

2018

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### Recommended Citation

Peter Halprin and Stephen Wah, *Ethics in International Arbitration*, 2018 J. Disp. Resol. (2018)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2018/iss1/10>

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# Ethics in International Arbitration

*Peter Halprin\* & Stephen Wah\*\**

The growth of international arbitration has expanded both the pool of arbitrators as well as the counsel involved in international arbitration. This growth has resulted in arbitrators, counsel, and parties of various cultural and legal traditions participating in disputes. Because different cultural and legal traditions may come into conflict, there is increasing focus and discussion regarding what guidelines or rules, if any, should govern international arbitrations. The discussion regarding whether any guidelines or rules should govern arbitration asks whether a forum for dispute resolution built on the concepts of neutrality, party autonomy, and procedural flexibility should be governed by strict rules imposed by an authority other than the parties.

In 2010, Doak Bishop gave the keynote address at the ICCA Congress in Rio De Janeiro on the topic of ethics in international arbitration advocacy.<sup>1</sup> He took the position that there is a current, compelling need for the development of a Code of Ethics in international arbitration and for the adaptation of tribunals and institutions to the adoption of such a code.<sup>2</sup> Although he set forth a number of examples of the current challenges, one such example, attributed to Johnny Veeder, illustrates the dilemma: “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...”<sup>3</sup> In proposing a Code of Ethics, Mr. Bishop submitted that such a Code could accomplish three goals: (1) clarifying the applicable rules and reducing ambiguity; (2) leveling the playing field so that conflicting obligations do not unduly benefit one party at the expense of the other; and (3) providing greater transparency, and building confidence in the system.<sup>4</sup> Such a Code would thus, theoretically, solve the challenge outlined by Mr. Veeder.

On the other hand, respected practitioners have pointed out the difficulties with such a code. As set forth by the two authors, “[g]iven the local or regional differences in the formulation and application of ethics rules, it is unclear how divergences may simply be ‘papered over’, resolved or erased with the imposition of a single, universal, uniform code.”<sup>5</sup> While the debate continues, the ethical quandaries remain. In addressing such issues, the vantage points as well as the applicable

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1. See Doak Bishop, Ethics in International Arbitration INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, 1 (2010), [http://www.arbitration-icca.org/media/0/12763302233510/icca\\_rio\\_keynote\\_speech.pdf](http://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf).

2. See *id.*

3. See *id.* at 4.

4. See *id.* at 10–11.

5. See Toby Landau QC and J. Romesh Weeramantry, *A Pause for Thought*, in 17 INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE 496, 501 (Albert Janven den Berg ed., 2013). Landau has been further quoted expressing the concern that regulation might “cure the disease but kill the patient.”

rules and guidelines governing arbitrator and counsel conduct differ. As such, this Article addresses ethics in international arbitration first from the vantage point of arbitrators and then from the vantage point of counsel.

## I. INTERNATIONAL ETHICS RULES FOR ARBITRATORS

As international arbitration has increased in popularity, there has been an expansion in the pool of arbitrators, and a commensurate diversification of the cultural and legal traditions among them and among parties.<sup>6</sup> In response, there has been increased attention on the standards used to evaluate arbitrator conduct, including a proliferation of specialized codes of ethics and rules intended to guide and govern arbitrator conduct.<sup>7</sup>

In the absence of a mandatory international code governing the conduct of arbitrators in international arbitration, a number of international guidelines have been developed. As discussed in detail below, although such guidelines are not binding, they present useful guideposts in determining what conduct is ethical in international arbitration. In particular, guidelines promulgated by the International Bar Association (“IBA”) are considered most reflective of international practice.<sup>8</sup>

In an abundance of caution, potential arbitrators, as well as those appointed to serve, would be wise to review international guidelines, the applicable rules of the institution (if any) administering the dispute, and those of any bar association(s) of the jurisdiction(s) potentially applicable to the dispute (including those of the jurisdiction where the arbitrator is admitted to practice).

In familiarizing themselves with national law, arbitrators should take the time to review pertinent case law pertaining to the concepts of impartiality and independence. Generally, under national laws and arbitral rules, an arbitrator has to be and remain independent and impartial, and must disclose all facts that may be relevant to their independence and impartiality.<sup>9</sup> The exact meaning of the terms “independent” and “impartial” may be unclear and may differ under different arbitral rules and legal regimes.<sup>10</sup> In general, however, independence refers to the requirement that there be “no actual or past dependent relationship between the parties and the arbitrators which may or at least appear to affect the arbitrator’s freedom of judgment.”<sup>11</sup> Impartiality, generally, refers to the requirement that arbitrators neither

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See CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* 224 (Oxford University Press, 2014).

6. See ROGERS, *supra* note 5, at 1-2; see also Catherine A. Rogers, *The Ethics of International Arbitrators*, *Bocconi Legal Studies Research Paper No. 2007-01*, LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, JURIS PUBLISHING, 2008, <http://ssrn.com/abstract=1081436>.

7. See *id.*

8. See *infra* Part I, A and B.

9. See JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KROLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 255 (2003); see also English Arbitration Act of 1996 (24)(1); 9 U.S.C.A. § 10( a)(2); UNCITRAL Arbitration Rules (as revised in 2013), Art. 12(1); London Court of International Arbitration Rules (2014), Art. 5.3; ICC Rules of Arbitration (2012), Art. 11(1).

10. See LEW, *supra* note 9, at 257; see also *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968); compare *AT&T Corporation & Lucent Technologies Inc. v. Saudi Cable Company*, [2000] 2 Lloyd’s Rep 127 (Court of Appeal).

11. See LEW, *supra* note 9, at 261.

favor one party nor are predisposed with regard to the disputed issue(s).<sup>12</sup> According to Julian Lew, “[w]hile impartiality is needed to ensure that justice is done, independence is needed to ensure that justice is seen to be done.”<sup>13</sup> An arbitrator’s lack of impartiality or independence can provide grounds for the challenge of an arbitrator or to an award.<sup>14</sup>

#### *A. IBA Rules of Ethics for International Arbitrators*

In the late 1980s, the IBA set forth ethical rules to govern the conduct of international arbitrators (the “Rules of Ethics”).<sup>15</sup> As explained in the Introductory Note:

International arbitrators should be impartial, independent, competent, diligent and discreet. The rules seek to establish the manner in which these abstract qualities may be assessed in practice. Rather than rigid rules, the Rule of Ethics reflects internationally acceptable guidelines developed by practising lawyers from all continents.<sup>16</sup>

The IBA sought to emphasize the fact that the rules cannot be binding upon either the arbitrators or the parties in the absence of an adoption by agreement.<sup>17</sup> The IBA emphasized that the Rules of Ethics were not intended to create grounds for the setting aside of awards by national courts.<sup>18</sup> The Rules of Ethics cover a number of areas of ethics including the elements of bias, the duty of disclosure, communications with parties, and the confidentiality of the deliberations. The “Fundamental Rule” is that “[a]rbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and remain free from bias.”<sup>19</sup>

An arbitrator, under the Rules of Ethics, shall accept an appointment only if:

- (1) he is fully satisfied that he is able to discharge his duties without bias;
- (2) he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of the arbitration; and
- (3) he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.<sup>20</sup>

Bias is determined with respect to both impartiality and independence.<sup>21</sup> The former relates to favoritism toward one of the parties, while the latter arises from

12. See *id.* at 258; compare Klaus Lionnet, *The Arbitrator’s Contract*, 15 *ARB. INT’L* 161, 167 (1999) (“Almost always, the parties nominate arbitrators, because this is the parties’ fundamental procedural right. This was recently confirmed by a decision of the German Supreme Court”).

13. See LEW, *supra* note 9, at 261.

14. See *AT&T Corporation & Lucent Technologies Inc.*, [2000] 2 *Lloyd’s Rep* at 127 (“requiring real danger of bias”); see also Lawrence Shore, *Disclosure and Impartiality: An Arbitrator’s Responsibility vis-à-vis Legal Standards*, *DISP. RESOL. J.* 32, 38 (2002) (highlighting differences between Circuits of the United States Courts of Appeal with respect to the standard for demonstrating bias).

15. *INT’L BAR ASS’N, IBA RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS*, 15 *INT’L BUS. LAWYER* 335, 335 (1987), <http://heinonline.org/HOL/LandingPage?handle=hein.journals/ib115&div=91&id=&page=>

16. *Id.* at 336.

17. *Id.*

18. *Id.*

19. *Id.* at § 1.

20. *Id.* at 336–37, §§ 2.1–2.3.

21. *INT’L BAR ASS’N, supra* note 15, at 337, § 3.1.

relationships between an arbitrator and one of the parties.<sup>22</sup> Because, according to the Rules of Ethics, the appearance of bias is best overcome by full disclosure, a prospective arbitrator “should disclose all facts or circumstances which give rise to justifiable doubts as to his impartiality or independence.”<sup>23</sup>

Communications with the parties are permitted prior to appointment, largely for the purpose of avoiding conflicts and ensuring that a potential arbitrator has the requisite time to devote to the dispute, as well as during the selection of a third or presiding arbitrator where there are three arbitrators.<sup>24</sup> *Ex parte* communications with the parties, however, are discouraged.<sup>25</sup> Where the parties have requested or consented to the suggestion of settling the case, the tribunal as a whole may make proposals for settlement to the parties.<sup>26</sup>

The Rules of Ethics also require arbitrators to observe the duty of diligence in that, in addition to devoting the proper time and attention to the proceedings, arbitrators are required to do their best to conduct the arbitration in such a manner that costs do not rise to an unreasonable proportion of the interests at stake.<sup>27</sup>

### B. IBA Guidelines on Conflicts of Interest

In 2004, the IBA promulgated the IBA Guidelines on Conflicts of Interest in International Arbitration (the “Guidelines”). The Guidelines were subsequently updated in 2014.<sup>28</sup>

The Guidelines are not mandatory legal provisions and neither override applicable laws nor the rules chosen by the parties.<sup>29</sup> They were designed with the aim of finding “general acceptance and adherence within the international community.”<sup>30</sup> Although the Guidelines have been criticized from various quarters, and have not been adopted by major arbitral institutions such as the ICC International Court of Arbitration and the London Court of International Arbitration, they have largely achieved these results as they are commonly referenced and generally considered persuasive authority in international arbitration.<sup>31</sup>

22. *Id.*

23. *Id.* at § 4.1.

24. *Id.* at §§ 5.1–5.2.

25. *See id.* at § 5.3.

26. *See id.* at 338, § 8.

27. INT’L BAR ASS’N, *supra* note 15, at 338, § 7.

28. INT’L BAR ASS’N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, i-iii (2014), [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#).

29. *Id.* at 3, ¶ 6; *See also* Edna Sussman, *Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives in Soft Law in International Arbitration*, in *SOFT LAW IN INTERNATIONAL ARBITRATION* 239, 247 (Lawrence W. Newman & Michael J. Radine, eds., 2014).

30. Sussman, *supra* note 29, at 247.

31. *See, e.g., W Limited v. M SDN BHD* [2016] EWHC (Comm.) 422 ¶ 33(Eng.) (referencing the “distinguished contribution” made by the Guidelines in the field of international arbitration); *see also* INT’L BAR ASS’N ARBITRATION GUIDELINES AND RULES SUBCOMM., REPORT ON THE RECEPTION OF THE IBA ARBITRATION SOFT LAW PRODUCTS, 29 (2016), (noting the broad acceptance and use by the international arbitration community); *Id.* at page 39 (noting that the ICC has repeatedly stated that it is not bound by the Guidelines). The Report further provides that, based on survey results, the Guidelines were referenced in approximately 65% of the cases in which issues of conflicts arose at the time of the constitution of the panel, and that when acting as arbitrators, North American practitioners consulted or relied upon the Guidelines in approximately 84% of cases when deciding on whether to accept an appointment and 91% of the cases when making a disclosure. *Id.* at 40-41.

Part II of the Guidelines, “Practical Application of the General Standards,”<sup>32</sup> is often invoked in international arbitration because it provides a simple color-based system involving specific factual scenarios to determine whether the appointment of an arbitrator violates conflict of interest rules. Part II of the Guidelines is divided into the following parts: a non-waivable Red List, a waivable Red List, an Orange List, and a Green List.

The non-waivable Red List includes “situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a conflict cannot cure the conflict.”<sup>33</sup> Under the Guidelines, an example of a non-waivable Red List situation is one in which the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.<sup>34</sup>

The waivable Red List consists of less severe situations but situations that are severe enough such that they are waivable “only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator....”<sup>35</sup> An example of a waivable Red List situation is one in which the arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties, or where the arbitrator had a prior involvement in the dispute.<sup>36</sup>

The Orange List involves situations in which there may be justifiable doubts as to the arbitrator’s impartiality or independence.<sup>37</sup> Thus, pursuant to the IBA Guidelines, an arbitrator has a duty to disclose in such situations.<sup>38</sup> It should be noted, however, that the failure to disclose “should not result automatically in either non-appointment, later disqualification or a successful challenge to any award.”<sup>39</sup> Indeed, “[n]ondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.”<sup>40</sup> Orange List situations involve those in which the arbitrator has previously provided services for one of the parties or had other involvement in the case such as where “[t]he arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.”<sup>41</sup>

The Green List involves situations in which there is no appearance of or actual conflict of interest.<sup>42</sup> Thus, the arbitrator has no duty to disclose situations falling within the Green List.<sup>43</sup> An example of a Green List situation is one in which the arbitrator has previously expressed a legal opinion concerning an issue that also arises in the arbitration but the opinion is not focused on the case.<sup>44</sup>

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32. INT’L BAR ASS’N, *supra* note 28, at 17.

33. *Id.* at ¶ 2.

34. *Id.* at 20, § 1.1.

35. *Id.* at 17, ¶ 2.

36. *Id.* at 2, § 2.1.

37. *See id.* at 18, ¶ 3.

38. INT’L BAR ASS’N, *supra* note 28, at 18, ¶ 3.

39. *Id.* at ¶ 5.

40. *Id.*

41. *Id.* at 22, § 3.1.2.

42. *Id.* at 19, 7.

43. *Id.*

44. INT’L BAR ASS’N, *supra* note 28, at 25, § 4.1.1.

*i. Key Changes in the 2014 Guidelines*

The latest revisions to the Guidelines, the 2014 Guidelines, acknowledged “the increased complexity in the analysis of disclosure and conflict of interest issues” and sought to provide some guidance in contemporary practice.<sup>45</sup> The 2014 Guidelines contain a number of key revisions including those with respect to advance waivers, the arbitrator “bearing the identity” of their law firm, third-party funding, and tribunal secretaries.<sup>46</sup> For advance waivers, the General Standard 3(b) of the 2014 Guidelines provides that while the validity and effect of such waivers will depend upon the circumstances, an arbitrator’s ongoing duty of disclosure is non-dischargeable.<sup>47</sup> With respect to “bearing the identity,” General Standard 6(a) of the 2014 Guidelines provides that an arbitrator is considered to bear the identity of his or her law firm.<sup>48</sup> Thus, arbitrators at firms must evaluate conflicts in the context of their law firms.

Similarly, with regard to third-party funding, General Standard 6(b) of the 2014 Guidelines now provides that:

Any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration may be considered to bear the identity of such a party.<sup>49</sup>

Tribunal secretaries and assistants, pursuant to General Standard 5(b), are expressly subject to the Guidelines.<sup>50</sup>

The 2014 Guidelines also make changes in the lists under Part II of the Guidelines. Arbitrators should review the revisions as new scenarios have been added. Without delving into the whole of the changes, two revisions are highlighted here. First, although this is really a change in the General Standards, one revision relates to the Non-Waivable Red List under which arbitrators are now advised not to act even in the absence of a timely objection.<sup>51</sup> Second, the Green List now contemplates relationships through social media.<sup>52</sup> Thus, potential arbitrators need not delete their LinkedIn profiles.

*ii. Judicial Applications of the Guidelines*

Although the Guidelines are rarely the subject of judicial scrutiny, there are a number of cases in which courts have looked to the Guidelines in proceedings to

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45. *Id.* At 1, ¶ 1.

46. *See, e.g.*, Khaled Moyeed, Clare Montgomery, & Neal Pal, *A Guide to the IBA’s Revised Guidelines on Conflicts of Interest*, KLUWER ARBITRATION BLOG (Jan. 29, 2015), <http://kluwerarbitrationblog.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/>.

47. INT’L BAR ASS’N, *supra* note 28, at 7.

48. *Id.* at 13.

49. *Id.*

50. *Id.* at 12.

51. *See id.* at 18, ¶ 4.

52. *See id.* at 27, § 4.4.4.

challenge awards involving allegations of arbitrator bias.<sup>53</sup> In one such survey of case law, the IBA Conflicts of Interest Subcommittee suggested that perhaps “courts’ reluctance to refer to the Guidelines may be rooted in the belief that domestic law provides a comprehensive regime governing arbitrators’ independence and impartiality.”<sup>54</sup> Time has passed since the initial survey was published in 2007, and a more recent IBA report noted that “the Guidelines often have been referenced by the relevant Decision-maker (arbitral institutions, tribunals, or courts) in reaching a pronouncement on the existence of a conflict of interest.”<sup>55</sup> Although there is a dearth of judicial guidance on the subject, the below review of case law from a few select jurisdictions provides a snapshot into how courts view the Guidelines.

### *1. Application of the Guidelines by U.S. Courts*

In *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, the United States District Court for the Southern District of New York looked to the Guidelines in analyzing whether the umpire’s alleged failure to disclose provided a basis for vacating an arbitral award.<sup>56</sup> The dispute centered on alleged omissions that the Chair made in providing his disclosures. While initially stating that he had no conflicts of interest, the Chair failed to later disclose that his company was conducting business with a company that was pursuing the purchase of a party to the dispute. The Court looked to the arbitration agreement (which had provisions regarding disclosure and financial interests), the American Arbitration Association’s Code of Ethics for Arbitrators in Commercial Disputes, and the IBA Guidelines on Conflicts of Interests in International Arbitration. Looking to the Guidelines, the Court noted that the Guidelines were intended to aid “parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection.”<sup>57</sup>

The Court determined that both the AAA’s Code of Ethics and the Guidelines suggest that “any doubt as to whether or not to disclose should be resolved in favor of disclosure.”<sup>58</sup> While the amount of business conducted between the Chair’s company and the company considering acquiring a party to the dispute was found to have been minimal, based on these authorities, the Chair had a duty to disclose that

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53. SUSSMAN, *supra* note 29, at 248 (“Few court decisions have cited the guidelines and those that have often have done so without deference to their provisions”); Judith Gill, *The IBA Conflicts Guidelines – Who’s Using Them and How?* 1 DISP. RESOL. INT’L 58 (2007) (survey regarding use of the Guidelines); INT’L BAR ASS’N CONFLICTS OF INTEREST SUBCOMM., *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 DISPUTE RESOL. INT’L 5 (2010). Although this reflects the attitudes of arbitration users, as opposed to courts, it is worth noting that 71% of respondents indicated that they had seen the Guidelines used in practice and a further 19% were aware of them but had not seen them used in practice. See QUEEN MARY UNIVERSITY OF LONDON, SCHOOL OF ARBITRATION & WHITE & CASE LLP, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION, 35. According to the same survey, 60% of respondents familiar with the Guidelines considered them effective. *Id.* at 36.

54. INT’L BAR ASS’N CONFLICTS OF INTEREST SUBCOMM., *supra* note 53, at 6.

55. INT’L BAR ASS’N ARBITRATION GUIDELINES AND RULES SUBCOMM., *supra* note 31, at 29.

56. *Applied Industrial Materials Corp v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, No. 05 CV 10540(RPP), 2006 WL 1816383 (S.D.N.Y. 2006); *aff’d*, 492 F.3d 132 (2d Cir. 2007).

57. *Id.* at 8.

58. *Id.*



which could create the appearance of partiality.<sup>59</sup> The Court also looked to the Guidelines for the proposition that, “[f]ailure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.”<sup>60</sup> The Court used this provision to support the conclusion that the Chair’s failure to investigate the relationship between his company and the potential acquirer did not excuse his lack of disclosure.<sup>61</sup>

The Court’s reliance upon the Guidelines appeared to be grounded in the following notions:

It is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, secure in the knowledge that arbitrators will adhere to these standards...Because of the increase in international transactions and the corresponding increase in disputes it is crucial that there exist a requirement of an appearance of impartiality in arbitrations conducted in this jurisdiction, and that courts take actions designed to assure foreign entities that arbitrations in the United States are free from the suggestion of partiality.<sup>62</sup>

In *New Regency Productions v. Nippon Herald Films*, the United States Court of Appeals for the Ninth Circuit referenced the Guidelines in rendering a decision on, among other things, an arbitrator’s duty to investigate and disclose conflicts.<sup>63</sup> Akin to the District Court in *Applied Indus. Materials Corp.*, in addition to referencing the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, the Ninth Circuit referenced the Guidelines.<sup>64</sup> Specifically, the Court referenced General Standard 7(c), which provides that an arbitrator is under a duty to investigate potential conflicts and that the failure to disclose is not excused by a lack of knowledge if there is no reasonable attempt to investigate.<sup>65</sup> Regarding the Guidelines, the Ninth Circuit explained that although it was “not binding authority and [does] not have the force of law, when considered along with an attorney’s traditional duty to avoid conflicts of interest,” the Guidelines reinforced case law authority.<sup>66</sup>

In a recent case, *Republic of Argentina v. AWG Grp. Ltd.*, the Republic of Argentina sought to vacate an arbitration award, in part, because one of the arbitrators allegedly had a direct interest in the outcome of the award.<sup>67</sup> In support of its position, Argentina cited the Guidelines and argued that the arbitrator’s role as a director of an organization fell within the Guidelines’ Non-Waivable Red List.<sup>68</sup> Citing *New Regency*, the Court found that “[o]ther courts have found these guidelines to

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59. *See id.* at 9.

60. *Id.* at 8.

61. *Id.*

62. *See id.* at 9; Judith Gill reports that there is an unpublished decision, *HSN Capital LLC (USA) v. Productora y Comercializador SA de CV (Mexico)*, Case No. 8:05-CV-1769-T-30TBM, 2006 WL 1876941 (M.D. Fla. July 5, 2006), in which the court rejected the respondent’s invitation to rely on the Guidelines in a dispute regarding bias. *See Gill, supra* note 53, at 68, n. 34.

63. 501 F.3d 1101 (9th Cir. 2006).

64. *See id.* at 1109-10.

65. *See id.* at 1110.

66. *Id.*

67. *Republic of Arg. v. AWG Grp. Ltd.*, 221 F. Supp. 3d 335, 346-47 (D.D.C. 2016).

68. *Id.* at 355.

be persuasive, but not binding authority.”<sup>69</sup> The United States District Court for the District of Columbia found that the guidelines did not favor Argentina’s position as they require a material interest and such interest was “wholly absent on the part of the challenged arbitrator.”<sup>70</sup>

## 2. *Application of the Guidelines by Canadian Courts*

In Canada, it is reported that parties frequently consult the Guidelines in selecting party-appointed arbitrators.<sup>71</sup> Since 2007, there have been at least two decisions from Ontario involving the Guidelines.<sup>72</sup>

In *Telesat Canada v. Boeing Satellite Systems Int’l Inc.*, a party challenged a chairperson on the grounds that her partner, in a three-person law firm, was engaged as an arbitrator in a related arbitration, with overlapping evidence and issues between the arbitrations, involving one of the parties to the dispute.<sup>73</sup> The Court looked to the Guidelines, holding that although they were not incorporated by reference in the arbitration, “the issue of potential apprehension of bias [...] is not particular to international arbitrations [...] and sheds light directly on the issue of this Chairperson through the lens of the arbitration community.”<sup>74</sup> After analyzing the General Standards 2 and 6, and the pertinent situations set forth in the lists, the Court determined that the Chairperson firm’s involvement in the case required the express consent of both parties, which was not received, in accepting the appointment of the Chairperson.<sup>75</sup> Given the potential for bias, and national law on the subject, the Court determined that the impartiality of the panel and the public’s perception of the integrity of the process would be enhanced by replacement of the Chairperson.<sup>76</sup>

In *Jacobs Securities Inc. v. Typhoon Capital B.V.*, the Claimant challenged an adverse award on the grounds that the circumstances gave rise to justifiable doubts as to the sole arbitrator’s independence and impartiality.<sup>77</sup> Looking to the Guidelines, as urged by Claimant, the Court rejected the notion that the arbitrator was biased because his former firm, and not his current firm, had acted for a third party that was involved in the arbitration. In utilizing the Guidelines, the Court described them as “widely recognised as an authoritative source of information as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases.”<sup>78</sup>

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69. *Id.*

70. *Id.*

71. See Gill, *supra* note 53, at 61.

72. See INT’L BAR ASS’N ARB. GUIDELINES AND RULES SUBCOMM., *supra* note 31, at 63.

73. *Telesat Canada v. Boeing Satellite Sys. Int’l, Inc.*, 2010 ONSC 4023 (CanLII).

74. See *id.* at 154.

75. See *id.* at 155-59.

76. See *id.* at 161-62.

77. *Jacob Sec. Inc. v. Typhoon Capital B.V.*, 2016 ONSC 604 (CanLII).

78. *Id.* at ¶ 41.

### 3. Application of the Guidelines by U.K. Courts

According to the 2007 survey, the use of the Guidelines in the U.K. was reported to be varied.<sup>79</sup> On the one hand, a majority of practitioners reported no mention of the Guidelines in their practice in the appointment and challenge of arbitrators.<sup>80</sup> On the other hand, for those that reported use in their practice, they reported that the Guidelines were considered to be a “useful compendium of the views of international practitioners and internationally accepted practices.”<sup>81</sup>

There have been a few decisions by U.K. Courts referencing the Guidelines.<sup>82</sup> The decisions vary in their willingness to apply and adopt the Guidelines. One recent decision of particular note, addressed below, referenced the “contribution” of the Guidelines while criticizing a number of provisions.

In *ASM Shipping Limited of India v. TTMI Limited of England*, the Commercial Court rejected an attempt to use the Guidelines as further guidance in a dispute regarding an allegation of apparent bias against one of the arbitrators.<sup>83</sup> The Court determined that the situation at bar was not covered by the Guidelines and that in any event, the Guidelines were not germane to the dispute.<sup>84</sup> One analysis of the case, however, has suggested that the Court was, in fact, invited to draw inferences from the non-inclusion of the case in the Guidelines but did not do so.<sup>85</sup>

In *A and others v. B and another*, the Queen’s Bench Division, Commercial Court, was asked to decide a challenge to an LCIA award on the grounds that there were justifiable doubts as to the impartiality of the sole arbitrator.<sup>86</sup> In support of the Claimant’s argument, the Claimant sought to invoke the Guidelines “not because...they are mandatorily applicable, but because their spirit shows what the international arbitration community considers does give rise or may give rise to a real risk of bias.”<sup>87</sup> Noting that the Guidelines may not specifically address the manner at hand, Claimant argued that the Court should apply the approach of the Guidelines “by analogy on the basis that their spirit covers what should happen in all cases of potential conflict, irrespective of whether the facts of the particular case fall within the list.”<sup>88</sup> The Court did not accept the Claimant’s argument and held that because the Guidelines were expressly intended not to override national rules, they could not alter the Court’s decision.<sup>89</sup> The Court also declined to adopt Claimant’s argument that the situation was within the “spirit” of the Guidelines.<sup>90</sup>

As noted above, the Guidelines were recently criticized in an English decision. In *W Limited v. M SDN BHD*, the court considered a challenge to two arbitration awards issued by a sole arbitrator.<sup>91</sup> The claimant challenged the award on the basis of the English Arbitration Act, which permits a challenge “on the grounds of serious

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79. Gill, *supra* note 53, at 67.

80. *Id.*

81. *Id.*

82. INT’L BAR ASS’N ARBITRATION GUIDELINES AND RULES SUBCOMM., *supra* note 31, at 61.

83. 2005 APP. L.R. 10/19.

84. *See id.* at ¶ 39(4).

85. INT’L BAR ASS’N CONFLICTS OF INTEREST SUBCOMM., *supra* note 53, at 11.

86. 2011 EWHC 2345, ¶ 1 (Comm.).

87. *See id.* at ¶ 37.

88. *See id.* at ¶ 39.

89. *See id.* at ¶ 73.

90. *See id.* at ¶ 77.

91. *W Limited v. M SDN BHD*, [2016] EWHC 422 (Eng).

irregularity affecting the tribunal, the proceedings or the award.”<sup>92</sup> In support of the challenge, Claimant cited to the Guidelines that provide, in pertinent part, that a non-waivable red list conflict exists where an arbitrator (or their firm) “regularly advises the party, or an affiliate of the party” and “derives significant financial income therefrom.”<sup>93</sup> An “affiliate” is broadly defined in the Guidelines as all companies in a group of companies.

The arbitrator was a partner at a law firm that provided services to a client company that had the same corporate parent as Respondent. His firm, however, did not advise the parent company or the respondent’s party, and there was no suggestion that he personally did work for the client company. Despite this, and relying upon the Guidelines’ definition of “affiliate,” Claimant argued that since the arbitrator’s firm did work for a client company with the same parent company as Respondent, there was a conflict of interest.

After concluding that there would be no conflict under applicable English law, the Court addressed Claimant’s position under the Guidelines. The Court took issue with the application of the term “affiliate.”<sup>94</sup> Specifically, the Court criticized the notion that an arbitrator could be disqualified where they were neither aware of, nor involved with, the advising of an affiliate of a party.<sup>95</sup>

The Court also questioned the application of Guidelines insofar as there appear to be tensions between some of the General Standards.<sup>96</sup> In Part 2(1), the Guidelines state that “[i]n all cases” it is “the General Standards should control the outcome” and General Standard (2)(d) maintains a “categorical position, not allowing for judgment by reference to the facts of the case.”<sup>97</sup> On the other hand, General Standard (6)(a) states that the relationship between an arbitration and a law firm “should be considered in each individual case,” dispelling the idea that these are “catch-all rules.”<sup>98</sup>

#### *4. Application of the Guidelines in Swiss Courts*

Although no Swiss court decisions were reported in the 2007 survey, survey respondents reported use of the Guidelines in Switzerland at the stage of the appointment of arbitrators.<sup>99</sup> Subsequent to the survey, as discussed below, Switzerland’s highest court commented upon the Guidelines. Since that decision, as set forth in the recent IBA Report, the Swiss Federal Supreme Court has referenced the Guidelines in five cases, once without prompting by the parties.<sup>100</sup>

In a decision issued by Switzerland’s highest court, a party challenged an adverse arbitration award on the grounds that the panel was improperly composed.<sup>101</sup> The party challenging the award argued that the panel was improperly composed because a party-appointed arbitrator, counsel, and the chair all belonged to the same professional organization. The Court discussed the Guidelines as follows:

92. *See id.* at ¶ 3.

93. *See id.* at ¶ 5.

94. *See id.* at ¶¶ 33–41.

95. *See id.*

96. *See id.*

97. *W Limited v. M SDN BHD*, 2016 EWHC 422 at ¶ 38 (Eng).

98. *Id.* at ¶ 39.

99. Gill, *supra* note 53, at 67.

100. INT’L BAR ASS’N ARB. GUIDELINES AND RULES SUBCOMM., *supra* note 31, at 59.

101. Bundesgericht [BGer] [Federal Supreme Court] Mar. 20, 2008, 4A\_506/2007 (Switz.).

Such guidelines admittedly have no statutory value; yet they are a precious instrument, capable of contributing to harmonization and unification of the standards applied in the field of international arbitration to dispose of conflict of interests and such an instrument should not fail to influence the practice of arbitral institutions and tribunals.<sup>102</sup>

Referring the parties to the Green List, the Swiss Federal Supreme Court held that professional relationships between the arbitrators and counsel within the framework of a professional or social association are not sufficient to justify a challenge nor does it oblige the arbitrators to disclosure that affiliation in their statements of independence, and thusly rejected the challenge.<sup>103</sup>

Per the IBA Report, a later decision of the Swiss Federal Supreme Court set forth the following position on the Guidelines:

[O]ne should not overestimate the weight to be given to these formal grounds. It should not be forgotten that although these guidelines represent a useful tool (in determining conflicts of interest), they do not have the force of law. Consequently, the particular circumstances of a case and the relevant case law will remain the determining factor in deciding a question of conflicts of interest.<sup>104</sup>

### 5. Conclusions from the Survey of Case Law

The above case law suggests that while courts may look to the Guidelines as persuasive authority in evaluating conflicts in international arbitration, courts look to applicable law first, and the weight given to the Guidelines may vary.

#### b. Guidelines from the Chartered Institute of Arbitrators

The Chartered Institute of Arbitrators maintains a Code of Professional and Ethical Conduct (“CPEC”) which its members are required to follow.<sup>105</sup> As the Chartered Institute has 15,000 members across 133 countries, many arbitrators may be bound by the CPEC.<sup>106</sup>

Part 2 of the CPEC relates “to the conduct of members when acting or seeking to act as neutrals in alternative dispute resolution processes, wherever conducted, whether or not they have been appointed so to act by the Institute or any officer of the Institute and whether or not the process is conducted under the auspices of the Institute.”<sup>107</sup>

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102. *See id.* at 3.3.2.2 (internal citations omitted).

103. *See id.*

104. INT’L BAR ASS’N ARB. GUIDELINES AND RULES SUBCOMM., *supra* note 31, at 59.

105. CHARTERED INSTITUTE OF ARBITRATORS, ETHICS, <http://www.ciarb.org/guidelines-and-ethics/ethics>.

106. CHARTERED INSTITUTE OF ARBITRATORS, ABOUT CIARB, <http://www.ciarb.org/about>.

107. CHARTERED INSTITUTE OF ARBITRATORS, THE CHARTERED INSTITUTE OF ARBITRATORS CODE OF PROFESSIONAL AND ETHICAL CONDUCT FOR MEMBERS, 1 (2009), <http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/code-of-professional-and-ethical-conduct-october-2009.pdf?sfvrsn=2>.

As explained in the Introduction to the CPEC, the purpose of the CPEC is to serve as a guide and as a point of reference for users of the process and to promote public confidence.<sup>108</sup> CPEC is described as a reflection of internationally acceptable principles.<sup>109</sup> CPEC's Introduction further notes that in many instances, "members will be bound by other codes of practice or conduct imposed upon them by virtue of membership of primary professional organisations."<sup>110</sup>

This recognition is echoed in the Introduction to Part 2, which provides that the rules are subject to the overriding requirements that they shall not, among other things, require a member to act in a way that is unethical or unlawful under any other Code or law applicable to the member, or override or replace the rules or applicable laws of any dispute resolution process.<sup>111</sup>

As for the rules proper, they cover the following nine areas: Behaviour, Integrity and Fairness, Conflicts of Interest, Competence, Information, Communication, Conduct of the Process, Trust and Confidence, and Fees.<sup>112</sup>

Thus, members of the Chartered Institute of Arbitrators, in particular, should consult these rules and act accordingly.<sup>113</sup>

### *C. Institutional Codes and Rules Governing Arbitrator Conduct*

As new institutions and jurisdictions vie for prominence as centers of international arbitration, those institutions and jurisdictions are increasingly promulgating their own ethical rules to govern the resolution of disputes governed by those institutions.<sup>114</sup> Ethical rules from several institutions are discussed below.

Examples of institutional codes as they pertain to arbitrators include those promulgated by the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre, and the Cairo Regional Centre for International Commercial Arbitration.

The Hong Kong International Arbitration Centre's Code of Ethical Conduct for Arbitrators (the "HKIAC Code") begins with the following preamble:

In some instances the ethics set down in HKIAC's Code of Ethical Conduct herein may be repeated in legislation governing the arbitration, case law or the rules which parties have adopted. In many instances, arbitrators will also be bound by other codes of practice or conduct imposed upon them by virtue of membership of primary professional organisations...<sup>115</sup>

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108. *Id.*

109. *Id.*

110. *Id.*

111. *See id.* at 2.

112. *See id.* at 2-3.

113. Indeed, the Chartered Institute of Arbitrators and its members can, and have, brought disciplinary procedures against members in the past.

114. *See ROGERS, supra* note 5, at 83 (tracing the promulgation of ethical codes at national and regional institutions).

115. HONG KONG INT'L ARB. CTR., CODE OF ETHICAL CONDUCT (2017), <http://www.hkiac.org/arbitration/arbitrators/code-of-ethical-conduct>.

A prior iteration of the HKIAC Rules contained the following language:

The purpose of adopting a Code of Ethics for arbitrators is not only to serve as a guide to the conduct of arbitrators, but also to serve as a point of reference for users of the arbitration process and to promote

Thus, akin to the Rule of Ethics discussed above, the HKIAC Code seeks to promote international norms rather than to provide a rigid set of rules. Two notable, unique, provisions are set forth below.

First, “[a]n arbitrator shall not permit outside pressure, fear of criticism or any form of self-interest to affect his decisions.”<sup>116</sup> The fear of criticism is an interesting inclusion but appears to speak to the notion that an arbitrator must be both impartial and independent. Second, the rules prohibit the acceptance of “any gift or substantial hospitality, directly or indirectly, from any party to the arbitration, except in the presence of the other parties and/or with their consent.”<sup>117</sup> This is in contrast, for example, with §5.5 of the IBA Rules of Ethics which prohibits the acceptance of any gift.<sup>118</sup>

The Singapore International Arbitration Centre’s Code of Ethics for an Arbitrator (“SIAC Code”),<sup>119</sup> outlined in part below, also sets forth requirements for arbitrators.

Prospective arbitrators shall accept an appointment only if they (1) are fully satisfied that they can discharge their duties without bias, (2) have adequate knowledge of the language governing the arbitration, and (3) are “able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.”<sup>120</sup> Second, the disclosure requirements, in addition to asking for any relationships (including personal relationships) of the arbitrators, also requires disclosure of “the extent of any prior knowledge [a potential arbitrator] may have of the dispute.”<sup>121</sup> Third, as a limitation on interviewing prospective arbitrators, prior to accepting an appointment, “an arbitrator may only enquire as to the general nature of the dispute, the names of the parties, and the expected time period required for the arbitration.”<sup>122</sup> Fourth, an additional limitation on communications, absent contrary applicable arbitration rules, prohibits arbitrators from conferring with parties or their counsel until after the Registrar gives notice of the formation of the Tribunal to the parties.<sup>123</sup>

#### *D. Conclusion on International Arbitration Ethics for Arbitrators*

Given the uncertainty described above, arbitrators are advised to take a cautious approach to ethical conduct. This approach involves analyzing potentially applicable ethical rules and guidelines, and looking to the arbitration clause, institutional rules, soft law and guidelines, bar association rules (including those of organizations such as the Chartered Institute of Arbitrators), and potentially applicable national law. The best way to avoid potential issues is to err on the side of disclosure and to set forth, early in a proceeding, applicable ethical codes. A practice pointer, echoed below in the discussion of best practices for counsel, is for the arbitrators to work

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public confidence in arbitration as a suitable forum for resolving disputes. The Code itself is not a rigid set of rules but is a reflection of internationally acceptable norms.

116. *Id.*

117. *Id.*

118. See INT’L BAR ASS’N, *supra* note 15, at § 5.5.

119. SINGAPORE INT’L ARB. CTR., CODE OF ETHICS FOR AN ARBITRATOR, <http://www.siac.org.sg/our-rules/code-of-ethics-for-an-arbitrator>.

120. *Id.* at § 1.1.

121. *Id.* at § 2.2(b).

122. *Id.* at § 4.1.

123. *Id.* at § 4.2.

with the parties to reach agreement on ethical rules following the appointment of the tribunal.

## II. ETHICAL DUTIES OF COUNSEL IN INTERNATIONAL ARBITRATION

Like arbitrators in international arbitration, counsel may find themselves in an “ethical no-man’s land.”<sup>124</sup> The problem is encapsulated in the following passage:

Counsel in international arbitrations are not regulated by an international bar; their individual national bar association establishes their code of conduct. A lawyer from a civil law country may have significantly different obligations concerning preservation of evidence than a lawyer practicing in a common law jurisdiction. Even among common law jurisdictions, the difference in preparing witnesses for cross-examination may be significant. Furthermore, counsel in international arbitration may be subject to diverse and potentially conflicting bodies of domestic rules and norms. The range of rules and norms applicable to the representation of parties in international arbitration may include those of the party representative’s home jurisdiction, the arbitral seat, and the place where hearings physically take place.<sup>125</sup>

Professor Catherine Rogers has outlined three distinct problems caused by the lack of clear ethical guidance.<sup>126</sup> The first problem, known as “double deontology” arises where a lawyer is subject to the regulatory power of more than one jurisdiction and the rules of the jurisdictions impose obligations on the lawyer such that it is impossible to comply with both simultaneously.<sup>127</sup> The result is that the attorney is faced with the prospect of professional discipline regardless of what action is taken by the attorney.<sup>128</sup> The second problem, referred to by Professor Rogers as the “inequality-of-arms” problem, arises where attorneys who are bound by different ethical rules are involved in a single international proceeding.<sup>129</sup> Under such circumstances, the proceedings may be structurally unfair such as where, for example, a civil law jurisdiction lawyer cannot interview a witness before trial while an American lawyer is permitted to do so.<sup>130</sup>

The third problem identified by Professor Rogers, related to the others, is a “choice-of-law or conflicts-of-law” problem.<sup>131</sup> In this iteration of the challenge,

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124. See ROGERS, *supra* note 5, at 18 (“...those participating in international arbitration dwell in an ethical no man’s land”); Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, *Legal Studies Research Paper No. 18-2010*, 1 (2010) (“At best, therefore, attorneys in an international arbitration are each abiding by different and often-conflicting national ethical rules. At worst, they are operating in an ethical no-man’s land”), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1559012](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012).

125. Monique Sasson, *Ethics in International Arbitration*, LAW360 (2016) (internal references omitted).

126. See ROGERS, *supra* note 5, at 107-10.

127. See *id.* at 107.

128. See *id.*

129. See *id.* at 107-08.

130. See *id.*

131. See *id.* at 108-11.



the issue is that it is unclear when and how particular ethics rules apply in international arbitration.<sup>132</sup> Professor Rogers illustrated the issue as follows:

Which ethical rules govern a New York lawyer's confidentiality obligations to his or her French client in a Singapore-seated arbitration against a Japanese company that is represented by the German office of an English law firm?<sup>133</sup>

These issues are exacerbated by what has come to be known as "guerrilla tactics," actions to delay, obstruct, or subvert the arbitration process.<sup>134</sup> Examples of such tactics include abuse of document production, creating conflicts, frivolous challenges of arbitrators, frivolous anti-suit injunctions, and witness tampering.<sup>135</sup>

While the problems are clear, the solutions are less so.<sup>136</sup> Some have advocated for the creation of a universal code of ethics for counsel in international arbitration<sup>137</sup> while others see such "hard law" as antithetical to the notion of procedural flexibility that is a core tenet of international arbitration.<sup>138</sup> As set forth below, there have been attempts to provide a solution, including the promulgation of the IBA guidelines.

#### a. IBA International Code of Ethics for Lawyers

First adopted in 1956, and most recently revised in 1988, the IBA's International Code of Ethics was developed to complement the local ethics standards that practitioners are required to follow in their home jurisdictions.<sup>139</sup> The International Code of Ethics requires that:

A lawyer who undertakes work in a jurisdiction where he is not a full member of the local profession adhere to the standards of professional ethics in

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132. See *id.* at 108.

133. See *id.* at 108-09.

134. See Edna Sussman, *Can Counsel Ethics Beat Guerrilla Tactics?: Background and Impact of the New IBA Guidelines on Party Representation in International Arbitration*, 6 N. Y. DISPUTE RESOLUTION LAWYER 47, 48 (2013); see also Edna Sussman & Solomon Ebere, *All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration*, 22 AM. REV. INT'L ARB. 611 (2011) (survey of behaviors considered to be "guerrilla tactics").

135. Sussman & Ebere, *supra* note 134, at 613-16.

136. Professor Rogers' answer to the illustration of the "choice-of-law or conflicts-of-law problem" is humorously telling – "Most attorneys faced with this question could offer only a confused shrug. Most national bar authorities could not do much better." See ROGERS, *supra* note 5, at 109.

137. See, e.g., W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS (1971); Detlev F. Vagts, *The International Legal Professional: A Need for More Governance?*, 90 AM. J. INT'L L. 250 (1996); Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 AM. REV. INT'L ARB. 214 (1992); Bishop, *supra* note 1.

138. See Sussman, *supra* note 134, at 47 (noting that, "A number of commentators believed that there can be no workable solution to this problem, that there were too many guidelines already confusing the field of international arbitration, and that regulation would diminish the flexibility of the process"); see also Landau and Weeramantry, *supra* note 5.

139. INT'L BAR ASS'N, INTERNATIONAL CODE OF ETHICS, (1988), [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#).

the jurisdiction where he has been admitted. He shall also observe all ethical standards that apply to lawyers of the country where he is working.<sup>140</sup>

The International Code of Ethics, though not specific, sets forth general principles regarding ethics. It includes, among other things, the fact that lawyers should be independent in the discharge of their duties, maintain due respect toward courts, avoid *ex parte* communications, and never represent conflicting interests in litigation.<sup>141</sup>

It does not, however, make any reference to international arbitration. Furthermore, akin to the Code of Conduct for European Lawyers discussed below, it suggests that an attorney must abide by both the ethical codes of their home jurisdiction and those in which they find themselves practicing. This can be impossible where, as discussed above, the pertinent rules in the two jurisdictions conflict.

### *b. IBA International Principles on Conduct for the Legal Profession*

According to the IBA, the 2011 IBA International Principles on Conduct for the Legal Profession (the “International Principles”) represent “the 21<sup>st</sup> century version” of the International Code of Ethics, with the International Code of Ethics (and its revisions) serving as the precursors to the International Principles.<sup>142</sup>

The International Principles address the following ten core values: (1) Independence; (2) Honesty, integrity and fairness; (3) Conflicts of interest; (4) Confidentiality/professional secrecy; (5) Clients’ interest; (6) Lawyers’ undertaking; (7) Clients’ freedom; (8) Property of clients and third parties; (9) Competence; and (10) Fees.

The commentary to the International Principles notes that, “[t]he International Principles express the common ground which underlies all the national and international rules which govern the conduct of lawyers, principally in relation to their clients. The General Principles do not cover in detail other areas of lawyer conduct, for instance regarding the courts, other lawyers or the lawyer’s own bar.”<sup>143</sup> It is notable that the International Principles define “Court/Tribunal” as including an arbitrator in a binding arbitration proceeding.<sup>144</sup> This clarifies that the International Principles do, in fact, extend to arbitration.

### *c. IBA Guidelines on Party Representation in International Arbitration*

On May 25, 2013, the IBA adopted the IBA Guidelines on Party Representation in International Arbitration (the “PR Guidelines”).<sup>145</sup> According to the preamble, the PR Guidelines “are inspired by the principle that party representatives should

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140. *Id.*

141. *Id.*

142. IBA publishes new code of conduct for the global legal profession, INT’L BAR ASS’N (JULY 21, 2011), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=BC99FD2C-D253-4BFE-A3B9-C13F196D9E60>.

143. INT’L BAR ASS’N, INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION, 10, ¶ 3 (2011), [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#). C

144. *Id.* at 33-4.

145. INT’L BAR ASS’N, GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARB. (2013), [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#).

act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.”<sup>146</sup> The PR Guidelines apply where the parties agree or where the Tribunal, after determining that it has the authority to rule on such matters, determines that it wishes to use them.<sup>147</sup>

The PR Guidelines offer guidance on a number of topics including: Party Representatives, such as the exclusion of Party Representatives from participating in all or part of the arbitral proceedings in the event of a conflict; Communications with Arbitrators, such as ex parte communications; Submissions to the Arbitral Tribunal, such as the false submission of fact or expert evidence; Information Exchange and Disclosure, such as the preservation, collection, request, and production of documents; Witnesses and Experts, such as the preparation of Witness Statements and Expert Reports; and Remedies for Misconduct, such as admonishing, the drawing of inferences, and the assessment of costs.

According to a recent IBA report, per a survey on its usage, the PR Guidelines were only referenced in less than 20% of arbitrations involving issues of counsel conduct.<sup>148</sup> Per the survey, in arbitrations in which the PR Guidelines are referenced, tribunals usually only consult them and do not feel bound by them.<sup>149</sup> No public cases involving reference to the PR Guidelines were reported.<sup>150</sup>

Although many have welcomed their arrival, the PR Guidelines have been criticized as raising “questions about the generality of ethical codes and about unintended consequences in the form of opportunistic challenges to derail arbitral proceedings or to serve as strategy tools to vacate awards.”<sup>151</sup> It has also been suggested that this regulatory scheme, akin to the creation of an international arbitral procedural code, would result in “replacing an evil (domestic procedure) by a greater evil (international procedure).”<sup>152</sup>

At a very minimum, the PR Guidelines provide what Edna Sussman has described as an “excellent opening” for a tribunal to initiate a discussion with counsel as to “what should be deemed to be appropriate conduct in the arbitration to equalize ethical norms, curb guerilla tactics and ensure fundamental fairness.”<sup>153</sup> Indeed, as suggested by Dr. Monique Sasson, the best and most practical approach to utilize the PR Guidelines is to encourage the parties and their counsel to adopt them in individual cases and to incorporate them in the initial procedural order.<sup>154</sup>

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146. *Id.* at 2.

147. *Id.* at 4, ¶ 1; see also Sussman, *supra* note 134, at 49.

148. INT’L BAR ASS’N ARB. GUIDELINES AND RULES SUBCOMM., *supra* note 31, at 78, ¶ 203.

149. *Id.* at ¶ 204.

150. *Id.* at ¶ 206.

151. William W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 ARB. INT’L. 409, 411 (2014). According to the Queen Mary/White & Case 2015 Survey, only 24% of respondents have seen the PR Guidelines used in practice. See QUEEN MARY UNIVERSITY OF LONDON, SCHOOL OF ARBITRATION & WHITE & CASE LLP, *supra* note 53, at 35. A further 61% of respondents were aware of the PR Guidelines but have not seen them used in practice. *Id.*

152. Park, *supra* note 151, at 411, n. 10; see also Landau & Weeramantry, *supra* note 5.

153. Sussman, *supra* note 134, at 49.

154. Sasson, *supra* note 125.

*d. Code of Conduct for European Lawyers*

The Code of Conduct for European Lawyers (the “Code”) was originally adopted at the Council of Bars and Law Societies of Europe Plenary Session held on October 28, 1988 and has subsequently been amended at Plenary Sessions in 1998, 2002, and 2006.<sup>155</sup>

The Code was developed in light of the continued integration of the European Union and the increasing frequency of the cross-border activities of lawyers. The Code was established with intent to create rules common to European lawyers but with the recognition that a lawyer will remain bound to observe the rules of the Bar or Law Society to which he or she belongs (to the extent that they are consistent with the rules in the Code). The best articulation of this balance is Article 5.9, which governs disputes amongst lawyers in different member states. Where such a dispute occurs, under Article 5.9, a lawyer who believes that a colleague has breached a rule of professional conduct is directed to (1) “draw the matter to the attention of that colleague,” (2) “try to settle it in a friendly way”, and (3) not commence any form of proceeding against a colleague “without first informing the Bars or Law Societies to which they both belong for the purpose of allowing both Bars or Law Societies concerned an opportunity to assist in reaching a settlement.” The rules outline general principles of ethics in the context of client relations, relations with the courts (with an extension to arbitrators), and relations between lawyers.

As to relations with Arbitrators or Arbitral Tribunals, an attorney is required to follow the same rules that apply when appearing before a court.<sup>156</sup> This requires:

- (1) Following the rules of conduct applied before that court or tribunal.
- (2) Maintaining due regard for the fair conduct of the proceedings.
- (3) Maintaining due respect and courtesy toward the court while defending client interests and doing so without regard to the lawyer’s own interests or to any consequences to him or herself or to any other person.
- (4) Never knowingly giving false or misleading information to the court.<sup>157</sup>

The explanatory notes are particularly useful with regard to Article 4.2, which provides examples of improper conduct.<sup>158</sup> For example, a lawyer may not make contact with the judge without informing the lawyer acting for the opposing party.<sup>159</sup>

Article 4, however, has been criticized insofar as it fails to answer the following question: what are the applicable rules of conduct for lawyers appearing before an

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155. THE COUNCIL OF BARS AND LAW SOCIETIES OF EUR., CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS, 13 (2013), [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_CoCpdf1\\_1382973057.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf).

156. *Id.* at 19, art. 4.5.

157. *Id.* at arts. 4.1-4.4.

158. *See id.* at 30.

159. *Id.*

international arbitration tribunal?<sup>160</sup> In the absence of a clear answer it may be difficult to comply as required under the Code. This is especially true where the rules of multiple jurisdictions are involved in an international arbitration and are in conflict.

This issue has not escaped the attention of the drafters. In fact, in the section describing the purpose of the Code, the drafters stated that “a particular purpose of the statement of [these] rules is to mitigate the difficulties which result from the application of ‘double deontology,’ notably as set out in Articles 4 and 7.2 of Directive 77/249/EEC and Articles 6 and 7 of Directive 95/5/EC.”<sup>161</sup>

Despite this awareness, however, the Code may mitigate the problem of double deontology, but is unlikely to solve for it in matters involving international arbitration.

*e. The Chartered Institute of Arbitrators and Arbitral Institutions’ Efforts to Regulate Counsel Conduct*

Similar to the institutional efforts regarding arbitrators, discussed above, some institutions have also attempted to set forth ethical guidance for counsel.<sup>162</sup> Some commentators have described such efforts as “‘the best of many bad options,’ as [institutions] can affirm the power of arbitral tribunals to deal with counsel conduct while addressing the transnational nature of international arbitration.”<sup>163</sup>

Although not truly a comprehensive code of conduct for counsel, the Chartered Institute of Arbitrators has introduced practice guidelines for the interview of prospective arbitrators.<sup>164</sup> The Chartered Institute of Arbitrators’ practice guidelines were prepared in recognition of the fact that there are wide differences in practice across jurisdictions and cultures.<sup>165</sup> In fact, in preparing the guidelines, it was noted that there were statements of strong opposition to the idea of interviews being allowed at all.<sup>166</sup> One of the key aims of the guidelines, however, is to provide arbitrators wanting a framework in which to operate with a degree of comfort and structure.<sup>167</sup>

The American Arbitration Association/International Centre for Dispute Resolution maintains “Standards of Conduct for Parties and Representatives.”<sup>168</sup> These

160. ROGERS, *supra* note 5, at 43.

161. Despite this awareness, however, the Code may mitigate the problem of double deontology, but the Code does not solve for it.

162. See ROGERS, *supra* note 5, at 84.

163. See Charles B. Rosenberg and M. Imad Khan, *Who Should Regulate Counsel Conduct in International Arbitration*, KLUWER ARBITRATION BLOG (Apr. 18, 2016), <http://kluwerarbitrationblog.com/2016/04/18/who-should-regulate-counsel-conduct-in-international-arbitration/>.

164. CHARTERED INSTITUTE OF ARBITRATORS, INTERNATIONAL ARBITRATION PRACTICE GUIDELINE: INTERVIEWS FOR PROSPECTIVE ARBITRATORS (2015), <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>.

165. See *id.* at para. 1.3. In the review of literature in the guidelines, there is express reference to the ABA’s Code of Ethics for Arbitrators in Commercial Disputes and the IBA Rules of Ethics for International Arbitrators. See *id.* at para. 2.2. As to the former, as discussed above, there are key provisions relating to arbitrator interviews.

166. See *id.* at para. 1.3.

167. See *id.* at para. 3.1.

168. AM. ARB. ASS’N & INT’L CTR. FOR DISP. RESOL., STANDARDS OF CONDUCT FOR PARTIES AND REPRESENTATIVES, [https://www.adr.org/sites/default/files/document\\_repository/AAA\\_ICDR\\_Standards\\_of\\_Conduct\\_Parties\\_and\\_Representatives\\_0.pdf](https://www.adr.org/sites/default/files/document_repository/AAA_ICDR_Standards_of_Conduct_Parties_and_Representatives_0.pdf).

general standards, among other things, require party representatives to advise their clients and witnesses as to the appropriate conduct that is expected of them during the proceedings.<sup>169</sup> These general standards largely contain rules which should be followed in all proceedings, including those in court, such as having the participants refrain from using vulgar, profane, or otherwise inappropriate language.<sup>170</sup>

The 2014 Arbitration Rules of the London Court of International Arbitration contain a provision that governs parties' legal representatives through an Annex with "General Guidelines for the Parties' Legal Representatives."<sup>171</sup> By adopting the LCIA Rules, parties are obligated to ensure that their legal representatives comply with the Guidelines.<sup>172</sup> As explained by William Park:

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 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.<sup>173</sup>

According to the Annex, the guidelines are intended to "promote generally the good and equal conduct of the parties' legal representatives appearing by name within the proceedings."<sup>174</sup> They are not 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."<sup>175</sup> The guidelines are also not to "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."<sup>176</sup>

The Annex sets forth a number of ethical guidelines including a prohibition on the making of false statements, the use of false evidence, or the concealment of documents.<sup>177</sup> Critically, the Tribunal is empowered to decide how a representative has violated the general guidelines and, if so, how to exercise its discretion to impose any or all of the following sanctions: (a) 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 the applicable rules.<sup>178</sup>

Whether the adoption of ethical codes in institutional rules represents a trend or the LCIA's code is simply an outlier, this is an interesting development that should be monitored by counsel as it provides a potential solution to some of the problems associated with conflicting ethical rules.

169. *Id.* at 1.

170. *Id.*

171. THE LONDON COURT OF INT'L ARB., ARB. RULES, arts. 18.5 and 18.6 (2014).

172. *Id.* at art. 18.5; *See also* Park, *supra* note 151 at 419.

173. Park, *supra* note 151, 419-20.

174. ANNEX TO THE LCIA RULES, ¶ 1 THE LONDON COURT OF INT'L ARB. (2014).

175. *Id.*

176. *Id.*

177. *Id.* at ¶¶3-5.

178. *Id.* at ¶7; ARB. RULES, *supra* note 171, at art. 18.6.

*f. Conclusion on International Arbitration Ethics for Counsel*

Given the uncertainty described above, counsel is advised to take a cautious approach to ethical conduct. This approach involves looking to the arbitration clause, analyzing potentially applicable ethical rules and guidelines, institutional rules, soft law and guidelines, bar association rules (including those of organizations such as the Chartered Institute of Arbitrators), and potentially applicable national and state law. The best way to avoid potential issues, as echoed above, is for counsel to take a proactive approach by proposing and reaching an agreement on ethical rules as early as possible in the arbitration.

### III. CONCLUSION

Arbitration practitioners, regardless of where they are practicing, should seek out and be aware of potential ethical rules that may be applicable to a dispute. They should be aware that although guidelines such as those promulgated by the IBA are generally voluntary and not universally recognized, the failure to heed them could have consequences for their clients and the outcome of their cases. This is particularly important for those practitioners who serve as arbitrators, as many arbitral institutions have rules which affect eligibility for appointment and may bind arbitrators to ethics rules even when they do not bind practitioners.

In disputes involving parties from multiple jurisdictions, ethical issues can be particularly thorny to navigate, as the rules of the various jurisdictions may be in conflict or otherwise inconsistent. Practitioners encountering such situations would be wise to come to some agreement, either in drafting the arbitral clause or once the dispute has begun, regarding the applicable rules or guidelines relevant to the dispute.

Although there is a lively debate brewing as to the need for a binding international code of ethics, there does not seem to be a consensus as to the path forward for such a code. Recent trends suggest a movement in favor of international principles or guidelines that arbitrators and counsel can look to in a dispute without making compliance with such principles or guidelines mandatory. While the emergence of such guidelines or rules is to be monitored, the best way to avoid uncertainty, as aforementioned, is to reach an agreement between the parties or to specify the applicable code of ethics, or the agreed upon principles or guidelines, in the arbitral clause or in the initial procedural order once a dispute has commenced.