

COUNSEL ETHICS IN INTERNATIONAL ARBITRATION: IS THERE ANY NEED FOR REGULATION?

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Abstract

Is there any need to establish ethical norms governing the conduct of counsel in international arbitration? In order to answer this question, the article considers the reasons which gave rise to the arbitration community's perceived need for regulation when it comes to counsel ethics. If, on the one hand, the opening of the arbitration community to "newcomers" calls for shared principles and rules covering several facets of the arbitration proceedings, on the other hand, these principles and rules should also take into account the duties which counsel traditionally owe to their clients. The tension which may sometimes exist between these forces may provide the pathway to concrete and effective solutions shared by all players in arbitration.

I. Introduction

The international arbitration community has recently been confronted with the question whether there is any need to establish dedicated ethical rules governing the conduct of counsel in international arbitration. This question has given rise to heated debates amongst practitioners and commentators.¹ Different answers to the question mentioned above have been put forward;

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¹ Edna Sussman & Solomon Eber, *All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration*, 22(4) AM. REV. INT'L ARB. 611 (2011); Michael Hwang & Jennifer Hon, *A New Approach to Regulating Counsel Conduct in International Arbitration*, 33 (3) ASA BULL. 658 (2015); Christopher Lau, *Do Rules and Guidelines Level the Playing Field and Properly Regulate Conduct? – An Arbitrator's Perspective*, in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY, ICCA CONGRESS SERIES NO. 19 559 (Andrea Menaker ed., 2017); Paula Hodges, *Equality of Arms in International Arbitration: Who is the Best Arbitrator of Fairness in the Conduct of Proceedings?*, in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY, ICCA CONGRESS SERIES NO. 19 599 (Andrea Menaker ed., 2017); Felix Dasser, *Equality of Arms in International Arbitration: Do Rules and Guidelines Level the Playing Field and Properly Regulate Conduct? – Can They? Will They? Should They? The Example of the IBA Guidelines on Party Representation*, in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY, ICCA CONGRESS SERIES NO. 19 634 (Andrea Menaker ed., 2017); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2849-2892 (2d ed. 2014); NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 3.221-3.231 (6th ed. 2015); Elliot Geisinger, "Soft Law" and Hard Questions: ASA's Initiative in the Debate on Counsel Ethics in International Arbitration, in THE SENSE AND NON-SENSE OF GUIDELINES, RULES, AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION, ASA SPECIAL SERIES NO. 37 17 (Daniele Favalli ed., 2015); Felix Dasser, *A Critical Analysis of the IBA Guidelines on Party Representation*, in THE SENSE AND NON-SENSE OF GUIDELINES, RULES, AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION, ASA SPECIAL SERIES NO. 37 33 (Daniele Favalli ed., 2015); William W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30(3) ARB. INT'L 409 (2014); Tom Cummins, *The IBA Guidelines on Party Representation in International Arbitration - Levelling the Playing Field?*, 30(3) ARB. INT'L 429 (2014); Alan S. Rau, *Arbitrators Without Powers? Disqualifying Counsel in Arbitral Proceedings*, 30(3) ARB. INT'L 457 (2014); Jeffrey Waincymer, *Regulatory Developments in the Control of Counsel in International Arbitration - The IBA Guidelines on Party Representation in International Arbitration and the New LCLA Rules and Annex*, 30(3) ARB. INT'L 513 (2014); Elliott Geisinger, *President's Message: Counsel Ethics in International Arbitration - Could One Take Things a Step Further?*, 32(3) ASA BULL. 453 (2014); Domitille Baizeau, *The IBA Guidelines on Party Representation in International Arbitration: A Plea for Caution*, 2(2) BCDR INT'L ARB. REV. 343 (2015); Alexis Mourre, *Soft Law as a Condition for the Development of Trust in International Arbitration*, 51 REVISTA BRASILEIRA DE ARBITRAGEM 82 (2016); Alexis Mourre & Eduardo Z. Jaramillo, *The IBA Guidelines on Party Representation in International Arbitration*, in FESTSCHRIFT AHMED SADEK EL-KOSHERI 109 (Nassib G. Ziade ed., 2015); Alexis Mourre, *Chapter 25: About Procedural Soft Law, the IBA Guidelines on Party*

however, it is fair to state that no general consensus has been reached so far on a uniform way to deal with the issue under consideration.

On one end of the spectrum, there are international associations and arbitration institutions such as, for instance, the International Bar Association [“**IBA**”] and the London Court of International Arbitration [“**LCIA**”] which took concrete steps in the direction of regulation of counsel ethics. For instance, the IBA Council adopted on May 25, 2013 the “*IBA Guidelines on Party Representation in International Arbitration*”.² Similarly, the “*General Guidelines for the Parties’ Legal Representatives*” attached to the LCIA Rules of 2014 are intended to serve the same purpose.³

On the other end of the spectrum, there are voices advocating for restraint when it comes to establishing rules aimed at governing the behaviour of counsel during the arbitral proceedings.⁴

The present article will, *first*, provide a brief sociological overview of the evolution of the arbitration community over the past few decades; such evolution is arguably one of the reasons for the perceived need for regulation of counsel conduct; *second*, the article will address the

Representation and the Future of Arbitration, in THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 239 (Patricia Shaughnessy & Sherlin Tung eds., 2017); Paula Hodges, *The Proliferation of “Soft Laws” in International Arbitration: Time to Draw the Line?*, AUSTRIAN Y.B. INT’L ARB. 205 (2015); Alexis Mourre, *Conflicts Disclosures: The IBA Guidelines and Beyond*, AUSTRIAN Y.B. INT’L ARB. 291 (2015); Doak Bishop, *Safeguarding the Fair Conduct of Proceedings - Presentation at Breakout Session C3*, in INTERNATIONAL ARBITRATION – THE COMING OF A NEW AGE?, ICCA CONGRESS SERIES NO. 17 465 (van den Berg ed., 2013); Doak Bishop & Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, in ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES NO. 15 391 (Albert Jan van den Berg ed., 2011); Doak Bishop & Margrete Stevens, *Safeguarding the Fair Conduct of Proceedings – Report*, in INTERNATIONAL ARBITRATION – THE COMING OF A NEW AGE?, ICCA CONGRESS SERIES NO. 17 473 (Albert Jan van den Berg ed., 2013); Toby T. Landau QC & Romesh Weeramantry, *A Pause for Thought*, in ICCA CONGRESS SERIES NO. 17 497 (Albert Jan van den Berg ed., 2013); Doak Bishop, *Ethics in International Arbitration*, in ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES NO. 15 383 (Albert Jan van den Berg ed., 2011); Silvano D. Orsi, *Ethics in International Arbitration: New Considerations for Arbitrators and Counsel*, 3 (1) THE ARBITRATION BRIEF 92 (2013); Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 AM. REV. INT’L ARB. 214 (1992); Günther J. Horvath, *Guerilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?*, AUSTRIAN Y.B. INT’L ARB. 297 (2011); Arman Sarvarian, *Common Ethical Standards for Counsel before the European Court of Justice and European Court of Human Rights*, 23 (4) EJIL 991 (2012); Carrie Menkel-Meadow, *Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration?*, in MÉLANGES EN L’HONNEUR DE PIERRE TERCIER 883 (Peter Gauch et al. eds., 2008); Jean-André Diaz et al., *Debate: Does each Player Meet the Others’ Expectations? Does the Arbitration Process Meet the Users’ Expectations?*, in PLAYERS INTERACTION IN INTERNATIONAL ARBITRATION, DOSSIERS OF THE ICC INSTITUTE OF WORLD BUSINESS LAW 122 (Bernard Hanotiau & Alexis Mourre eds., 2012); Maxi Scherer, *Chapter 18: Legal Representatives*, in ARBITRATING UNDER THE 2014 LCIA RULES – A USER’S GUIDE 283 (Maxi Scherer et al. eds., 2015); Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341 (2002); Petr Dobiáš, *Ethical Rules of Conduct in International Arbitration*, 7 CZECH. Y.B. INT’L L. 27 (2017); Ugo Draetta, *The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization*, 33 (2) ASA BULL. 327 (2015); Jean-Christophe Honlet, *The IBA Guidelines on Party Representation in International Arbitration*, 30(6) J. INT’L ARB. 701 (2013); Michael E. Schneider, *President’s Message: Yet another opportunity to waste time and money on procedural skirmishes: The IBA Guidelines on Party Representation*, 31(3) ASA BULL. 497 (2013); Cyrus Benson, *The IBA Guidelines on Party Representation: An Important Step in Overcoming the Taboo of Ethics in International Arbitration*, (1) CAHIERS DE L’ARBITRAGE/PARIS J. INT’L ARB. 47 (2014).

² IBA Guidelines on Party Representation in International Arbitration, available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

³ London Court of International Arbitration Rules, available at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx [hereinafter “LCIA Rules”].

⁴ Felix Dasser, *A Critical Analysis of the IBA Guidelines on Party Representation*, in THE SENSE AND NON-SENSE OF GUIDELINES, RULES, AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION, ASA SPECIAL SERIES NO. 37 33 (Daniele Favalli ed., 2015); Michael E. Schneider, *President’s Message: Yet another opportunity to waste time and money on procedural skirmishes: The IBA Guidelines on Party Representation*, 31(3) ASA BULL. 497 (2013).

question of what aspects (if any) of counsel ethics should actually be regulated; *finally*, conclusions will be drawn in the third section of the article.

Rather than providing cast-in-stone solutions, the purpose of this article is mainly to raise awareness of some issues which, in the author's view, cannot be ignored by any future attempt to regulate counsel conduct in international arbitration.

II. The Evolution of the Arbitration Community and the Need for New Rules and Guidelines – A Sociological Overview

In their seminal book titled “*Dealing in Virtue - International Commercial Arbitration and the Construction of a Transnational Legal Order*” published in 1996, Yves Dezalay and Bryant Garth analysed international arbitration from a sociological standpoint. Dezalay and Garth's book is a cornerstone of the studies conducted on arbitration outside of a purely legal perspective.

Dezalay and Garth described the community of international arbitration using the following words:⁵

“*[i]nternational commercial arbitration is moving from a small, closed group of self-regulating artisans to a more open and competitive business.*”

They, in particular, analysed the evolution of the sociological phenomenon of international arbitration, from a small and rather closed “*club*” of professionals which shared common background and standards of conduct to a wider group of younger “*technocrats*” who were selling “*their services to business practitioners*” by putting emphasis on their “*professionalism*” as opposed to the “*idealism*” and “*amateurism*” of their predecessors.⁶

The transition from the era of the so-called arbitration “*divas*” to the era of the professional “*technocrats*” called for the “*rationalisation of arbitration know-how*”;⁷ in other words, the need for the formalisation of rules and guidelines to be applied by the wider community of arbitration practitioners.

Dezalay and Garth wrote their book some twenty years ago and experience has shown that the evolution of the arbitration community has not ended, quite to the contrary.

Although the arbitration community is still often described as a “*club*”⁸ and, in a derogatory way, as a form of “*mafia*”, as a matter of fact, this community is far more open and diversified today than it used to be thirty or forty years ago. This trend has been described by using the expression “*democratisation*” of arbitration which ultimately means that the “*club*” is now opening its doors to

⁵ YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE - INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 39 (1996).

⁶ *Id.* at 36-37.

⁷ *Id.* at 37.

⁸ Iran-United States, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 336 (1984), cited in Detlev F. Vagts, *The International Legal Profession. A Need for More Governance?*, 90 AM. J. INT'L L. 250, 250 (1996).

new members, and these new members may be more diverse in terms of their legal and cultural background as well as procedural behaviour.⁹

If, on the one hand, this trend may certainly be welcomed as a positive development for arbitration,¹⁰ on the other hand, the need for shared principles and rules of conduct is growing as the “community” gets bigger every passing day.¹¹ These principles and rules could be directed to sanction improper behaviour as well as to ensure that all “actors” on the stage of arbitration are on a level playing field.¹² There is nothing surprising in such need.

The past few decades have been characterised by a “super-production” of rules and guidelines aimed at regulating almost every aspect of the arbitration proceedings¹³ (from the drafting of effective arbitration agreements,¹⁴ to the taking of evidence;¹⁵ from the organisation of arbitral proceedings,¹⁶ to the proper way to conduct interviews with prospective arbitrators¹⁷).

According to some commentators, such “super-production” of rules and guidelines is ultimately counter-productive, since it only achieves the final result of limiting the flexibility of the proceedings.¹⁸ Guidelines and regulations would thus undermine one of the paramount aspects (and a traditional “selling” point) of arbitration as opposed to civil litigation.¹⁹

Also, counsel conduct has recently been touched upon by the production of soft laws; as stated above, the need for rules and guidelines governing counsel conduct is again triggered by the wider community of professionals practising arbitration. The goal pursued by the drafters of these rules and guidelines is to remedy what Catherine Rogers has defined as an “ethical no-man’s land”.²⁰ This is so due to the characteristics of international arbitration emphasised by Rogers, for example the fact that most arbitrations take place in jurisdictions where neither of the

⁹ Doak Bishop & Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, in ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES NO. 15 391, 394 (Albert Jan van den Berg ed., 2011); Alexis Mourre, *Conflicts Disclosures: The IBA Guidelines and Beyond*, AUSTRIAN Y.B. INT’L ARB. 291, 298 (2015); Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341, 352 (2002).

¹⁰ MICHAEL MCLLWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE 255 (2010).

¹¹ Mourre, *supra* note 9, at 298; Rogers, *supra* note 9, at 357.

¹² Edna Sussman & Solomon Ebere, *All’s Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration*, 22 (4) AM. REV. INT’L ARB. 611, 623 (2011); Domitille Baizeau, *The IBA Guidelines on Party Representation in International Arbitration: A Plea for Caution*, 2(2) BCDR INT’L ARB. REV. 343, 347 (2015).

¹³ Paula Hodges, *The Proliferation of “Soft Laws” in International Arbitration: Time to Draw the Line?*, AUSTRIAN Y.B. INT’L ARB. 205, 205 (2015).

¹⁴ IBA Guidelines for Drafting International Arbitration Clauses (2010), available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

¹⁵ IBA Rules on the Taking of Evidence in International Arbitration (2010), available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

¹⁶ UNCITRAL Notes on Organizing Arbitral Proceedings (2016), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2016Notes_proceedings.html.

¹⁷ CIARB Guidelines for Interviews for Prospective Arbitrators (2016), available at <http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/guideline-on-interviews-for-prospective-arbitrators.pdf?sfvrsn=16>.

¹⁸ Ugo Draetta, *The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization*, 33(2) ASA BULL. 327, 333 (2015).

¹⁹ *Id.* at 341.

²⁰ Rogers, *supra* note 9, at 342.

parties' counsel is licensed, the uncertainty surrounding the issue whether national ethical rules apply at all in arbitration, the absence of a supranational authority in charge of overseeing the conduct of counsel in arbitration and the limits of the arbitrators' power to sanction attorneys.²¹

Any analysis conducted on this topic must take into account some issues which go to the heart of an effective regulation of counsel ethics in international arbitration.

III. What Should Be Regulated? The Potential Conflict between Different Sets of Counsel's Duties

A key question to be addressed when it comes to the issue whether counsel conduct should be regulated is what should actually be the scope of any prospective regulation? In other words, what should actually be regulated?²²

If we look at the attempts made so far in this respect, we come across some quite broad duties which guidelines and rules intend to promote, such as:

- the counsel's duty "*to ensure the integrity and fairness of the arbitral proceedings*",²³
- the counsel's "*duty of candour or honesty owed to the Tribunal*",²⁴
- the promotion of "*the good and equal conduct of the parties' legal representatives appearing by name within the arbitration*",²⁵ and
- the counsel's duty "*not [to] engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award*".²⁶

The broad duties mentioned above are substantiated by the rules and guidelines through references to the formation of one party's counsel team,²⁷ the production of documents,²⁸ the making of factual assumptions before the arbitral tribunal,²⁹ the drafting of witness statements and expert reports,³⁰ etc.

²¹ Rogers, *supra* note 9, at 342-343.

²² Baizeau, *supra* note 12, at 345.

²³ Guideline No. 1, IBA Guidelines on Party Representation in International Arbitration, *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

²⁴ Comments to Guidelines 9-11, IBA Guidelines on Party Representation in International Arbitration, *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

²⁵ LCIA Rules, annex, ¶ 1, *available at* http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

²⁶ LCIA Rules, annex, ¶ 2, *available at* http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

²⁷ Guidelines 4-6, IBA Guidelines on Party Representation in International Arbitration, *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

²⁸ Guidelines 12-17, IBA Guidelines on Party Representation in International Arbitration, *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx; LCIA Rules, annex ¶ 5, *available at* http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

²⁹ Guidelines 9-11, IBA Guidelines on Party Representation in International Arbitration, *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx; LCIA Rules, annex ¶ 3, *available at* http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

³⁰ Guidelines 18-25, IBA Guidelines on Party Representation in International Arbitration, *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

It is fair to assume that every attempt to regulate the conduct of counsel in international arbitration will also have to deal with another overarching duty which governs the activity of counsel; namely, the duty of loyalty counsel owe to their clients and the obligation on counsel to present their clients' case in the most effective and convincing way before the arbitral tribunal.³¹

In an ideal world, fairness and loyalty towards the opposing party and the arbitrators, and loyalty to clients should not conflict with one another, however, in the real world, the clash between these sets of duties may exist and must hence be taken into account.

Both the IBA Guidelines on Party Representation and the LCIA Guidelines annexed to the LCIA Rules are very cautious when they address the potential conflict between the two sets of duties described above insofar as they expressly provide that:³²

*“[...] [t]he Guidelines are also **not intended** to derogate from the arbitration agreement or **to undermine either a Party representative’s primary duty of loyalty to the party whom he or she represents or a Party representative’s paramount obligation to represent such Party’s case to the Arbitral Tribunal.**”³³*

[emphasis added]

And

“[n]othing in these guidelines is intended to derogate from the Arbitration Agreement or to undermine any legal representative’s primary duty of loyalty to the party represented in arbitration or the obligation to present the party’s case effectively to the Arbitral Tribunal. Nor shall these guidelines derogate from any mandatory laws, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to a legal representative appearing in the arbitration.”³⁴

[emphasis added]

The relation existing between the duties previously mentioned is crucial in order to determine the actual boundaries of what is ethically permissible in international arbitration.³⁵

In this respect, any debate regarding ethical issues in international arbitration would probably be deprived of its meaning if, for instance, one were to take the view that making false factual statements before an arbitral tribunal, knowing that those statements are false, shall not be reproached to counsel when such false statements support the client's case. If that is the position, the conclusion one could be entitled to draw is that anything is admissible provided that the action undertaken in the proceedings will ultimately lead to some advantage to the

³¹ Alexis Mourre & Eduardo Z. Jaramillo, *The IBA Guidelines on Party Representation in International Arbitration*, in FESTSCHRIFT AHMED SADEK EL-KOSHERI 109, 113 (Nassib G. Ziade ed., 2015); Rogers, *supra* note 9, at 383.

³² Jean-Christophe Honlet, *The IBA Guidelines on Party Representation in International Arbitration*, 30(6) J. INT'L ARB. 701, 702 (2013).

³³ Guideline 3, IBA Guidelines on Party Representation in International Arbitration, *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

³⁴ LCIA Rules, annex, ¶ 1.

³⁵ Rogers, *supra* note 9, at 384.

client. On the contrary, if we take the opposite view (as the author believes we should), then it is crucial to focus on the relation between the duties owed to clients and the duties owed to arbitrators, the opposing side and, in general, the duty to conduct the proceedings fairly.

As confirmed by the IBA Guidelines on Party Representation and the LCIA Guidelines annexed to the LCIA Rules, it would be over-simplistic to conclude that the general duty to act fairly and in the interest of the arbitration should always outweigh the counsel's duty of loyalty owed to their clients (a duty which is defined as "*primary*" by those guidelines). However, it would be equally inaccurate to conclude that the duty of loyalty owed to clients should always prevail over the counsel's duty to act fairly in the proceedings in the interest of the integrity of the arbitration.³⁶

In this respect, no guidelines, however comprehensive, will ever be so detailed as to capture the entire, multi-faceted reality of international arbitration. The choice made by the IBA Guidelines on Party Representation and the LCIA Guidelines annexed to the LCIA Rules to favour some flexibility through the affirmation of general principles and overarching duties seems, in this respect, to go in the right direction. Flexibility in fact may help the guidelines to adapt to real life; this remains true even if one were to take the view that too much flexibility may ultimately favour some uncertainty.³⁷

An example taken from the practice may illustrate the impact of the conflict between counsel's duties and how this conflict is key to the issue presently under consideration.

In an arbitration conducted in Switzerland, a party filed around fifteen procedural applications. These applications included no less than:

- *five* requests to stay the arbitration,
- *one* request to bifurcate the proceedings,
- *two* requests for interim measures, and
- *three* requests to strike off the record portions of the resisting party's briefs or evidence.

All these applications were eventually dismissed by the arbitral tribunal.

The applicant also started parallel criminal proceedings against two managers of the resisting party and challenged a procedural order by the arbitral tribunal before the Swiss Federal Supreme Court.

³⁶ See also Guideline No. 9, IBA Guidelines on Party Representation in International Arbitration, which provides that "[a] Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal" and Guideline No. 10 which states that "[i]n the event that a Party Representative learns that he or she previously made false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission."

³⁷ On the uncertainty of the IBA Guidelines on Party Representation in International Arbitration, see GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2855 (2d ed. 2014).

The resisting party contended that the procedural applications mentioned above were part and parcel of the applicant's agenda, the purpose of which was to delay the proceedings and aggravate the dispute in an attempt to exhaust the resisting party's financial resources.

The answer given by the applicant to the resisting party's argument was that one party cannot be in any manner limited with respect to the actions it believed it should undertake in order to protect what that party perceived to be its rights. According to the applicant, the outcome of the applications was no evidence of any bad faith on the applicant's part. The real meaning of the argument made by the counsel for the applicant is that he justified his actions taken within the framework of the arbitration proceedings by relying on the duty of loyalty owed to his client and the duty to protect his client's rights and interests. Furthermore, the resisting party did not raise any ethical issue regarding the applicant's counsel; instead, it sought a decision from the arbitral tribunal ordering the applicant to reimburse all costs incurred as a result of the unsuccessful applications, irrespective of the outcome of the final decision to be made by the arbitrator on the merits of the case.

The approach taken by the resisting party in the matter under consideration shows a tendency to seek monetary remedies which clearly fall within the arbitrators' jurisdiction rather than ethical sanctions directed against counsel.

The reasons for such approach may rest on the following facts:

- (i) it may be difficult to discharge the burden of proof as to alleged violations of ethical rules of conduct applied to purely procedural incidents (*see* in this respect the defence raised by the applicant in the case described above),
- (ii) ethical codes applicable to counsel issued by national associations governing lawyers' profession are perceived as not ideal to address issues arising out of international disputes,³⁸
- (iii) the traditional recourse to bodies within Bar associations which should sanction the violations of ethical norms is perceived as uncertain,³⁹ and
- (iv) even if one may argue that arbitrators are better placed to assess one party's (and its counsel's) conduct within the proceedings, it may be difficult to obtain a decision by arbitrators in this respect.

To seek a monetary remedy which touches upon the allocation of the costs of the arbitration is not at all an exceptional remedy in arbitration; a request of such nature, therefore, allows arbitrators to act within their traditional "*comfort zone*".⁴⁰

³⁸ *Id.* at 2851-2854.

³⁹ *Id.* at 2886.

⁴⁰ *See, e.g.*, art. 38 (5) International Chamber of Commerce rules of Arbitration, *available at* <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>; Art. 49 (6), Rules for Expedited Arbitrations of the Arbitration Institute of Stockholm Chamber of Commerce, *available at* http://www.sccinstitute.com/media/161463/final_draft_expedited-rules-23112016.pdf.

IV. Conclusion

The ever-growing community of international arbitration arguably calls for clearer and shared rules of conduct on counsel's part. However, one could still wonder whether there is any actual need to put on paper broad principles and duties such as, for instance, that counsel should not lie or that they should act fairly during the proceedings.

The IBA Guidelines on Party Representation and the LCIA Guidelines provide an affirmative answer to this question. They serve, in particular, a twofold purpose insofar as they try to define what should be considered as improper in international arbitration, and, by doing so, they allow certain practices and/or behaviours.

Some authors have indicated that in some instances these guidelines actually attempt to regulate aspects of the arbitral process which are already dealt with in a different context. In this respect, it would be hard to properly distinguish between true issues of ethics and issues relating to the independence and impartiality of arbitrators and/or the admissibility and weighing of evidence.⁴¹

Another important question which any attempt to codify rules dealing with the conduct of counsel in arbitration must address is which authority will be in charge of enforcing such rules. Arbitrators and institutions may be reluctant to intervene to sanction counsel who behave improperly. In parallel, the Swiss Arbitration Association has recently concluded that time is not yet ripe for the creation of a transnational "*Global Arbitration Ethics Council*" in charge of supervising ethical issues in international arbitration based on shared core principles of ethical conduct.⁴²

The solutions contained in the IBA Guidelines on Party Representation and the LCIA Guidelines have been criticised by practitioners and some of these criticisms are shared by the author. The IBA and LCIA had, however, the merit to start a discussion within the arbitration community and the hope is that such discussion will continue without being discouraged by the obvious difficulties and issues which may be encountered along the way.

⁴¹ Elliot Geisinger, "*Soft Law*" and *Hard Questions: ASA's Initiative in the Debate on Counsel Ethics in International Arbitration*, in THE SENSE AND NON-SENSE OF GUIDELINES, RULES, AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION, ASA SPECIAL SERIES NO. 37 17, 21 (Daniele Favalli ed., 2015).

⁴² Sebastiano Nesi, *Creation of a Global Arbitration Ethics Council: the Swiss Arbitration Association declares that time has not yet come*, THOMSON REUTERS PRACTICAL LAW ARB. BLOG (Nov. 10, 2016), available at <http://arbitrationblog.practicallaw.com/creation-of-a-global-arbitration-ethics-council-the-swiss-arbitration-association-declares-that-time-has-not-yet-come/>.