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3. Counsel ethics in international arbitration: a no-man's land or a strategic playground?

Nuna Lerner

Nuna Lerner (1)

Partner

Gornitzky & Co.

Tel Aviv

1. INTRODUCTION

Over the last three decades, international arbitration has enjoyed increasing popularity. Growing figures of cases arbitrated before arbitration centres, rising numbers of arbitration clauses drafted into commercial agreements, and new categories of disputes arbitrated —including class actions, sports, and tax. (2)

International arbitration is commonly considered to enjoy several inherent advantages, making it superior to other means of dispute resolution: flexibility and efficiency, enforceability and finality, neutrality, expertise, and confidentiality. (3)

To a great extent, the institution of international arbitration owes its success to practitioners who promote its advantages to clients and the greater community. The professional status of these practitioners impacts the legitimacy, real and perceived, of international arbitration. Lawyers who negotiate and draft commercial agreements and lawyers who act as counsels or arbitrators in arbitration proceedings commonly decide which rules and laws apply to a dispute, which arbitrators decide it, and which institution administers it. How these lawyers conduct themselves vis-à-vis other players of the arbitration procedure, including disputants, arbitrators, and opposing counsels, can affect the popularity of international arbitration.

P 54 When arbitration lawyers conduct themselves fairly, they strengthen the perception of international arbitration's fairness and other traits, making it more attractive to potential users. When practitioners conduct themselves unfairly, they lend credence to any perceptions of the practice as biased and less fair, thus weakening it and threatening its success and popularity.

How lawyers conduct themselves in international arbitration proceedings has been the subject of abundant legal writing. The cause of scholarly interest in this issue is the absence of community consensus on which set or sets of ethical rules apply to counsel litigating international matters. The lack of clear guidelines and the potential overlap of different (and at times contradictory) standards create ethical dilemmas that lawyers are unequipped to solve individually. As there is no transnational institution governing the practice of international arbitration, any potential solution must be voluntarily accepted by the community.

As the practice of international arbitration grows, the ethical dilemmas faced by arbitration practitioners become more common and more acute. Lawyers report that when acting as counsel in international arbitration, they most often are unclear on which set of ethical rules they should adhere to and often choose to follow the rules of conduct of the bar association where they are licensed. (4) However, local bar associations' rules of conduct rarely extend outside their jurisdiction. (5)

Scholars suggest that the answer is far more complicated than each lawyer's adhering to their local rules. Several different sets of rules and laws may apply to a single lawyer acting in an international setting: the rules of the bar association where the lawyer is licensed, the law of the seat of arbitration or jurisdiction of dispute, the law of the contract in dispute, another law altogether, or a combination of several of these. (6)

This dilemma was categorized as a 'no-man's land' more than 20 years ago:

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> *'International arbitration dwells in an ethical no-man's land. Often by design, arbitration is set in a jurisdiction where neither party's counsel is licensed. The extraterritorial effect of national ethical codes is usually murky, as is the application of national ethical rules in a nonjudicial forum such as arbitration. There is no supranational authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far. Arbitral tribunals have no legitimate power to sanction attorneys, and specialised ethical norms for attorneys in international arbitration are nowhere recorded. Where ethical regulation should be, there is only an abyss'.* (7)

Scholars and practitioners have devoted considerable attention to the suggested need

for a robust and universally accepted set of ethical standards to govern counsel ethics in international arbitration. Several dozen articles have suggested various perspectives and potential avenues to achieve a global framework. However, a crystallised solution remains elusive, and no set of rules has become standard practice.

Could it be that sophisticated lawyer —who, through many years of practice, have learned the strategic potential of international arbitration's procedures and how to work in its grey areas and manipulate its flexibility— have no motivation to change the status quo? It is easy to see why an outside observer mindful of the extensive writing on the subject but also of the lack of a widely accepted practical solution, might conclude that the answer is yes.

Is there a risk that, by playing in the ethical no-man's land, lawyers are bending international arbitration's celebrated flexibility to the breaking point? If the answer to this question is also in the affirmative, corrective actions need to be taken immediately. Arbitration lawyers should be careful not to bite the hand that feeds the community.

In an attempt to answer these questions, this paper analyses the impact that divergent ethical standards have on counsel in international arbitration. Chapter 2 provides an overview of the common dilemmas and considers how the specialisation of arbitration lawyers and the (welcome) democratisation of arbitration escalated them. The tools that scholars have suggested to bypass these dilemmas and the extent to which the industry has adopted them are reviewed in Chapter 3. In Chapter 4, the proposition that sophisticated lawyers are not motivated to promote a unified approach is offered, and a
P 56 comparison is drawn from another ● syndrome of the growing sophistication of arbitration practitioners that may jeopardise the popularity of international arbitration. A conclusion and word of advice are offered in Chapter 5.

2. THE DILEMMA OF COUNSEL ETHICS IN INTERNATIONAL ARBITRATION

2.1. LAWYERS' ETHICS

Ethics, the 'principles of conduct governing an individual or a group', (8) have been the centre of philosophical discussions for centuries. The idea of legal profession ethics is derived from society's expectations of what a lawyer's role is within the legal system and what the lawyer's behaviour should be. (9) A lawyer is a representative of clients, an officer of the legal system, and a citizen having special responsibility for the quality of justice. (10) These roles are usually harmonious; however, there is an inherent tension between a lawyer's obligation toward their client and the legal system and their interest in their own success. Bar association codes of ethics aim to protect the legal profession by easing the tension between divergent obligations. (11)

Most rules of conduct commit lawyers to five ideals: truthfulness, fairness, independence, loyalty, and confidentiality. (12) Lawyers are obliged to act honestly, with integrity and in good faith toward all participants of the legal proceedings. (13)

According to the chair of the IBA Professional Ethics Committee, Adv. Gabor Damjanovic, lawyers' ethics are considered inherently correlated to their professional reputation, which is one of the essential attributes that are considered when choosing a lawyer to act as a representative or an arbitrator to decide a matter. (14) In an arbitration setting,
P 57 tribunals often rely on the reputation of counsel appearing ● before them; counsel who was once unethical may find it hard to advocate their client's case effectively. (15) As a result, lawyers are frightfully mindful that 'it only takes 5 seconds to destroy one's integrity that took a lifetime to build'. (16)

The result is that lawyers adhere to their bar association's ethical standards for fear not only of the association's sanctions but also of that of their community and peers. When ethical rules are unclear or ambiguous or differ between lawyers, they create an uneven playing field that threatens the critical balance that is a prerequisite of a reliable and successful legal system.

2.2. COUNSEL ETHICS IN INTERNATIONAL DISPUTES

When lawyers are working in an international setting, at least two ethical dilemmas are expected to arise as a result of divergent ethical standards: *i*) *Overlapping Standards Dilemma* —when different lawyers are bound by different ethical standards; *ii*) Double Deontology Dilemma —when two or more sets of ethical rules apply to a single lawyer.

a) Overlapping Standards Dilemma

As noted above, lawyers usually consider themselves bound by the rules of their bar association. When working on international disputes, counsel often work with lawyers from other jurisdictions, whether as colleagues on the same team or as opposing counsel, and there may be a significant difference in how each of them is free to act.

Each bar association uses different ethical standards, commonly drafted as broad obligations. By way of example, in Israel, a lawyer may not act with conduct 'that is unbecoming of the legal profession'. (17) In Germany, lawyers must show that they are 'worthy of the respect and trust their status as a lawyer demands'. (18)

The question of what conduct is 'becoming of the legal profession' or 'worthy of respect' is cultural and, to a great extent, the spectrum of answers results from diverse litigation
P 58 philosophies, advocacy techniques, and rules of procedure that are ● the basis of common law versus civil law jurisdictions. (19) Under common law, the adversarial process and counsel's role within that system behove detailed ethical codes and comprehensive commentaries to explain what is permitted and forbidden. Under civil law, the standards are often more general and drafted succinctly, leaving more room for interpretation, with some aspects wholly uncovered. (20)

It is not uncommon that behaviour considered respectful or 'becoming of a lawyer' in one jurisdiction is deemed disrespectful or forbidden in another.

A few examples: UK lawyers have an obligation to bring pertinent adverse legal authority to the tribunal's attention; German lawyers have no similar obligation. Canadian lawyers have an obligation to explain to their clients the necessity of fully disclosing documents and to assist them in doing so; lawyers from civil law jurisdictions usually have little guidance on the subject, as document disclosure is largely alien in these jurisdictions. (21)

Consequently, lawyers from different jurisdictions working on the same team might have to choose between allocating specific tasks (forbidden to some of them) to the individuals bound by more lenient rules, or restricting the whole team to the more rigid set of rules that apply to one of them.

Opposing counsel may encounter a different complex situation, with one party's counsel allowed to prepare witnesses for cross-examination or to converse with the counterparty's witnesses, while the counterparty's counsel may not. This would create an uneven playing field, potentially effecting the parties' chances of winning arguments or even disputes.

b) Double Deontology Dilemma

Several scenarios may create 'double deontology', whereby a lawyer is bound by two or more sets of obligations. International lawyers must identify the set (or sets) of laws that apply to them —a complicated task.

First, some lawyers are licensed in more than one jurisdiction and thus subject to
P 59 multiple standards. Second, some jurisdictions maintain a second set of ● rules for when lawyers work outside of their jurisdiction, which coexists with the regulations where they are licensed. (22) Third, counsel may be subject to the rules of the jurisdiction of the dispute. (23) Fourth, in an arbitration setting, counsel may also be subject to the rules of the seat of arbitration, or any rule adopted by the tribunal. (24)

In a recent conference, a UK/USA dual-qualified lawyer shared the common difficulty he experiences when conducting witness preparation in an arbitration setting. Under USA law, the lawyer is obligated to diligently prepare witnesses for cross-examination, including by rehearsing their potential testimony with them; however, as an English solicitor, he is barred from coaching witnesses. (25) A prudent counsel may try to comply with the more restrictive rules; however, when the rules contradict one another, this solution proves unsatisfactory, leaving the lawyers exposed no matter the path they choose. (26)

As growing numbers of lawyer's study, work, and live in more than one jurisdiction, the Double Deontology Dilemma is becoming more common.

2.3. ARBITRATION COUNSEL ARE PARTICULARLY EXPOSED TO BOTH TYPES OF ETHICAL DILEMMAS.

Two global trends are making international arbitration lawyers highly susceptible to both Overlapping Standards and Double Deontology Dilemmas: The Specialisation Trend and the Democratisation Trend.

a) Specialisation Trend

The practice of international arbitration has enjoyed growing popularity for several decades, and lawyers are gradually becoming more specialised in their services.

P 60 ● In traditional arbitration hubs like London or Paris, international arbitration lawyers have slowly developed their practice over decades in dedicated arbitration groups. Most of these professionals devote their practice to a specific area in international arbitration and invest very little time, if any, doing local litigation work. Emergent practices are also going through a similar transition; over time, these lawyers are becoming more specialised and more sophisticated, and their advice, more strategic.

In some complex or technical sectors, like energy and natural resources, sports, and maritime, specialised arbitration centres have developed, further increasing the specialisation of lawyers in those fields. (27)

As lawyers become more specialised, offering legal services no longer bound by their geography, their expertise becomes the epitome of 'international'. When each case involves a different set of rules —a unique puzzle between the law of the dispute, the

arbitration agreement, the seat, the parties' nationality and that of the tribunal— the lawyer's service is no longer that of a particular jurisdiction; instead, it is the know-how for cracking an international arbitration puzzle. This trend further enhances both dilemmas.

b) Democratisation Trend

For many years, international arbitration remained 'a relatively small, interconnected and cohesive group'. (28) The field was critically described as a 'club' or 'mafia', closed to minorities. (29) The arbitrator's community was criticised for making it 'difficult for talented newcomers to position themselves for a significant number of appointments'. (30)

However, the field, which was predominantly white, male, and English-speaking only twenty years ago, (31) has become far more diverse over the last decade.

P 61 First, while much remains to be done, as the practice gradually evolves, it attracts growing numbers of lawyers from underrepresented jurisdictions with different cultural and legal backgrounds. Second, the evolution of international commercial projects means that high-value, complicated disputes arise, and these call for large teams of lawyers to collaborate on. Third, intense commercial negotiations by sophisticated parties often result in a hybrid of rules between the laws of the agreement, the seat, and the arbitration agreement, necessitating collaboration between lawyers from different jurisdictions when disputes arise.

These universal slow-paced trends were accelerated during the COVID-19 pandemic. As the pandemic spread, tribunals and parties brought proceedings online. (32) One positive effect was making arbitration more accessible to traditionally underrepresented geographies. Opening the market to new and diverse arbitrators was foreseen by some practitioners; however, the community remained relatively sceptical that the pandemic would create a lasting change in that sense. (33)

In retrospect, technology carved a path toward accessibility for underrepresented groups, resulting in a larger, more diverse group of practitioners involved in international arbitration. (34) Africa is an interesting case study. For decades, African parties were involved in arbitration mainly as disputants, less so as counsels and arbitrators. (35) The pandemic opened the door for more African arbitrators and lawyers to take part in the
P 62 global pool of matters and develop their arbi tration practices. (36) While there is still a long way to go, African practitioners are more involved in international arbitration than before the pandemic.

The combination of these trends creates a truly international community where lawyers offer their services globally. The mirror image is sophisticated clients who seek from their lawyers more than local legal knowledge. The ultimate international arbitration lawyer speaks several languages, has work experience in different jurisdictions, is licensed in more than one country, and moves freely between seats of arbitration, institutional rules, and local requirements, collaborating with lawyers from different legal systems on each case, as the need arises. These trends are welcome; however, they create the perfect setting for ethical dilemmas to emerge.

3. THE COMMUNITY'S SEARCH FOR A SOLUTION

Over the last 20 or more years, the international arbitration community has been analysing the Overlapping Standards and Double Deontology Dilemmas. Much has been written of potential frameworks to resolve these issues, with a large number of authors suggesting a uniform code that the community would need to embrace. Some codes were indeed developed and even effected as institutional rules; however, the community has not substantially embraced any of them.

One main explanation is that while codes of conduct may mend misalignment between opposing lawyers and ease the Overlapping Standards Dilemma to some extent, they cannot fix it wholly, and they can also not ease the Double Deontology Dilemma. Gary Born has been quoted saying that 'any guidelines issued would sit on top of national ethical standards that are applicable to the parties. It is therefore unclear whether another set of guidelines would clean up the teenager's bedroom or whether it would simply add noise to it'. (37)

The popular solutions suggested by scholars and the potential reasons why these have
P 63 not enjoyed popularity in practice are considered below.

3.1. SOFT LAW INSTRUMENTS–THE IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION

The most popular ethical code is the International Bar Association's Guidelines on Party Representation in International Arbitration ('IBA Guidelines'). The guidelines were issued in 2013 as a work product of the Task Force on Counsel Conduct in International Arbitration, established in 2008 by the IBA Arbitration Committee ('Task Force'). Preceding the specialised international arbitration guidelines was the IBA Code of Ethics, which governed 'any lawyer of one jurisdiction in relation to his contacts with a lawyer of

another jurisdiction or to his activities in another jurisdiction'. (38)

The Task Force was mandated to determine whether diverse and potentially conflicting rules and norms may undermine the fundamental fairness and integrity of international arbitral proceedings. In a 2010 survey commissioned by the Task Force, respondents acting as counsel expressed that they are commonly uncertain which ethical regulations apply to them in arbitration proceedings, and 87 % stated that they are never, or only sometimes, sure what ethical regulation applies to their opposing counsel. (39) The Task Force concluded that specific ethical guidance was required.

The IBA Guidelines are nonbinding and only apply where parties agree to use them or are being directed to by a tribunal with authority to do so. The guidelines do not replace any other code of conduct that may apply but, rather, coexist alongside them. (40)

The arbitration community celebrated and promoted the IBA Guidelines. (41) Eighty-five percent of the 2015 Queen Mary Survey respondents were already aware of them, (42) and 24 % or more considered them effective or found them to be the best way to regulate
P 64 party representative conduct. (43) Other than some ● criticism that the guidelines were biased toward common law ethical rules, (44) the community generally received them well.

However, we do not know to what extent parties nowadays adopt the guidelines and to what extent tribunals address them in cases where potential misconduct is suggested. The available statistics only show that, prior to 2016, only 20 % of arbitrations involving issues of counsel conduct referenced them, and that, even when they were referenced, only 19 % of tribunals felt bound by them. (45)

It would be interesting to see updated empirical information on the use of the guidelines; however, in any event, the guidelines cannot act as a global solution, as they may only provide an additional layer of rules to those already applicable.

3.2. INSTITUTIONAL RULES: THE LCIA GUIDELINES

The London Court of International Arbitration (LCIA) was the first institution to impose ethical standards for counsel conduct. Article 18.5 and the General Guidelines for Parties' Legal Representatives, set in Annex to the 2014 LCIA Rules, establish a framework for regulating the ethical conduct of 'authorised representative appearing by name before the Arbitral Tribunal'. The annex is a shortened version of the IBA Guidelines; however, unlike those guidelines, it is compulsory.

The LCIA Rules expressly establish (in Article 18.6) the power of the tribunal to determine violations by the parties' authorised representatives and to order sanctions against them. However, such representatives are third parties to the arbitration agreement, which means the tribunal has no direct jurisdiction over them and cannot impose sanctions on them. The solution is mandating the parties to ensure that their authorised representatives agree to comply with the LCIA Guidelines. (46)

The list of sanctions that can be imposed on counsel as a disciplinary action includes a written reprimand, caution, and 'any other measure necessary to maintain the general
P 65 duties of the tribunal'. A public record of redacted sanctions ● could help develop a precedent as to what types of conduct should elicit sanctions from the Tribunal. (47) However, currently there is no public evidence that an LCIA tribunal has ever imposed sanctions, and so the guidelines have yet to be proven effective. (48)

On one hand, the rules create an ethical standard that exists across the LCIA and binds every party and named counsel appearing before an LCIA tribunal. However, the Annex does not derogate from any other ethical code that may apply, and paragraph 1 of the guidelines establishes that, in case of a conflict, the applicable mandatory rules have priority over them; (49) thus, it is also unfit as a global solution.

3.3. CHECKLIST METHOD BY ADV. CYRUS BENSON

Cyrus Benson proposed the Checklist Method. (50) The checklist identifies areas where ethical standards differ among counsel and offers solutions (obligations) that parties would need to adopt or reject. The checklist itself may be well thought out and elaborated to cover the most common issues; however, its use in practice is minimal, and there are many potential reasons for that.

While the checklist could be an effective tool in identifying where differences exist, it too has very little ability to resolve most of them, as it may only act as an additional undertaking and cannot derogate from any other ethical codes that apply.

However, the checklist's most significant disadvantage is its flexible nature. When counsel are asked to pick and choose the types of conduct they are willing to be bound by, the potential of identifying a magnitude of areas of disagreement is substantial. The checklist requires parties to spend considerable resources early in the proceedings, when resources might be stretched, to identify hypothetical issues that might not mature in the course of the procedure as well as other issues that the lawyers' ability to resolve is minimal.

Counsel may also be reluctant to collaborate with this exercise for fear that the tribunal
P 66

P 66 will pressure them to make painful concessions. No counsel would vol● unteer to have heated discussions with their counterparties early in the proceedings on theoretical issues that might never mature —let alone expose themselves to the tribunal's scrutiny on such issues.

Scrutiny from the tribunal may also result from counsel's reluctance to accept a more demanding standard than that which applies to them. Arbitrators are (many times) lawyers, too; when there is disagreement between counsel on ethical matters, the arbitrator may naturally lean toward counsel who come from a similar legal or cultural background to them.

The situation becomes more complicated when counsel considers that agreeing to a higher standard would be a tactical disadvantage to their client. In such a scenario, their obligations toward their client would restrict them from agreeing to the proposed solution. However, they would likely not volunteer to have that discussion with their counterparty and the tribunal so as not to expose what those tactical advantages are and what potential advantage they are seeking to maintain. (51)

To conclude, the exercise would be too expensive in terms of advocacy time, potential conflict with the tribunal, and possible waiver of tactical disadvantages in return for yet another partial solution.

3.4. TRIBUNAL'S DISCRETION

Lawyers acting as arbitrators also carry ethical burdens critical for the flourishing of arbitration, including ensuring the efficient and fair conduct of the proceedings *vis-a-vis* the creation and maintenance of a level playing field between parties.

Several authors consider the tribunal to be the most efficient instrument to handle counsel's ethical dilemmas. Tribunals may, at the first procedural conference, identify potential issues, offer solutions to diminish them, and allow the parties to agree (or make the decisions for them using their inherent powers). (52) While this solution may work on an ad hoc basis, it suffers multiple disadvantages that make it unfit as a global solution.

First, some debate exists on whether tribunals possess the power to impose ethical rules
P 67 on counsel; it is generally agreed that tribunals cannot override the ● domestic ethical rules of the seat of arbitration and those of the counsel's bar association when they apply. One must also question whether arbitrators have the power to enforce the domestic ethical rules of any counsel appearing before them. Moreover, their authority to impose sanctions on parties for counsel misconduct is also limited and depends on such factors as the institution rules, the arbitration agreement, and/or any ad hoc agreement between the parties.

Second, while research has found that diverse teams perform better (53) and that diversity within a tribunal positively affects users' perception of its independence, (54) a diverse tribunal may encounter internal disagreements. As the diversity in arbitrators grows, arbitrators, like the counsel that litigate before them, may bring different approaches and beliefs to the table, and they may agree with the ethical standpoints of one of the parties' counsels, or none of them; the same goes for their fellow tribunal members.

Third, being dependent on community feedback and referrals, tribunals may be reluctant to penalise counsel for misconduct out of fear of not receiving future appointments. (55) The very few statistics available show that tribunals do not commonly encourage parties to comment on ethical matters at the beginning of proceedings, and they rarely do so without being prompted by the parties. (56) As mentioned above in relation to the IBA Guidelines, at least as of 2016, tribunals tend not to use the guidelines; and when tribunals do use them, they tend to consider themselves not bound by them. In relation to the LCIA Guidelines, there is no public evidence to suggest that tribunals are imposing the sanctions that the rules allow them to.

4. ANOTHER PERSPECTIVE

There is another possible overreaching reason why the solutions presented by the community have never been significantly adopted. This is a far more self-serving reason than the traditional ones referred to above; its potential adverse effect on the popularity of international arbitration should not be overlooked.

P 68 ● The idea that a lawyer would voluntarily undertake harsher ethical rules than those they consider themselves bound by is a naïve one. Where ethical ambiguity exists, it should come as no surprise that lawyers would use that uncertainty to their (and their client's) advantage instead of actively working to eliminate it. Lawyers bound by more permissive rules would likely not be willing to voluntarily bind themselves by substantially more restrictive regulations, as the result would be to forgo the strategic advantage they have over their rivals. As suggested above, such conduct might also expose the lawyer to claims by their aggravated client, to which the lawyer owes duties of care, including the obligation to act in the client's best interests at all times. At the same time, lawyers who are subject to more restrictive codes of conduct are unable to adopt more liberal standards.

Sophisticated counsel with understanding and experience of arbitration, its procedural flexibility, and its grey areas win arguments and sometimes even cases by relying on the very same traits that make arbitration so popular, especially its flexibility. In the same way that counsel would persuade a tribunal to adopt a procedural approach beneficial to their client (*e.g.* implementing a stringent document-disclosure approach or ruling on the basis of documents only), they would act to eliminate any ethical disadvantages they or their team may suffer (*e.g.* by adding counsel from an ethically lenient jurisdiction to the team) and to analyse which ethical rules may bind their counterparty and use that knowledge to their advantage.

The 2015 Queen Mary Survey offers some telling statistics in this regard: while less than half of respondents felt that the conduct of party representatives should be regulated, almost 70 % of the in-house counsel subgroup voted for greater regulation of party representatives. (57) Clearly, lawyers acting as counsel prefer more freedom than what lawyers acting as clients consider appropriate.

The resistance to self-policing is evidenced in another growing trend where sophisticated lawyers deploy arbitration's most celebrated traits to benefit their clients: the noncompliance with arbitral awards. The enforceability of arbitral awards is one of international arbitration's most prominent advantages. Users of arbitration have grown to assume that awards will be complied with voluntarily and that, if they are not, then judicial enforcement will be quick and straightforward.

P 69 However, arbitration awards are growing more complicated to enforce in certain jurisdictions and more resource-heavy to enforce in most jurisdictions. As ● increasing numbers of arbitration debtors do not voluntarily pay awards, judicial enforcement is becoming an inevitable step in arbitration proceedings.

While the 2008 Queen Mary Survey reported that arbitral awards were voluntarily complied with in over 76 % of cases, an updated survey returned very different results. (58) A 2023 survey by Burford Capital found that voluntary payment of awards is down to 50 %, with only 9 % paid in full and on time. (59) Pragmatic arbitration lawyers would likely advise their clients that judicial enforcement proceedings can act as an effective tool to minimise award payment.

The rise of award resistance is owed partly to growing interest rates and declining economic conditions but also to the evolution of enforcement-resisting advice given to award debtors, and litigation funders are finding long enforcement-resistance processes to be more popular than before. (60) Filing for setting aside an award or negotiating an award payment has become the norm in non-repeated relationships, even in some cases where there is little prospect of setting aside the award.

While the data to test this trend are still minimal, the available information supports the proposition that strategic nonpayment has become another tool in the toolbox of arbitration lawyers. This is a dangerous trend whereby lawyers are potentially abusing the traits of arbitration —in this case, its enforceability— to promote their client's objectives, even at the price of slowly eroding their practice advantages and bases for success.

5. CONCLUSION AND WORD OF CAUTION

P 70 Scholars and practitioners have offered different solutions to the ethical dilemmas experienced by international arbitration lawyers, but none have stuck. This ● paper suggests that the community's resistance to self-policing is partly due to lawyers' unwillingness to take on strict ethical rules that would lose them strategic advantages over their counterparty.

Circling back to lawyer's obligations toward the different actors of legal proceedings, when lawyers promote international arbitration over other means of dispute resolution, their duties of care —as members of the legal profession, representatives of clients, and officers of the legal system (61) — oblige them to contribute to international arbitration's improvement or, at the very least, avoid any action to cause its decline. When counsel engages in conduct disadvantaging its counterparty, they actively contribute to the creation of an unfair advantage to one party to the arbitration. By doing so, they are threatening the basic fairness of arbitration, acting against their duties of care.

As with many other things in life, you cannot have your cake and eat it too. This paper calls for the upholding of high ethical standards not only because it is the right thing to do but also because if we, as a community, do not, we risk harming our field of practice. For arbitration to remain a leading international dispute-resolution solution, it must maintain its fairness, or it will become less attractive to users.

However, trying to unify a large and ever-evolving community to actively work toward a single solution, especially when no one solution is devoid of shortcomings, is unrealistic. Nevertheless, the fact that no one solution can cure the whole of the problem does not mean that the community should not promote solutions that can partly remedy it.

Out of the solutions suggested, the one that has the potential to make the fastest and most substantial impact is the institutional solution. While no public data conclude the success of the LCIA Guidelines, the guidelines' nonoptional nature could assure a

P 71 considerable change if implemented in a large number of cases. Since 2019, the leading institutions have governed over 7,000 new cases each year. (62) If these institutions impose ethical obligations on their users, they could have a massive positive impact on the market. (63)

Arbitration institutions are competitors, each promoting its most flattering advantages to attract more users to adopt its rules into their commercial agreements. Implementing compulsory ethical guidelines by arbitration institutions will promote the fairness of their procedures and make them more popular among users —which is why all institutions should move quickly to do so.

Implementing ethical guidelines would also help reduce the chances of institutional awards being scrutinised, set aside or remitted by local courts through judicial enforcement. As this paper is being drafted, the judgment in The Federal Republic of Nigeria v Process & Industrial Developments Limited [2023] EWHC 2638 (Comm) was being handed. The English Commercial Court upheld a challenge by Nigeria to three English seated arbitral awards worth $11 billion, finding they were procured by fraud and in a manner contrary to public policy, *inter alia*, as two of P&ID's counsels in the arbitration received and used Nigeria's internal privileged legal documents. An analysis of this judgment is not within the scope of this paper, and an order specifying its overall outcomes is still pending; however, the judgment itself will undoubtedly cause much debate in the international arbitration circle. Not only because it may devastate the reputation of the relevant counsels (64) but also because it has the potential to affect the reputation of arbitration as an institution.

To conclude, a word of caution. Lawyer, beware! The result of our actions or inactions could come quickly, 'it only takes 5 seconds to destroy one's integrity that took a lifetime to build'.

Arbitration is, after all, voluntary; if it stops being a better solution, other solutions will prevail.
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18) The Federal Lawyers' Act (*Bundesrechtsanwaltsordnung–BRAO),* Article 43.
19) See ZHARIKOV, *supra* note 4, at 1.
20) R. W. WACHTER 'Ethical Standards in International Arbitration: Considering Solutions to Level the Playing Field'. *Geo. J. Legal Ethics* 24 (2011), pp. 1148-1149.
21) See BENSON, *supra* note 12, at 84.

22) Such as the SRA's Overseas Practice Rules, which govern English solicitors, or the European Union Code of Conduct for European Lawyers. N.T., Matthew 'Double Deontology and the CCBE: Harmonizing the Double Trouble in Europe'. *Wash. U. Global Stud. L. Rev.* 6 (2007): 459; Code of Conduct for European Lawyers (1988, amended in 2006); FRONK, MATTHEW S. 'Making Mistakes Abroad: How the Global Delivery of Legal Services Created a Need for a Uniform Ethics Code'. *Mich. St. U. Coll. L. Int'l L. Rev.* 21 (2013), p. 503.

23) As is the case under the Model Rules of the American Bar Association. American Bar Association, *Model Rules of Professional Conduct* (2023), Rule 5.5.

24) See WACHTER, *supra* note 19, at 1143.

25) See GOLDOFSKY & ROTHSTEIN, *supra* note 4.

26) C.A. ROGERS, 'The Ethics of Advocacy in International Arbitration'. Penn State Legal Studies Research Paper No. 18-2010, *Penn State Law* (February 25, 2010), p. 5.

27) Ł. GEMBIŚ (K&L Gates, Poland), 'Are We Dealing with the Trend of Specialised Arbitration?', Kluwer Arbitration Blog, May 9, 2016, <https://arbitrationblog.kluwerarbitration.com/2016/05/09/are-we-dealing-with-the-trend-of-specialised-arbitration/>; G. LAZAREV, 'Thoughts on specialist arbitration: centres, rules and arbitrators', Practical Law Arbitration Blog, May 9, 2016, <http://arbitrationblog.practicallaw.com/thoughts-on-specialist-arbitration-centres-rules-and-arbitrators/>.

28) C. A. ROGERS, & F. BRODLIJA. 'Arbitrator Appointments in the Age of COVID-19'. Remote International Arbitration: The Covid-19 Revolution, *Kluwer Journal of International Arbitration* (2020), p. 4.

29) P. MARZOLINI, 'Counsel Ethics in International Arbitration: Is There Any Need for Regulation'. *Indian J. Arb. L.* 6 (2017), p. 2.

30) See ROGERS, *supra* note 28, at 4.

31) K. V. S. K. NATHAN, 'Well, Why Did You Not Get the Right Arbitrator?', 15 Mealey's International. Arbitration Reports 24 (July 2000).

32) E. VIDAK-GOJKOVIC & M. MCILWRATH, 'Chapter 11: The COVID-19 Revolution: The Future of International Arbitration Is Not Over Yet', in Maxi Scherer, Niuscha Bassiri, *et al.* (eds.), International Arbitration and the COVID-19 Revolution, Kluwer Law International, (2020), p. 2.

33) International Arbitration Survey: Adapting Arbitration to a Changing World by Queen Mary University of London and White&Case LLP (2021), available at https://arbitration.qmul.ac.uk/research/2021-in-ternational-arbitration-survey/('2021 Queen Mary Survey'), where only 13 % of the respondents agreed that the pandemic would promote diversity in tribunal members.

34) International Arbitration Survey: Future of International Energy Arbitration Survey Report by Queen Mary University of London and Pinsent Masons (2022), p. 6; However, with the movement toward the use of technology also came challenges, as various regional areas faced unequal access and familiarity with technology; B. GIUPPONI & OLMOS. ' 'Virtual' Dispute Resolution in International Arbitration: Mapping Its Advantages and Main Caveats in the Face of COVID-19'. *The Impact of Covid on International Disputes.* Brill Nijhoff, (2022), pp. 71-72.

35) E. ONYEMA, 'Chapter 33: African Practitioners, International Arbitration, and Inclusivity', in Cavinder Bull, Loretta Malintoppi, *et al.* (ed.), ICCA Congress Series No. 21 (Edinburgh 2022): Arbitration's Age of Enlightenment? ICCA Congress Series, *ICCA & Kluwer Law International* (2023), Volume 21, p. 3.

36) Survey on Costs and Disputes Funding in Africa-by-Africa Arbitration Academy (April 2022), p. 31; SOAS Arbitration in Africa Survey Report: Africa-connected Arbitration Perspectives on Major Global Issues by SOAS University of London and Pinsent Masons and Broderick Bozimo & Company (2022), p. 12.

37) R. KEATING, D. BRYNMOR & K. C. THOMAS, 'Different Approaches to Counsel Conflicts of Interest: Moving Towards a Common Duty'. *BCDR International Arbitration Review* 7.2 (2020), pp. 11-12.

38) International Bar Association. *International Code of Ethics.* (1956, amended 1988); International Bar Association. *IBA Guidelines on Party Representation in International Arbitration*, Preamble.

39) 'IBA Survey on Counsel Ethics in International Arbitration'. *Practical Law*, 2010, <https://uk.practical-law.thomsonreuters.com/3-5030627?transitionType=Default&contextData=%28sc.Default %29>.

40) See KEATING & THOMAS, *supra* note 36, at 12.

41) Alexis Mourre, President of the ICC International Court of Arbitration, 'Message from the president' in ICC Dispute Resolution Bulletin 2021, Issue 2.

42) International Arbitration Survey: Improvements and Innovations in International Arbitration by Queen Mary University of London and White & Case (2015). ('2015 Queen Mary Survey').

43) See *supra* note 42. at 40.

44) International Arbitration Bar Association Guidelines and Rules Subcommittee, Report on the Reception of the IBA Arbitration Soft Law Products (2016), p. 81, § 220.

45) See *supra* note 44 at 77, § 212.

46) M. SCHERER, 'Chapter 20: Authorized Representatives', in M. SCHERER, L. RICHMAN *et al.*, Arbitrating under the 2020 LCIA Rules: A User's Guide, Kluwer Law International (2021), p. 341.

47) See SCHERER, *supra* note 48, at 347.
48) P. CLIFFORD, & S. WADE, 'A Commentary on the LCIA Arbitration Rules 2020'. *(Sweet & Maxwell)* (2022), p. 286.
49) See SCHERER, *supra* note 48, at 347.
50) See BENSON, *supra* note 12, at 78.
51) See WACHTER, *supra* note 19, at 1158.
52) See WACHTER, *supra* note 19, at 1159 – 1160; See PARK, *supra* note 49, at 410.
53) E. FISCHER & M. ROOPA, 'Challenging Homogeneity in International Arbitration: Towards Greater Diversity and Inclusion in Counsel Teams'. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 89.2 (2023), p. 120.
54) 2021 Queen Mary Survey, p. 2.
55) See ZHARIKOV, *supra* note 4, at 41.
56) See ZHARIKOV, *supra* note 4, at 41.
57) 2015 Queen Mary Survey, p. 44.
58) International Arbitration Survey: Corporate Attitudes and Practices by Queen Mary University of London and Pricewaterhousecoopers (2008). The survey further provided that in over 57 % of cases when enforcement was required, it took less than a year for awards to be enforced and that parties were usually able to recover more than 75 % of the value of the award; Rowley, William J., 'Preface', Guide to Challenging and Enforcing Arbitration: Third Edition, *Law Business Research Ltd* (2023).
59) GC Survey: In-house lawyers on risk, litigation and what they expect from law firms in an uncertain economy by Burford Capital (2023), pp. 5-7.
60) G. BLUESTONE, *et al.*, *Judgment Enforcement and Litigation Finance: A Growing Trend in International Arbitration*, February 2023, <https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2023/02/02/-judgment-enforcement-and-litigation-finance-a-growing-trend-in-internation-al-arbitration>; Litigation Finance Journal, *Should Judgement Enforcement Move In-House?*, April 2022, <https://litigationfinancejournal.com/should-judgement-enforcement-move-in-house/>.
61) American Bar Association, *Model Rules of Professional Conduct* (2023), Preamble.
62) M. ALTENKIRCH, *et al.*, 'Arbitration Statistics 2022: The Number of Arbitration Proceedings Continues to Drop'. *Global Arbitration News*, Baker McKenzie, 2 Oct. 2023, <www.globalarbitra-tionnews.com/2023/10/02/arbitration-statistics-2022-the-number-of-arbitration-proceedings-continues-to-drop-but-the-amount-in-dispute-increases/>. Note that while the overall trend is showing steady growth year after year, 2021 and 2022 have shown somewhat of a decline in the number of new cases.
63) There is one possible deviation from the format of the LCIA Rules that institutions should consider: deflecting potential sanctions from the parties to the counsel engaging in or conducting the unethical action. There are several potential concerns with such proposed deviation; however, they are not within the scope of this paper.
64) At the endnote to the judgment, Knowles J indicated he would be referring a copy of the judgment to the bar associations of both lawyers, so that they could assess the professional consequences of their conduct.