regulatory approach to this issue is either useful or desirable. To the contrary, in our view adding an overriding layer of ethical regulation, authority and sanctioning powers to international arbitration would detract from its consensual nature, which of course is one of the key attractions of this form of binding dispute resolution over national court litigation. The risk of party representatives applying different ethical standards is no doubt a valid concern, but is it really sufficiently serious to justify such an interventionist approach?

The question certainly merits further research to define the scope of the problem. A survey along the lines of Ms Sussman's excellent work might expand the enquiry to include such questions as the frequency with which guerrilla tactics have been encountered or scenarios where differences in ethical standards have given rise to practical difficulties. Assuming such tactics and standards were applied by lawyers, the country of legal qualification of the representatives concerned would be a useful addition to the data. It might also be very helpful to consider the manner in which arbitration tribunals have been able to deal with these tactics and the circumstances in which those efforts have not been considered by the parties to be sufficient. This would place these issues into context, and permit further analysis of whether universal regulation is necessary and proportionate.

If such further analysis of the

problem convinces the international arbitration community that ethical regulation is necessary, then the question arises as to the level at which that regulation should be imposed. The current proposals encompass everything from mandatory rules imposed by individual arbitration institutions with responsibility for enforcement in the hands of the arbitration tribunal itself (the Annex to the LCIA Rules), to guidelines to be considered and adopted by agreement between the parties, again with enforcement by the tribunal (the IBA Guidelines), to the creation of a new transnational body charged with the enforcement of ethical principles (the ASA proposal). A universal criticism of these approaches is that none of them deals head on with the problem of double deontology. This would require coordination with the bars and regulatory bodies to which party representatives are bound, perhaps by encouraging them to exempt the application of their ethical rules to their members' practice in international arbitration.

There is a further alternative that does not appear to have been considered in any detail in the literature on this topic. If ethical regulation is to be adopted, is there any principled reason why it should not be adopted at the level of the arbitration law of the seat of arbitration chosen by the parties? Of course, such an approach to the issue would involve a number of practical difficulties, just as is the case with the other solutions that have been proposed, not least of which would be potentially the adoption of an amendment to the Model Law to include ethical strictures, and the potential rejections of such a provision by national or other legislators. And the development of ethical rules in legislation at the seat of the arbitration would

inevitably take time and considerable effort, and result in potentially different results in different seats.

But is this not precisely the way in which other aspects of international commercial arbitration have developed? Many nations have adopted slightly varying versions of the Model Law, or indeed adapted the principles of the Model Law to fit within their own legal environment, while other nations have decided upon their own approach to arbitration laws. The goal of developments in international arbitration has never been that any particular issue is dealt with worldwide in precisely the same way. The variety of approaches around the world gives meaning and value to the freedom of choice that is a fundamental principle of international arbitration, and enhances this form of dispute resolution.

Such an approach would minimize the problems of double deontology, in that many regulatory bodies already require lawyers to respect the conduct rules at the seat of the arbitration.⁴⁸ If national arbitration laws were adapted to include a clear code of professional conduct, those national regulators might be expected to defer to those rules in appropriate cases. This might be accomplished by means of a Schedule to the arbitration law, which would be capable of amendment without the need for further legislation. If, as considered above, the problem of conflicting ethical guidelines continues to concern practitioners, one might expect them to encourage their domestic regulators to adopt this kind of "carve-out" for international arbitration.

There is already at least one example of the adoption of this sort of approach, and that is in Section 40

of the English *Arbitration Act* 1996. This was a variation from the Model Law adopted by the Departmental Advisory Committee led by Lord Mustill, and is a mandatory provision for all arbitrations with their seat within England and Wales.⁴⁹ The DAC Report pointed out that sanctions for non-compliance with Section 40 are to be found in other provisions of the *Act*, including the tribunal's powers to deal with recalcitrant parties under Section 41, and to impose sanctions for failure to take steps ordered by the tribunal in a timely manner, such as under Section 73.⁵⁰ This is underpinned by the general principles set out in Section 1 of the *Act*, which are to be used in construing the provisions of the *Act*, and which include an explicit statement that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."⁵¹

Very few reported judgments deal in detail with the parties' duties under Section 40.⁵² It may be that international arbitration tribunals are using this provision to deal quietly with perceived unethical conduct in particular proceedings. It may also be that this provision needs to be strengthened to deal with concerns about unethical conduct.

International arbitration is always subject to the arbitration laws of the situs. So if the consensus within the international arbitration community is that some form of ethical regulation is necessary, is the legislative approach not one that the international arbitration community should seriously consider?

*Jane Wessel is a Partner in the International Disputes group of Shepherd and Wedderburn LLP,

resident in their London office. Her practice encompasses international commercial arbitration, investor state arbitration, competition litigation, commercial litigation and mediation. Jane is a Fellow of the Chartered Institute of Arbitrators and a CEDR Accredited Mediator. E-mail: Jane.Wessel@shepwedd.co.uk

Gordon McAllister is a solicitor-advocate and an associate in Crowell & Moring's London office, where he is a member of the International Dispute Resolution and Antitrust Recovery practice groups. Gordon represents clients in both commercial and investment arbitration and his practice involves a wide variety of commercial litigation, including the pursuit of antitrust claims. E-mail: gmcallister@crowell.com

Endnotes

¹ Catherine Rogers, *Ethics in International Arbitration* (Oxford: Oxford University Press, 2014) at 106.

² EC, *Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained*, [1998] OJ L 77. See, specifically, art 6(1), which provides that "a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of the activities he pursues there."

³ *Ibid.*, art 4.1 which provides that "[a] lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal."

⁴ *American Bar Association Model Rules of Professional Conduct* (2000), art 8.5(b), online: <www.americanbar.org>, "In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise [...]"

⁵ See e.g., W Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (New Haven and London: Yale University Press, 1971) at 116-7.

⁶ Edna Sussman encourages practitioners to "seize the moment." See Edna Sussman, "All's Fair in Love and War – Or Is It? The Call for Ethical Standards for Counsel in International Arbitration" (2010) 7.2 *Transnational Dispute Management*. Doak Bishop has referred to the *status quo* as an "ethical no man's land," noting Professor Rogers' view that "where ethical regulations should be, there is only an abyss." Doak Bishop, *Ethics in International Arbitration*, Address to ICCA Conference in Rio de Janeiro, 23-26 May 2010, citing Professor Rogers, "Fit and Function in Legal Ethics: Developing a Code of Attorney Conduct for International Arbitration" (2002) 23 *Mich Int'l L J* 341.

⁷ The details and merits of these institutional proposals are discussed more fully below.

⁸ A term used by Professor Rogers. See e.g., *The Ethics of Advocacy in International Arbitration*, Penn State Law, Legal Studies Research Paper No 18-2010 at 1.

⁹ See Douglas Thomas, "From No Man's Land to a Teenager's Bedroom" (2014) 9 *Global Arbitration Review*.

¹⁰ *Ibid.*

¹¹ In his 2001 Goff Lecture – The Lawyer's Duty to Arbitrate in Good Faith, V.V. Veeder made this point with considerable eloquence: "Lawyers are not musicians or ballet dancers: a lawyer's training, skills and ethics are still essentially rooted in a national legal system." See VV Veeder, "The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith", 18 *Arbitration International* at 431.

¹² See e.g., the comments of Sundaresh Menon, Chief Justice of Singapore during the London School of Economics and Political Science's debate on 9 May 2013: Is Self-Regulation of International Arbitration an Illusion? Sundaresh Menon, "Is Self-Regulation of International Arbitration an Illusion?" (4th LSE Arbitration Debate delivered at the London School of Economics and Political Science, 9 May 2013).

¹³ In *Rondel v Worsley* [1966] 3 WLR 950, Lord Denning characterised the position in England and Wales in the following terms: "[The advocate] has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth [...] He must produce all the relevant



authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.”

¹⁴ In his article “The Ethics of Advocacy” Gavin MacKenzie notes that: “In the United States the duty to the client is generally seen as the lawyer’s primary duty, while in Britain the duty to the court is preeminent. In [the Canadian] rules, the two duties are given equal prominence – which may make ethical choices in advocacy more difficult in our jurisdiction”. Gavin MacKenzie, “The Ethics of Advocacy” *The Advocates’ Society Journal* (September 2008) at 26.

¹⁵ At the inaugural IRE conference, Michael Todd QC made a similar observation about the different duties faced by lawyers depending on their home jurisdiction.

¹⁶ Sussman, *supra* note 6. The authors have taken the liberty in this article of reflecting and commenting extensively on Ms Sussman’s thought-provoking study.

¹⁷ *Ibid* at 611.

¹⁸ Stephan Wilske, “Preventing/Employing “Guerrilla Tactics” in Arbitration and Litigation: Are There Technically Legal “Guerrilla-Like” Practices that May be Used in Arbitration/Litigation” (2010) 7.2 *Transnational Dispute Management*.

¹⁹ On 9 May 2013, Sundaresh Menon, Chief Justice of Singapore, took part in the London School of Economics and Political Science’s debate: Is Self-Regulation of International Arbitration an Illusion? In his opening remarks, he summarised this problem in the following terms: “implied understandings or shared values do not provide any meaningful means of shaping or influencing conduct once we have morphed from a small, largely homogenous group to a very large heterogeneous group bringing a myriad of backgrounds, influences and perspectives of what constitutes acceptable conduct.” See Menon, *supra* note 11.

²⁰ See Patrick Thieffry, “European Integration in Transnational Litigation” (1990) 13 *BC Int’l & Comp L Rev*, 339 at 356-7.

²¹ Bernardo Cremedas “Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration” (1998) 14 *J Arb Int’l* 164 at 166.

²² See, *R v Momodou* [2005] EWCA Crim 177.

²³ See e.g., *Black Horse Lane Assocs., LP v Dow Chem Corp*, 228 F 3d 275, 304 (3d Cir 2000) (“[W]hen a witness is designated by a corporate party to speak on its behalf pursuant

to Rule 30(b)(6), “producing an unprepared witness is tantamount to a failure to appear” that is sanctionable.”)

²⁴ *Code Suisse de Deontologie*.

²⁵ See Rogers, *supra* note 1 at 100.

²⁶ Allowing commentators to conclude that “In international arbitration it is well recognised that witnesses may be interviewed and prepared prior to giving their oral testimony.” Alan Redfern, Martin Hunter, et al, *Redfern and Hunter on International Arbitration*, 5 ed (2009) at 403.

²⁷ Article 4(3) of the *IBA Rules on Taking Evidence in International Arbitration* provides that: “it shall not be improper for a party, its [...] legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.” *IBA Rules on Taking Evidence in International Arbitration* (2010), online: <www.ibanet.org>. Guidelines 18 to 24 of the *IBA Guidelines on Party Representation in International Arbitration* provide that counsel may assist a fact or expert witness in the preparation of his or her evidence, so long as the evidence remains the witness’s own. *IBA Guidelines on Party Representation in International Arbitration* (2013), online: <www.ibanet.org>. This is considered further below.

²⁸ Professor Rogers makes the observation that, notwithstanding US ethical rules typically prohibit *ex parte* communication with a judge, “domestic US arbitration rules permit parties to communicate throughout arbitral proceedings with their party-appointed arbitrators, even about crucial issues involving strategy.” This, she notes, can be controversial even for Continental European lawyers, who are more accustomed to *ex parte* communications during the currency of litigation. She highlights, however, the surprising result that lawyers from jurisdictions which consider *ex parte* communications with judges less favourably may, in fact, be more likely to communicate in this manner with members of an arbitral tribunal. See Rogers, *supra* note 1 at 126-128.

²⁹ See e.g., the thoughtful discussion by Dr Martin Rauber “The Impact of Ethical Rules For Counsel in International Commercial Arbitration - Is There a Need For Developing International Ethical Rules” (2014) 17 *Int A L R* 17 at 17-36. See, further, Sam McMullan “Holding Counsel to Account in International Arbitration” (2011) 24(2) *LJIL* at 491.

³⁰ At his Keynote address at the first ICCA Conference held 23 – 26 May 2010 in Rio de Janeiro, Doak Bishop voiced a similar concern, warning that the lack of clarity about applicable ethical standards “creates a certain instability in the system that could result in a

future crisis of confidence.” See Doak Bishop, “Ethics in International Arbitration” (ICCA Conference, 23 May 2010), online: <www.arbitration-icca.org>.

³¹ Rogers, *supra* note 1 at 136.

³² See e.g., Ignacio Madalena, *Ethics in International Arbitration* [2014] 15(6) *Int’l ALR*, 251.

³³ *IBA Guidelines on Party Representation in International Arbitration supra* note 26, Preamble.

³⁴ *Ibid*, guideline 24 “A Party Representative may, consistent with the principle that the evidence given should reflect the Witness’s own account of relevant facts, events or circumstances, or the Expert’s own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.”

³⁵ *Ibid*, guideline 26(c) “the Arbitral Tribunal, as appropriate, may consider the Party Representative’s Misconduct in apportioning the costs of the arbitration.”

³⁶ *LCIA Arbitration Rules* (2014) at para 1, online: <www.lcia.org>.

³⁷ *Ibid* at para 2.

³⁸ See e.g., Charles N Brower and Stephan W Schill, “Regulating Counsel Before International Tribunals” in *Making Transactional Law Work in a Global Economy: Essays in Honour of Detlev Vagts* (2010) 488, 489; Bishop, *supra* note 29.

³⁹ Wilske, *supra* note 18.

⁴⁰ Gary Born, speaking at Queen Mary University of London Institute of Regulations and Ethics, Royal College of Surgeons, 11 September 2014, echoing the comments of Toby Landau QC at the 2012 ICC Conference in Singapore warning that we should “kill the disease not the patient”. Gary Born, “Critical Evaluation of Ethical Rules in International Arbitration” (Inaugural Conference of the Institute for Regulations and Ethics, delivered at Royal College of Surgeons of England, 11 September 2014).

⁴¹ Professor William W Park, “A Fair Fight: Professional Guidelines in International Arbitration” (2014) 30.3 *Arbitration International LCIA* 425.

⁴² See e.g., Carlos Alberto Carmona, “Considerations on the IBA Guidelines on Party Representation” in *Les cahiers de l’arbitrage, International Arbitration: a Brazilian point of view* (2014) 30.

⁴³ Two from Singapore, one from Colombia, one from Mexico, one from Japan, and one from Nigeria. See *IBA Guidelines on Party Representation in International Arbitration, supra* note 26, 5-7.

⁴⁴ Julian Lew, “Critical Evaluation of Ethical Rules in International Arbitration” (Inaugural Conference of the Institute for Regulations

and Ethics, delivered at Royal College of Surgeons of England, 11 September 2014).

⁴⁵ 2014 LCIA Rules, *supra* note 36, art 18.5 and 18.6.

⁴⁶ Elliott Geisinger, President of the Association Suisse d'Arbitrage ("ASA"), speaking at Queen Mary University of London Institute of Regulations and Ethics, Royal College of Surgeons, 11 September 2014. Elliott Geisinger, "The Emerging Legal Framework of Ethical Rules" (Inaugural Conference of the Institute for Regulations and Ethics, delivered at Royal College of Surgeons of England, 11 September 2014). Dr. Geisinger noted that as an issue of principle, those deciding upon the merits of claim should not also be charged with enforcing ethical rules, stating "these are two different functions and there are strong reasons to keep them separate." See Global Arbitration Review, "From No Man's Land to a Teenager's Bedroom", 17 September 2014.

⁴⁷ ASA President's Message, "Counsel Ethics in International Arbitration – Could One Take Things a Step Further?", September 2014, available at <<http://www.arbitration-ch.org/pages/en/asa/news-&-projects/presidents-message/index.html>>. Dr. Geisinger remarked that these "core principles" may not differ very widely from the Annex to the 2014 LCIA Rules.

⁴⁸ See *supra*, notes 3-5 and accompanying text.

⁴⁹ Section 40 of the *Arbitration Act 1996* (UK), c 23 provides as follows:

(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

(2) This includes –

(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).

⁵⁰ Departmental Advisory Committee on Arbitration Report on the Arbitration Bill 1996 at para 205.

⁵¹ *Arbitration Act 1996*, *supra* note 48, s 1(a).

⁵² See e.g., *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm) and *Al-Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep 512.

