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Equality of Arms in Arbitration: Cost and Benefits

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**EQUALITY OF ARMS IN ARBITRATION:
COST AND BENEFITS**

Mélanges en l'honneur de Pierre Mayer, 2015

Boston University School of Law
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Lawyer Comportment in Arbitration:
Costs and Benefits in the Search for Equality of Arms

William W. Park*

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I. Asking the Right Questions

A. Equality of Arms

1. How Much Regulation is Too Much?

Asking the right question remains vital to getting a helpful answer. ‘Do we need even more lawyer regulation?’ Such rhetorical flourish suggests an easy negative response in the debate over formalized standards to guide conduct of party representatives in international

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arbitration. At best, say the skeptics, such guidelines simply propound self-evident propositions. At worst they provide ammunition to sabotage proceedings or obtain award annulment.

An inquiry into the optimum amount of lawyer regulation brings little insight into how to address potentially perverse effects of divergent norms for lawyer comportment on matters such as *ex parte* communication, suppression of document and witness preparation. Although no playing field will be perfectly level, some remain less even than others. Cross-border arbitration may appear rigged against advocates that respect procedures not observed by the other side.

Not surprisingly, at least two questions beg further exploration in any discussion of lawyer behavior in arbitral proceedings. First, will codes of conduct promote equality of arms among counsel? Second, will costs of those codes outweigh their benefits?

Finely balanced arguments present themselves, implicating a dialogue calling for serious efforts at understanding competing perspectives. No side hits a home run or makes a slam dunk, even if strong opinions often differ by reason of particular experiences or divergent weight accorded the risks and benefits of varying levels of arbitrator discretion.¹

Whether codes and guidelines promote the prospect of a fair fight in arbitration has been mooted most vigorously in the debate on standards for lawyer comportment contained in two sets of guidelines.² First came the International Bar Association Guidelines on Party Representation

¹ With admirable candor, one arbitrator has acknowledged that his view of professional guidelines as ‘overkill’ derives in part from the fact that he hears only big cases in which the parties are represented by large established law firms. See interview of Karl-Heinz Böckstiegel conducted by Sebastian Perry, GAR (Global Arbitration Review), Tuesday 8 May 2014.

² For early efforts at drawing attention to the need for professional guidelines, see V. V. Veeder, *2001 Goff Lecture - The Lawyer's Duty to Arbitrate in Good Faith*, 18 ARB.INTL. 431, at 433 (2002), asking the now-famous rhetorical question, ‘What are the professional rules applicable to an Indian lawyer in a Hong Kong arbitration between a Bahraini claimant and a Japanese defendant represented by New York lawyers?’ See also John Uff, *Duties at the Legal Fringe: Ethics in Construction Law*, Lecture at King’s College London, 19 Jun. 2003; Jan Paulsson,

(‘IBA Guidelines on Party Representation’).³ Close on their heels were the Guidelines annexed to the Arbitration Rules of the London Court of International Arbitration (‘LCIA Annex’), approved by the LCIA Court in May 2014.⁴ Each instrument implicates self-regulation of the legal profession, a matter discussed often in arbitration conferences and scholarly literature.⁵

One of most thoughtful critiques of such memorialized standards for good behavior was issued by the Association Suisse de l’Arbitrage (‘ASA’ or ‘Swiss Arbitration Association’) which summarizes as follows its concerns about the IBA Guidelines on Party Representation.

[T]here are few, if any situations concerning party representatives which require rules on party representation, applicable in the arbitration. The measures proposed [by the IBA Guidelines] do not provide adequate relief and in particular are unlikely to resolve a possible detriment to a party from situations where the playing field may not have been level. Above all, the [IBA Guidelines] risk doing considerable unintended harm, not least to the detriment of the users.’⁶

Standards of Conduct for Counsel in International Arbitration, 3 AM. REV. INT. ARB. 214 (1992). .

³ International Bar Association, Guidelines on Party Representation in International Arbitration (25 May 2013). The IBA Guidelines on Party Representation should not be confused with the IBA Guidelines on Conflict of Interest in Arbitration, designed to address arbitrator ethics rather than lawyer conduct, notwithstanding an obvious overlap.

⁴ General Guidelines for the Parties’ Legal Representatives, Annex to 2014 LCIA Rules, appended to this essay.

⁵ For early recommendations that arbitral institutions adopt something like the LCIA Annex, see Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Attorney Conduct for International Arbitration*, 23 MICH. INT’L L.J. 341 (2002); Catherine A. Rogers, *Context and Institutional Structure in Attorney Discipline*, 39 STAN. INT’L L. REV. 1 (2002). See generally, CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION (forthcoming 2014, Oxford U. Press).

⁶ Paragraph 2.1, Association Suisse de l’Arbitrage, IBA Guidelines on Party Representation in International Arbitration: Comments and Recommendation by the Board (Vorstand) of the Swiss Arbitration Association (ASA Board), published on 20 Jan. 2014, memorializing the results of discussion at a meeting of the ASA Board on 3 Oct. 2013.

In particular, the ASA expresses concern that the IBA Guidelines would place on arbitrators a duty that falls beyond their traditional mandate, and risk provoking further procedural complications that would distract from the main function of arbitral proceedings.⁷

The qualms expressed by the ASA have been echoed and amplified by critics from other quarters.⁸ Many raise understandable questions about the generality of ethical codes⁹ and about unintended consequences in the form of opportunistic challenges to derail arbitral proceedings or to serve as strategic tools to vacate arbitral awards.¹⁰ Certain observers stress perceived evils of

⁷ As an alternative, the ASA suggests that concerns about procedural unfairness be addressed by ‘improved understanding of [legal culture] differences’ and ‘if this were found to be necessary, in the context of the arbitration rules and their application...’ *Id.* at 5.

⁸ Cyrus Benson proposes that critics of guidelines might fall into three camps: denialists, laissez-faire, and (iii) skeptics. The first camp denies the existence of any issue of counsel conduct in international arbitration. The laissez-faire group believes that attempts to create guidelines destroy the benefits that come with a free system of arbitration. Finally, the skeptics believe that regulating counsel conduct will cause abuse, costs and delays that overshadow any benefits. 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. OF INT’L ARB. 47, 51 (2014).

⁹ Toby Landau is cited as contenting that ethical codes by their very nature will set open-textured rules too general to be of any use. See Sundaresh Menon, *Some Cautionary Notes for an Age of Opportunity* 79 ARB. 393 (Chartered Institute of Arbitrators 2013) at para. 31, citing Landau’s presentation Seminar on Contemporary Challenges in International Arbitration, Queen Mary College, University of London, 27 Sep. 2012.

¹⁰ See Sebastian Perry & Richard Wooley, *LCIA Unveils Draft Guidelines for Counsel Conduct*, GLOBAL ARB. REV. (2014). In connection with the IBA Arbitration Day in Paris, 14 Feb. 2014, Perry and Wooley report that Toby Landau (Essex Court Chambers, London) and Michael Schneider (Lalive, Geneva) warned on excessive regulation which risked robbing arbitration of its flexibility and giving parties greater scope for guerilla tactics. See also Markham Ball, *Probity Deconstructed*, 21 ARB. INT’L 323 (2005); Martin Rauber, *The Impact of Ethical Rules for Counsel in International Commercial Arbitration-Is there a Need for Developing International Ethical Rules?*, 1 INT’L ARB. L. REV. 17, 27 (2014) questioning whether there is a compelling need for the development of a binding code of conduct. See generally, Jean-Christophe Honlet, *The IBA Guidelines on Party Representation in International Arbitration*, 30 J. OF INT’L ARB. 701 (2013).

regulation *per se*, warning of ‘a frightening international arbitral procedural code’ which results in ‘replacing an evil (domestic procedure) by a greater evil (international procedure).’¹¹

Yet voices supporting self-regulatory standards present forceful counter-arguments. Those urging the arbitration community to be proactive include Sundaresh Menon, Chief Justice of Singapore, bringing a mix of Asian perspective and English legal tradition.¹² He chronicles the departure of days when arbitration lay in the domain of a select group with shared understandings, now replaced by an arbitration landscape that includes a diverse set of actors with uneven expectations that may challenge the integrity of international proceedings. For example, Menon notes that many Asian jurisdictions permit *ex parte* communications with arbitrators, who often take on the role of a mediator and arbitrator in the same dispute. Absent codes of conduct, parties from diverse backgrounds receive little guidance on proper behavior.

Few would challenge the proposition that an arbitral tribunal has inherent power to preserve the integrity of the proceedings by taking appropriate measures against disruptive counsel.¹³ If one lawyer repeatedly shouts rude epithets at his opposite number, the presiding arbitrator should normally ask the offender to sit down or to leave.

¹¹ Carlos Alberto Carmona, *Considerations on the IBA Guidelines on Party Representation in International Arbitration: A Brazilian Point of View*, 1 CAHIERS DE L’ARBITRAGE/ PARIS J. INT’L ARB. 29, 30 (2014).

¹² See Sundaresh Menon, *Some Cautionary Notes for an Age of Opportunity*, 79 ARB. 393 (2013). See also Sundaresh Menon, Keynote Address to 2012 ICCA Singapore Congress, in *International Arbitration: The Coming of a New Age?*, ICCA Congress Series (Kluwer Law International 2013, in Albert Jan van den Berg ed.). On the balancing of costs and benefits in standards in arbitration, see also JAN PAULSSON, *THE IDEA OF ARBITRATION* 290–291 (2013).

¹³ For example, according to the Swiss Arbitration Association, ‘under most if not all frequently used arbitration rules arbitrators have, expressly or implicitly, the powers to ensure the ‘fundamental fairness and integrity’ of the proceedings. If they do not always make adequate use of such powers, this would seem to be essentially a question of arbitration practice and arbitrator awareness rather than a lack of rules or guidelines’. 2014 ASA Board Report, cited *supra*, at para. 2.1.

More problematic, however, will be those aspects of lawyering which receive varying treatment depending on the jurisdiction. In the United States, lawyers routinely prepare witnesses for testimony, while in many parts of Continental Europe such practice is considered inappropriate.¹⁴ In jurisdictions following Anglo-American models, lawyers consider themselves under a duty not to suppress documents whose production has been ordered. In other countries, the duty of counsel to a client may override obligations to the arbitral tribunal, making it less than evident that such material will be delivered. In the conflict between the duty of candor to arbitrators, and the duty of loyalty to clients, the latter often prevails in legal systems where attorneys do not see themselves as officers of the court.

2. Why and How Fairness Matters

As a preliminary matter, one might well ask why it matters that there be a ‘fair fight’ in arbitration. What should the adjudicatory system care that professional obligations (for example, disclosure of documents directed by the tribunal) should be respected by lawyers for one side, but not by the other. In a similar vein, one might ask why it matters that the arbitrator be relatively free from bias.¹⁵

¹⁴ See e.g., Art. 13 of *Us et coutumes de l’Ordre des Avocats de Genève* which provides ‘L’avocat doit s’interdire de discuter avec un témoin de sa déposition future et de l’influencer de quelque manière que ce soit.’ (The lawyer must abstain from discussing with a witness his future testimony and may not influence the witness in any manner.). Concerning German prohibition on interviewing witnesses, see John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 at 834 (1985); John H. Langbein, *Trashing the German Advantage*, 82 NW. LAW REV. 763 (1988). By contrast, US lawyers would lack in diligence if they failed to rehearse their witnesses about questions to be asked, in theory a way to keep witnesses from being misled or surprised and arguably making testimony more accurate. See WIGMORE ON EVIDENCE (3d ed.) § 788; THOMAS A. MAUET, PRETRIAL 40 (4th ed, 1999).

¹⁵ Publicly, lawyers talk about the proverbial good arbitrator who will be honest and intelligent. Yet in evaluating candidates to sit in their own cases, they doubtlessly hope for someone well-disposed to their arguments.

Before the dispute arises, neither side knows who will get the benefits of an unfair dispute resolution process. Under this ‘veil of ignorance’, contracting parties will tend to prefer dispute resolution procedures that enhance the prospect of success to the more reasonable view of facts and law.¹⁶ An uneven playing field hinders rather than furthers that objective, whether dice get loaded through biased arbitrators or counsel fighting with unequal weapons. Divergent rules, permitting some lawyers to engage in conduct forbidden to others, will mean that only one side has its hands tied by a professional restriction, thereby threatening the basic fairness of arbitral proceedings.¹⁷

Honest debate must address which rules might be optimum in providing counterpoise between rival goals in arbitration, including fairness and efficiency. However, the broader challenge remains to promote a practice with the same rule applying to both sides. In arbitration between an American and an Austrian, one might argue for and against Anglo-American style document production. Such debate notwithstanding, it would be odd if only one side could count on effective production because counsel applied different standards on compliance to tribunal orders. Even if no clearly right rule presents itself on such controverted practices, the most basic notions of fair play and procedural justice would be offended if one legal team is permitted to engage in conduct forbidden the other side.

¹⁶ In modern times, the phrase was popularized by the philosopher John Rawls with respect to contingencies to which a rule might apply. To be just, rules should be uninformed by existing litigation strategy. They should not be created in function of what might be called the ‘ouch test’, which looks to see who gets hurt by a particular norm. See JOHN RAWLS, *A THEORY OF JUSTICE* 136 (1971).

¹⁷ V.V. Vedeer, *2001 Goff Lecture: The Lawyer’s Duty to Arbitrate in Good Faith*, 18 *ARB. INT’L* 431 (2002); Martin Rauber, *The Impact of Ethical Rules for Counsel in International Commercial Arbitration – Is there a Need for Developing International Ethical Rules?* 17 *INT’L ARB. L. REV.* 17, 22 (2014).

To some extent, the debate on guidelines raises long-standing themes about the nature of law and the desirable extent of regulations in general. Those who remain skeptical about guidelines will see them as creating a risk of ‘side shows’ that disrupt proceedings. The suggestion will be made that the guidelines are not really needed. By contrast, proponents consider the codes as tools to assist those who quite rightly want to say ‘not so fast’ with objectionable conduct.

The conversation evokes the so-called “bad man theory” of the American jurist Oliver Wendell Holmes, presented in a lecture delivered at Boston University in January 1897. Arguing that individuals who care little for ethics nevertheless want to avoid fines and damages, Holmes suggested that the best characterized of law would be prediction of what brings the sanction feared by the proverbial bad man.¹⁸ Of course, there would be those who say that adherence to the law comes less from reading statutes than from an environment where adherence to certain norms remains commonplace.

The relationship between law and ethics becomes much more complex in an international context. Indeed, research suggests that ethical decisions in foreign languages differ from those reached in one’s native tongue. Larger numbers of people will endorse rational sacrifice when moral dilemmas are posed in a foreign language, presumably because effort and engagement of the reasoning process will be greater.¹⁹

¹⁸ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

¹⁹ In the so-called Trolley and Fat Man Problem a train will strike five people unless switched to a different path, where only one person will die. Disaster can also be averted by pushing a fat man onto the track, so his bulk will stop the train. When polled, more people agree to pull the switch than to push the fat man, although the arithmetic (one life for five) remains the same. Reluctance to push the fat man appears as a visceral reaction, contrasted to an impersonal flip of a lever. In a study at the Spanish University of Pompeu Fabra, willingness to push the fat man

B. Merging Streams

Among arguments offered against codified professional guidelines, the most often presented relate to some version of the ‘not needed’ contention. For some, codes of conduct remain a response in search of a problem, with the downside of injecting undue rigidity. Good arbitrators, it is submitted, can manage cross-cultural conflicts with grace and flexibility, through established rules combined with informal understandings of how things should be done. Implicit in this vision of reality, arbitration takes its tone from a gentlemen’s club of grand old men (with one or two distinguished women, perhaps) residing in a line drawn from London through Paris and on to Geneva.

If such days ever existed, they are long gone. Today, new players in the arbitral process include governments, companies, counsel and arbitrators from multiple litigation traditions. International arbitration has been democratized through participation of talented lawyers and arbitrators from around the world. Enlightened policy-makers in the arbitral community will learn from the past by recognizing how arbitration has evolved over the past half century.

New entrants come to the arbitral process not only from different geographical regions and legal cultures, but also from varied professional paths: litigators from law firms; academics who teach contracts or civil procedure; transactional lawyers and in-house counsel; and a host of non-lawyers, including engineers, quantity surveyors, accountants, economists, insurance underwriters and government officials.

Increasingly, the world of international arbitration might be compared to a series of merging streams, trickling down from different places, ultimately coming together in a single

increased when the question was asked in a foreign language. See ‘*Language and morality: Gained in translation*’, *ECONOMIST*, 17 May 2014.

river. Each of these varied backgrounds arrives in the arbitration community through a different path, with divergent training and perspective. Thus it should not be surprising that the very nature of arbitration, and obligations to be imposed on counsel, appear through different lenses.²⁰

In this connection, the impact of diversity in background cannot be overemphasized. The simple invocation of ‘fair treatment’ will doubtless have effect in homogeneous communities that rely on reputation bonds and shame to encourage cooperative behavior. Social pressure might work well among Jewish diamond dealers in Amsterdam, who form a relatively cohesive group with close social and religious ties.²¹

By contrast, in a stubbornly heterogeneous world, shame alone may not be enough. A Boston merchant might be quite willing to take his chances at not getting invited to lunch by a government official from Algiers with whom his company has differed. In such situations, the collectivity of stakeholders in the process of international economic cooperation would normally be assisted by some precision in what will be expected of them.²²

²⁰ Cyrus Benson when describing his experience with ethical issues in arbitration notes that ‘these experiences do not involve scandalous or unethical conduct. Instead, they concern lawyers on different sides of the same case acting ethically but nonetheless differently on matters of importance’. 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. OF INT’L ARB. 47, 48 (2014).

²¹ See Lisa Bernstein, *Opting Out of The Legal System*, 21 J. Leg. Stud. 115 (1992); JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (Oxford 1983). One might also look to the Puritans in colonial New England, although even these very like-minded folk had disputes which required formalized adjudication mechanisms. See Cohasset Marshlands Arbitration between Plymouth and Massachusetts, 9 Jun. 1640, recounted in WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION* 304–308 & 426–428 (Samuel Eliot Morison, ed., 1952, reprinted A.A. Knopf, 1991). However, it took another twenty-five years for the settlers to reach a compensation package with the prior owners, represented by the great chief Wompatuck, Sachem of the Massachusetts tribe. See E. VICTOR BIGELOW, *NARRATIVE HISTORY OF THE TOWN OF COHASSET* 143 (1898).

²² One intriguing experiment in the effect of codes can be found in the so-called Stone-Campbell Movement of early 19th century United States. Two clergymen (Barton Stone and Alexander Campbell) advanced the idea that Christians should be, well, just Christians, without labels such

Even among what might be seen as relatively well-related legal traditions, different expectations persist. The European tradition has long condemned *ex parte* communication between counsel and the arbitrators.²³ Until recently, however, American practice presumed party-nominated arbitrators to be non-neutral and thus permitted *ex parte* communication with their appointers.²⁴ By 2004, most arbitration in the United States was brought into line with global standards,²⁵ with a general expectation of independence for all arbitrators.²⁶

as Presbyterian, Methodist, Catholic and such. They resolved to worship with no rules but the Scriptures. In a short while, divisions arose based on views about musical instruments, missionary societies, Sunday schools, communion, and salaried clergy. The movement remains vibrant to this day, albeit with multiple groups and different tenets, illustrating the challenge for even those with highest goodwill to live in community without specific guidelines. See Christian History, Issue 106 (Christian History Institute, 2013); Leroy Garrett, *The Stone-Campbell Movement* (1994); *The Stone-Campbell Movement: A Global History* (D. Newell Williams, Douglas A Foster & Paul M. Blowers, eds. 2013).

²³ See William W. Park, *Arbitrator Integrity*, 46 SAN DIEGO L. REV. 629 (2009); adapted in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 189 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, Claire Balchin, eds, 2010); updated as *Rectitude in International Arbitration*, 27 ARB. INT'L 473 (2011).

²⁴ In domestic (rather than international) arbitration, it was assumed that arbitrators nominated by one of the parties were partisan unless explicitly agreed otherwise. See Canon VII, *AAA Code of Ethics for Arbitrators in Commercial Disputes 1977*, in X Y.B. COM. ARB. 132, 137 (Pieter Sanders ed., 1985).

²⁵ See Paul D. Friedland & Ank Santens, *The Internationalization of American Arbitration*, 18(2) News & Notes, Inst. Transnat'l Arb. 1 (2004); Ben H. Sheppard, *A New Era of Arbitrator Ethics in the United States*, 21 ARB. INT'L 91 (2005); Bruce Meyerson & John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained*, 59 DISP. RES. J. 10 (Feb–Apr. 2004); David Branson, *American Party-Appointed Partisan Arbitrators – Not The Three Monkeys*, 30 U. DAYTON L. REV. 1 (2004). For a broader exploration of arbitrator independence in the United States, see generally Alan Scott Rau, *Integrity in Private Judging*, 38 So. Tex. L. Rev. 485 (1997), adapted in 14 ARB. INT'L 115 (1998).

²⁶ Under the 2004 Arbitral Code of Ethics, adopted jointly by the American Bar Association and the American Arbitration Association, a party-nominated arbitrator may be non-neutral only if so provided by the parties' agreement, the arbitration rules or applicable law. See Preamble ('Note on Neutrality') and Canon X, 2004 ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes. This development reinforced a change in the American Arbitration Association domestic commercial arbitration rules, effective Jul. 2003, which established a presumption of

C. Mandatory State Rules

In the quest for a more level playing field in arbitration, the role of mandatory state rules continues to remain limited. Complaints might be filed with authorities in Geneva about a Swiss *avocat* who misbehaved in an international proceeding, just as the Massachusetts Board of Bar Overseers might hear complaints about a Boston attorney who conducted himself improperly in a cross-border arbitration. However, neither the Swiss nor the Massachusetts authorities would be able to solve the problem of different standards being applied to counsel from different jurisdictions representing opposing parties in an international case, whether within their borders or not.

In theory, one national law might take on such power as to become internationalized in scope, much as Britain imposed its own norms throughout the world to end the slave trade in the early 19th century.²⁷ However, the chance of success for such a development seems slim in a world with so many legal cultures rightly concerned about their own notions of professional ethics, a matter to which we shall return later.

Tensions among regulatory schemes will of course arise even absent the IBA Guidelines or the LCIA Annex. In many jurisdictions, one lawyer who observes dishonest behavior by

neutrality for all arbitrators. Rule 18 (applicable unless there has been agreement otherwise) prohibits parties from communicating *ex parte* with an arbitrator, except that for party-nominated (rather than presiding) arbitrators there may be communication: (i) to advise a candidate of the nature of the controversy or (ii) to discuss selection of a presiding arbitrator. Under Rule 12(b), party-nominated arbitrators must meet general standards of impartiality and independence unless there has been agreement otherwise, as permitted by Rule 17(a)(iii).

²⁷ See Foreign Slave Trade Act 1806 (46 Geo III c 52), enacted following considerable lobbying by William Wilburforce who later prevailed in the complete abolition of slavery in the British Empire through in the early 19th century.

another must report the misconduct to professional authorities.²⁸ Sitting as arbitrator, attorneys might struggle between their obligations as members of the bar, to report make a disciplinary report, and their duties to respect the parties' legitimate expectation that the proceedings will remain confidential.²⁹

II. Promoting More Level Playing Fields

Establishing more level playing field for lawyers in international arbitration will prove a challenge to the best of minds, implicating a persistent tension among various national notions of good practice. Few uncontroversial paths will present themselves with any clarity. Those seeking to meet the challenge may be forgiving for recollecting the sign over the entrance to Dante's *Inferno*: *Lasciate ogni speranza, voi che entrate* -- 'Abandon all hope, you who enter here'.³⁰

²⁸ Rule 8.3 of the American Bar Association Model Rules of Professional Conduct, effective in most of the United States, requires members of the bar to report unprivileged knowledge that raises a substantial question about another lawyer's honesty or trustworthiness. This Rule does not indicate whether a duty exists to report lawyers from other jurisdictions. If someone admitted to practice in Massachusetts observes misconduct by a member of the English or the Texas bar, must the Boston attorney contact authorities in London or in Austin? Even in today's interdependent global economy, a lawyer's duties lie principally to his or her own community, at least as a matter of professional ethics. Would Massachusetts have a legitimate interest in triggering disciplinary action in England or Texas, even assuming the Bostonian had requisite knowledge about the professional rules in those two other places, so as to justify complaints?

²⁹ Such conflicts bring to mind another oft-quoted adage of Justice Oliver Wendell Holmes, "General propositions do not decide concrete cases." See dissent in *Lochner v. New York*, 198 US 45,76 (1905), a now discredited landmark U.S. Supreme Court case holding that freedom of contract, implicit in the Due Process Clause of the Constitution's 14th Amendment, invalidated a state law which limited the time a baker could work to ten hours per day. The law attempting to protect the health of bakers was deemed an unreasonable interference with the individual's liberty to contract. The three paragraph dissent by Holmes accused the majority of judicial activism, suggesting that the constitution is not intended to embody a particular economic theory.

³⁰ Dante Alighieri, *Divine Comedy, Inferno, III, 9* (composed c. 1308–1314, printed as *La divina commedia*, 1555).

To address uneven playing fields, at least three possibilities present themselves. The first would be to address the matter in an ad hoc fashion, with each tribunal applying its own approach. The second implicates guidelines elaborated by a professional body with international stature. A final alternative would be to have the parties agree on standards in advance, most likely through a code of conduct annexed to selected arbitration rules.

A. Inherent Powers

One way to promote uniform standards for counsel conduct would be to leave the matter to the inherent power of each tribunal to maintain the basic integrity of the proceedings. On an ad hoc basis, arbitrators would decide what rules and sanctions to impose on disruptive lawyers whose behavior threatens due process. If the parties fail to define the arbitrator's powers concerning counsel conduct, the tribunal may be left only with a default rule that by submitting to the arbitral process, the parties have presumptively entrusted to arbitrators a wide-ranging power to determine just how to proceed.³¹

This solution works easily for some scenarios. When advocates throw public insults against their adversaries, they merit exclusion from the hearing rooms in most legal cultures.³²

Greater difficulty arises when disruption may take a subtler form that escapes the jurisdiction of any single arbitral tribunal. For example, a lawyer for respondent might nominate

³¹ See generally, Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 473 (2011).

³² However, even those commentators who argue in favor of the inherent powers of an arbitral tribunal acknowledge that the matter is not settled. See Carlos Alberto Carmona, *Considerations on the IBA Guidelines on Party Representation in International Arbitration: a Brazilian Point of View*, 1 CAHIERS DE L'ARBITRAGE/ PARIS J. OF INT'L ARB. 29 at 45 (2014) citing *Northwestern Nat'l Ins. Co. v. Inesco, Ltd.*, 866 F.Supp.2d 214 (S.D.N.Y. 2011), holding that matters of attorney disqualification fall beyond the jurisdiction of arbitrators.

a series of party-appointed arbitrators with obvious conflicts of interest in the hope of sabotaging the proceedings with the inevitable challenges.

More common problems relate to lawyer behavior that touches standards which differ from place to place. As discussed earlier, such controverted matters include pre-trial interview of witnesses,³³ and the duty to provide a tribunal with documents damaging to a client's case.

In some instances, the tribunal itself may be divided on proper standards in a way that precludes any effective decision-making. One party-nominated arbitrator might establish *ex parte* communication with his or her appointer, within a procedural framework that contains no provision on the matter, as for example the arbitration rules of the International Chamber of Commerce. How should the remaining members of the tribunal react? Without accepted principles on the matter, the only option might be a threat of resignation by one or more arbitrators, hardly a healthy solution. How does the tribunal even begin addressing the 'right' answer in a cross-cultural context with such divergent views on the integrity of the proceedings?

B. Professional Guidelines

The second alternative would be along the lines of the IBA Guidelines on Party Representation, which purport to provide standards that take some of the guess-work out of the process. The IBA Guidelines on Party Representation join a growing number of non-

³³ See discussion *supra* of rules for interviewing witnesses before trial. In the absence of standardized rules of conduct, some arbitration rules and national regulations have attempted to carve out special rules for lawyers in international cases. See Nathalie Voser, *Best Practices: What Has Been Achieved and What Remains to Be Done*, in Markus Wirth (ed.) *Best Practices in International Arbitration* 1, ASA BULL., Special Series No. 26 (2006), suggesting, 'It is traditionally a violation of ethical rules for an attorney to contact a witness beyond establishing whether or not a person should be nominated as witness'. *Id.* at 2. She continues that in the interest of equal treatment, it should be accepted that lawyers have previous contact with their witnesses before arbitration begins. In this vein, Article 25 of the Swiss Rules of International Arbitration provides that in international arbitration it is not improper for a party's legal advisors to interview witnesses or experts.

governmental instruments often referred to as ‘soft law’ to distinguish such norms from the ensemble of treaties, statutes and cases that make up more traditional sources of law.

To some extent, debate on the value and legitimacy of such ‘soft law’ has been unduly complicated by conflation of very different usages for this term. To some, the expression seems to imply derogation from the arbitrator’s duty to apply relevant (and predicable) legal norms such as to permit meaningful plans, as might happen by an arbitrator’s unauthorized arrogation of power to decide in *amiable composition*.³⁴ To others, by contrast, ‘soft law’ refers to gap filling on procedural and ethical matters through professional guidelines that represent good practice in matters such as document production, witness statements, conflicts disclosures and organization of hearings.³⁵ In this latter sense, ‘soft law’ has on occasion informed national courts in elaborating court decisions on international arbitration.³⁶

Although the IBA Guidelines on Party Representation may represent views that have obtained some currency in the international community, they are by no means universally accepted. The text of Guideline 16 provides that a party representative should not suppress or

³⁴ See THOMAS SCHULTZ, *TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION* 18–19 (2014), citing W. Michael Reisman, *Soft Law and Law Jobs*, 2 J. INT’L DISP. SETTLEMENT 25, at 26 (2011). For Professors Reisman and Schultz, law seems to possess somewhat of an ‘on/off’ property that does not permit adjectives like soft or slightly.

³⁵ See generally, *The Procedural Soft Law of International Arbitration*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 141 (L. Mistelis & J. Lew, eds. 2006); Thomas Stipanowich, *Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings* (2014, Legal Research Paper Series, Paper No. 2014/4); forthcoming as chapter in *SOFT LAW IN INTERNATIONAL ARBITRATION*, Pepperdine University Legal Studies Research Paper No. 2014/4.

³⁶ For an example of soft law adopted in national court decisions, see *Applied Industrial Materials Corp. (AIMCOR) v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 2006 WL 1816383 (S.D.N.Y. 28 Jun. 2006), *aff’d* 492 F.3d 132 (2d Cir. 2007). Vacating an award for arbitrator failure to investigate relevant business contacts with affiliate of one party, the district court made reference to the IBA Guidelines on Conflicts of Interest as well as the American Arbitration Association Code of Ethics for Arbitrators.

conceal, or advise a Party to suppress or conceal, ‘documents that have been requested by another Party or that the Party whom he or she represents has undertaken, or been ordered, to produce.’ The legitimacy of this provision will not be self-evident to counsel from jurisdictions where loyalty to the client transcends duty to a tribunal as to information shared with the other side of a lawsuit.

C. Institutional Rules

A final option would be party agreement on standards of conduct, through reference to arbitration rules that include professional guidelines. Such an option would comport with arbitration’s essential nature as a creature of contract, with professional guidelines merging with party autonomy to enhance the prospect that the litigants will get the benefit of their bargain: an adjudicatory process that is both fair and final. Of course, consensus can also be reached through negotiation without institutional rules, albeit with varying chances of success.³⁷

The 2014 LCIA Arbitration Rules take this third route, with a provision that governs the parties’ ‘Legal Representatives’ (Article 18) and an Annex with ‘General Guidelines for the Parties’ Legal Representatives.’ By adopting the LCIA Rules, parties will be under an obligation to ‘ensure that all [their] 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 Tribunal.’³⁸

This rule-based approach gives the application of professional guidelines a greater ‘buy-in’ from the parties, and thus broader legitimacy. Unlike recourse to the inherent powers of a

³⁷ On the corollary question of how far the litigants trust the independence of the institution itself, see Charles Poncet, *The Independence of the Court of Arbitration for Sport*, 1 EUR. INTL. ARB. REV. 31 (2012).

³⁸ Article 18.5 of the 2014 Arbitration Rules of the London Court of International Arbitration.

tribunal (ad hoc rulings), or guidelines elaborated by a professional association, the rules-based approach proves consistent with the contractual underpinnings of arbitration, where the two sides in essence define the equality of arms expected through adoption of an institutional code.

Critics of the rules-based approach assert that professional codes of conduct should be presented on an ‘opt-in’ or an ‘opt-out’ basis, rather than applicable in all events. Such suggestions have much merit, and will doubtless be explored by arbitration practitioners working with institutional representatives to enhance the optimum degree of acceptance.

Of course, even with the best of codes along the lines now proposed, significant ethical and behavioral challenges remain.³⁹ For example, when third parties fund claimants, taking a portion of the winnings as compensation, funders might need to be considered affiliates of claimant, thus subject to disclosure requirements, with counsel communications deemed privileged.⁴⁰ And animosity between an arbitrator and counsel presents special challenges, given the variety of contexts in which hostility can arise.⁴¹ These and other open issues in arbitration will form part of the rocks and potholes in the road to fairer proceedings.

³⁹ One of the most intractable problems relates to so-called issue conflicts where an arbitrator may have expressed views before proceedings begin. An arbitrator with experience need not have prejudged open questions. Yet a fine line exists between knowing enough to decide the case, and knowing so much as to have a closed mind.

⁴⁰ Third Party Funding in International Arbitration, Dossiers, International Chamber of Commerce, ICC Institute of Business Law (Bernardo Cremades & Antonias Dimolitsa, eds. 2013); LISA BENCH NIEUWVELD & VICTORIA SHANNON, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* (2012). Currently the International Council for Commercial Arbitration sponsors a Working Group on Third-Party Funding in International Arbitration, chaired by Catherine Rogers and William W. Park.

⁴¹ Although arbitrators might disqualify themselves based on long-standing personal friction with a lawyer for one side, it would be highly problematic to allow respondent’s counsel to sabotage proceedings by provoking the arbitrator with curses and epithets designed to create the type of antagonistic atmosphere that could get the arbitrator disqualified.

III. Revisiting the Options

A. Specificity

For most legal norms, the devil lurks in the detail, with costs and benefits revealing themselves as rules and principles work themselves out in the rough and tumble of actual cases. Standards of conduct for lawyers in international arbitration prove no exception. Even the most experienced arbitration specialist may find it a challenge to identify and articulate with confidence the ‘right’ rule.

For better or for worse, therefore, generality remains one of the hallmarks in many of the provisions elaborated in both the IBA Guidelines and the LCIA Annex. What might be called the ‘specificity problem’ compounds itself by reason of a long-standing perception (albeit not uncontested) that discretion and flexibility remain key benefits of arbitration.⁴² Overly general provisions may be manipulated depending on the objective sought to be achieved. Standards drawn too narrowly carry their own risks.

To enhance the prospect of a level playing field, the IBA Guidelines on Party Representation invoke broadly worded standards to be applied in a wide range of scenarios. For example, Guideline 13 provides that parties’ representatives should not make requests to produce or object to such requests ‘for an improper purpose, such as to harass or cause unnecessary delay’ but without defining either ‘improper purpose’ or ‘unnecessary delay’.

The LCIA Annex states that it is intended to promote ‘equal conduct of the parties’ legal representatives appearing within the arbitration proceedings’ but not to derogate from the arbitration agreement nor to undermine the lawyer’s primary duty of loyalty to his or her client,

⁴² William W. Park, *Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion* (The 2002 Freshfields Lecture); William W. Park, *Procedural Default Rules Revisited*, in *ARBITRATION INSIGHTS* 331 (J. Lew & L. Mistelis, eds. 2006).

or the obligation to present that party's case effectively. After its preamble, the Annex sets forth general prohibitions on activities intended unfairly to obstruct the arbitration or to jeopardize the finality of any award. There are also warnings against frivolous challenges to the arbitral tribunal's jurisdiction and reliance on authority known to be unfounded.

Along a similar vein, the IBA Guidelines on Party Representation profess to be 'inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense'. This standard, however, will apply only to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon the Guidelines after determining that it has the authority to rule on matters of Party representation.

Specific mandates may in some instances be controversial. For example, the LCIA Annex also prohibits knowingly concealing or assisting in the concealment of any document ordered to be produced by the arbitral tribunal. In some legal systems, that duty may be far from accepted, given a sense that the lawyer's obligation to the client overrides deference to the arbitral tribunal.

The IBA and the LCIA alike specifically addressed the matter of *ex parte* communications between arbitrators and lawyers. The LCIA Annex addresses with relative specificity the matter of *ex parte* communications between arbitrators and lawyers. Article 13.4 of the 2014 LCIA Rules, as well as Paragraph 6 of the Annex, generally prohibit parties and their legal representatives from initiating any unilateral contact relating to the arbitration or the parties' dispute with any member of the Arbitral Tribunal. Guideline 7 of the IBA Guidelines on Party Representation follows similar contours, providing that unless otherwise agreed a party representative should not engage in any *ex parte* communications with an arbitrator concerning

the arbitration, while making exceptions for discussions about availability, expertise and selection of the presiding arbitrator.

General standards will doubtless become more useful through publication of rulings that apply general principles. Although far from easy, the task of publication remains in the realm of possibility, as evidenced by the LCIA publication of sanitized versions of decisions on challenge of arbitrators for lack of independence and impartiality.⁴³

B. Sanctions

1. In General

The availability of sanctions to promote compliance with professional guidelines will prove a challenge. Neither the IBA Guidelines on Party Representation nor the LCIA Annex provides an exhaustive list of measures that the tribunal can take in response to counsel misconduct. Article 18.6 of the LCIA Annex lists remedies for failure to respect the behavioral dictates. These include written reprimand and caution, as well as ‘any other measure necessary to maintain the general duties’ of the tribunal. The IBA Guidelines on Party Representation contain a similar provision, which emphasizes a party’s right to be heard on the matter of misconduct and the purpose of the remedy.

Broad language can sometimes serve a useful role, given that not all misbehavior will yield to facile analysis on either the nature of the offense and the configuration of the case. The following scenario actually happened in an arbitration known to the author. During a week of evidentiary hearings, claimant’s counsel entered the hearing room at night and copied documents

⁴³ See Special Edition on Arbitrator Challenges, 27 *ARB. INT’L* 281 et seq (2011), with Introduction by Thomas W. Walsh & Ruth Teitelbaum.

belonging to respondent's legal team. Although the material consisted of exhibits that had been (or would be) presented to the tribunal, the margin notes indicated the opposing counsel's confidential interpretation of the evidence.

On discovering the exhibit 'borrowing' respondent's counsel made an application to strike the claims. Would dismissal of the claims have been an appropriate remedy? Or would such action have resulted in the award being vacated for denying claimant an opportunity to present its case? What monetary sanctions might have been satisfactory if claimant had prevailed and otherwise been entitled to costs? Would monetary sanctions matter if claimant had been unsuccessful and in any event been directed to pay the other side's expenses? These are not easy questions.

Regardless of whether sanctions are leveled against counsel or the party itself, no self-evidently effective approach presents itself. Cost shifting may be inadequate if the misbehaving party has no assets. Adverse inferences remain theoretically possible, but pose a serious risk to award enforcement due to the possibility that they will appear to the recognition forum as a breach of due process.

Even without effective penalties, however, guidelines still promote equality of arms, to the extent of communicating useful information to lawyers from diverse backgrounds. Markers tell both sides what is expected. Although not perfect, the current initiative toward guidelines for party representatives constitutes a first attempt to address the need for a relatively level playing field.

2. Disqualifying the Lawyer

Although some conduct resists effective remedy, other behavior will prove more amenable to useful solutions. Consider, for example, change of counsel during proceedings, a

prospect that might result in unexpected conflicts (real or perceived) by reason of the late notice of a relationship between arbitrator and lawyer.

What is to be done if one side changes legal representation on the eve of the hearings, with the lawyer coming from the same firm (or chambers) as a member of the tribunal? Does the arbitrator resign? Or is the new lawyer excluded?

Those who object to disqualification of counsel by an arbitral tribunal usually emphasize the right to choose one's lawyer, which is true enough. Yet choice of counsel remains only one element of a fair proceeding. An even more fundamental expectation will be that the arbitrator be independent. No one with a dog in the fight should judge the contest. Such independence would be illusory if one side could appoint a lawyer from the same firm as the arbitrator.

At the beginning of the arbitration, selection of the arbitral tribunal will be restricted by concern to avoid conflicts with the named counsel. Neither side would normally be permitted to appoint as arbitrator a member of their legal team's firm.

The matter becomes more complex once the case has evolved. It would be highly disruptive if things had to stop, with a new tribunal constituted, because just prior to hearings one side appointed counsel drawn from the presiding arbitrator's family or firm.

There are, of course, ways to address the matter other than disqualification of the counsel. A few minutes of silence, or a longer adjournment, may well provide participants an opportunity to evaluate the consequences of bias. Normally, however, postponement will be less appetizing to the claimant, which wants to get on with the case, than a respondent who welcomes a chance for delay.

Both the IBA Guidelines and the LCIA Rules take special pains to address the introduction of new counsel after proceedings have begun, in a way that creates potential

disruption of fair hearing. Both the IBA Guidelines on Party Representation and the LCIA Annex contain specific provisions to address this matter. Article 18.3 of the LCIA Annex provides that following the tribunal's formation, any intended change or addition by a party to its legal representatives shall be notified to the tribunal and to the other parties and 'shall only take effect in the arbitration subject to the approval of the Arbitration Tribunal.'

This approach contrasts slightly in formulation with the IBA standards, which in Guidelines 4-6 authorize a tribunal to exclude a new party representative from participating in the proceedings, if to do so would safeguard the integrity of the proceedings. Party representatives must identify themselves to the other parties and the arbitral tribunal 'at the earliest opportunity.' Once a tribunal has been constituted, a person should not accept representation when a relationship exists between the person and an arbitrator such as to create a conflict of interest.

The LCIA 'approval' and IBA 'exclusion' would normally lead to the same result. However, the LCIA formulation may have the merit of connoting respect for the parties' original position, and certainly sounds less aggressive than disqualification.

The change-of-counsel problem has been widely discussed in the context of an ICSID case implicating the Republic of Slovenia as respondent.⁴⁴ The tribunal had been chaired by an individual affiliated with the same barristers' chambers in London as a new co-counsel appointed by respondent late in the proceedings.⁴⁵ Although free to select its lawyers prior to constitution of the arbitral tribunal, the respondent was found not entitled to change its legal team in a way that might imperil the tribunal's legitimacy, creating a justifiable apprehension of bias. The

⁴⁴ *Hrvatska Elektroprivreda, dd v. Slovenia*, ICSID Case No. ARB/05/24 (2008).

⁴⁵ The tribunal chair and counsel for respondent were both affiliated with Essex Court Chambers.

arbitral tribunal decided that the new counsel should not appear before another member of his chambers.

Discussions about exclusion of counsel often confuse two separate issues. In the present context, the first question will be whether some standards should address late arrival of counsel in circumstances that might sabotage the proceedings. A negative answer seems difficult. If the opening day of hearings finds Respondent appointing a representative from a law firm whose members include the presiding arbitrator, the case can hardly continue with serenity or integrity. The arbitrator's resignation will put things back to square zero in a way quite unfair to claimant.

A separate question addresses whether a conflict does indeed exist, matter that remains fact intensive, with reasonable people often disagreeing. English barristers usually do not deem themselves tainted with conflicts of other members of their chambers, and thus see no objection to members of the same chambers acting as counsel and as arbitrator in a single case. Perhaps this will be the right answer from the perspective of those steeped in traditional London practice. Yet it is not odd that those from other legal cultures may take different views in an age when chambers brand themselves for marketing purposes.⁴⁶

⁴⁶ Barristers do not share profits, thus distinguishing their practice from the law firm model. Some observers note, however, that members of chambers do share expenses, and engage in marketing as an ensemble. Special concern exists when a mentor/disciple relationship exists between counsel and arbitrator, or even two arbitrators. The IBA Working Group noted the distinction between law firms and barristers' chambers but concluded that the promotional disseminated by many chambers creates a perception that chambers should be treated the same as law firms. See Otto L.O. de Witt Wijnen et al., *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 *BUS. L. INT'L* 433, 455–456 (2004). Article 3.2 of the IBA Guidelines on Conflicts of Interest in International Arbitration includes in its Orange List of situations to be disclosed the fact that two arbitrators, or an arbitrator and counsel, belong to same chambers.

C. Local Bar Authorities

Some commentators suggest that lawyer discipline by arbitral tribunals interferes with the role of local regulatory bodies such as bar authorities,⁴⁷ a view shared by at least some judicial decisions.⁴⁸ On reflection, the concern must be dismissed. The arbitral tribunal and the state regulatory authorities apply different sets of standards, emanating from different sources of authority, carrying different sanctions.⁴⁹ Compliance with international standards does not create a safe haven against application of local rules; nor does compliance with local rules prevent application of international standards.⁵⁰

An arbitral tribunal in England would be hard pressed to find a good reason to apply Massachusetts bar rules to a misbehaving lawyer from Massachusetts representing a client in a London arbitration. Rather, the tribunal would invoke the IBA Guidelines or the LCIA Annex, which remain distinct from the Massachusetts rules and present no affront to the prerogatives of the Massachusetts Board of Bar Overseers in hearing complaints against a Boston lawyer.

⁴⁷ See ASA Comments on IBA Guidelines on Party Representation, 20 Jan. 2014, discussed *supra*.

⁴⁸ See e.g., *Bidermann Indus. Licensing Inc. v. Avmar N.V.*, 173 A.D.2d 401 (1991) (N.Y. App. Div., 1st Dep't 1991) (holding that arbitrator had no right to disqualify one side's attorneys on grounds of their involvement as potential witnesses). The court suggested that 'matters of attorney discipline are beyond the jurisdiction of arbitrators' and that issues of attorney disqualification 'similarly involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules' beyond arbitrator determination. See also *Northwestern Nat'l Ins. Co. v. Insko, Ltd.*, 866 F.Supp.2d 214 (S.D.N.Y. 2011), holding that matters of attorney disqualification fall beyond the jurisdiction of arbitrators.

⁴⁹ Of course, in some instances an arbitrator might be called to consider national standards during arbitration of malpractice claims.

⁵⁰ For comment warning against reliance in international arbitration on the national bar regulations, see 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. OF INT'L ARB. 47, at 52 (2014), suggesting that '[d]omestic bar associations are less able to grasp the global implications their regulations may have, and their motivation for such regulations may not always be in the best interest of promoting international arbitration'.

In preserving the integrity of proceedings, arbitrators generally exercise authority by reason of standards agreed by the litigants, sometimes directly, and sometimes by incorporation through arbitration rules. In some instances, the arbitrators fill gaps by considering ‘soft law’ elaborated in procedural standards of international associations. By contrast, bar authorities impose rules mandated by the state. There is nothing odd about the co-existence of these two kingdoms, international and local, with some conduct allowed at one level but not the other.⁵¹

Of course, in the face of current uncertainties, some national standards have seen ‘carve outs’ for lawyers in international cases.⁵² Whether or not this trend continues, guidelines developed by the international arbitration community will doubtless raise awareness of conflicting applicable standards, and hopefully bring more carefully negotiated arbitration clauses.

Conclusion

An old Boston anecdote reports a misplaced compliment paid to Calvin Coolidge, thirtieth President of the United States, known for his conservative political philosophy. When an admirer expressed delight at a law passed during his Presidency, Coolidge replied that his more significant achievement was the legislation *not* passed during his time in the White House.

⁵¹ A different question (normally one of local law) would be posed if Massachusetts authorities seek to hear complaints against an English lawyer who comes to Boston to represent a British client in a Massachusetts arbitration, or whether Massachusetts authorities have any leverage with respect to complaints against a Massachusetts lawyer representing an American client in a London arbitration.

⁵² The Paris Bar clarified that it was not contrary to French ethical duties to prepare witnesses according to established arbitral practice. Resolution of the Paris Bar Council of 26 Feb. 2008, Paris Bar Bulletin, 2008, n° 9, p. 4. Italian rules on professional responsibility set forth rules for situations when an Italian lawyer acts in a foreign jurisdiction with ethical standards different from Italian ones. See Art. 3 of Codice Deontologico Forense, approved by Consiglio nazionale forense on 31 Jan. 2014.

Few would dispute the wisdom of refraining from actions that do more harm than good. Healthy individuals should not be sent to an operating table for gratuitous surgery. Such analogies, however, limp badly when doing nothing makes matters worse. Some medicines, like some rules, do indeed work.

In assessing whether the time has come for professional guidelines, common sense and experienced reflection will prove more useful than ideology or rhetoric. Those lucky enough to be involved only in smooth arbitrations may ask what the fuss is about, just as a healthy person often has difficulty understanding the needs of someone sick. Yet for many, the arbitration experience does not always prove to be quick and cheerful, and on occasion suffers from the inherent unfairness of counsel taking cues from different legal traditions.

At the present moment, the arbitration community remains at the starting point in elaborating guidelines. Thus it should not be surprising that standards go too far for some, while not far enough for others. Any good faith attempt to create a better playing field implicates some trial and error, with compromise in demand during the search for an optimum of aggregate social and economic welfare.

A Latin adage holds that truth is the daughter of time: *Veritas filia temporis*.⁵³ In evaluating whether professional guidelines will make arbitration better or worse, the arbitration community must, at least for now, put the matter into a box labelled ‘Awaiting Further Light.’

⁵³ A second century Roman grammarian attributes the saying to an unnamed predecessor: *Alius quidam veterum poetarum, cuius nomen mihi nunc memoriae non est, veritatem temporis filiam esse dixit.* (‘Another ancient poet, whose name I have forgotten, said that truth was the daughter of time’.) Aulus Gellius, *Noctes Atticae*, XII.11.7.

Appendix: Selected Provisions, 2014 LCIA Rules

Article 18 Legal Representatives

18.1 Any party may be represented in the arbitration by one or more authorised legal representatives appearing by name before the Arbitral Tribunal.

18.2 Until the Arbitral Tribunal's formation, the Registrar may request from any party: (i) written proof of the authority granted by that party to any legal representative designated in its Request or Response; and (ii) written confirmation of the names and addresses of all such party's legal representatives in the arbitration. After its formation, at any time, the Arbitral Tribunal may order any party to provide similar proof or confirmation in any form it considers appropriate.

18.3 Following the Arbitral Tribunal's formation, any intended change or addition by a party to its legal representatives shall be notified promptly in writing to all other parties, the Arbitral Tribunal and the Registrar; and any such intended change or addition shall only take effect in the arbitration subject to the approval of the Arbitral Tribunal.

18.4 The Arbitral Tribunal may withhold approval of any intended change or addition to a party's legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict or other like impediment). In deciding whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to all circumstances, including: the general principle that a party may be represented by a legal representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition.

18.5 Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal (which term shall include, under Articles 18.5 and 18.6, any Emergency Arbitrator) have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.

18.6 In the event of a complaint by one party against another party's legal representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may 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 fulfill within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii).⁵⁴

⁵⁴ The relevant portion of Art. 14.4, which tracks s. 33 of the 1996 English Arbitration Act, requires arbitrators to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent, as well as a duty to adopt procedures suitable to the circumstances, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.

Annex to the LCIA Rules
General Guidelines for the Parties' Legal Representatives
(Articles 18.5 and 18.6 of the LCIA Rules)

1: These general guidelines are intended to promote generally the good and equal conduct of the parties' legal representatives appearing by name within the arbitration proceedings. Nothing 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 the arbitration or the obligation to present that 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.

2: A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator's appointment or to the Arbitral Tribunal's jurisdiction or authority known to be unfounded by that legal representative.

3: A legal representative should not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court.

4: 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.

5: A legal representative should not knowingly conceal or assist in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal.

6: During the arbitration proceedings, a legal representative should not deliberately initiate or attempt to initiate with any member of the Arbitral Tribunal or with any member of the LCIA Court (making any determination or decision in regard to the arbitration) any unilateral contact relating to the arbitration or the parties' dispute, which has not been not 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 (where appropriate) the Registrar in accordance with Article 13.4.

7: In accordance with Articles 18.5 and 18.6, the Arbitral Tribunal may decide whether a legal representative has violated these general guidelines and, if so, how to exercise its discretion to impose any or all of the sanctions listed in Article 18.6.