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**"How to maintain a fair and just process when counsel, clients and  
co-arbitrators appear to be conspiring against you"**

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# "How to maintain a fair and just process when counsel, clients and co-arbitrators appear to be conspiring against you"

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## **1. Introduction**

The arbitration process is, by its very nature, fraught with uncertainty due to a large number of variables. Despite the many months (and sometimes years) of preparation that are devoted to a party's case, the success of the arbitration for all concerned rests mostly on the application of a fair and just process throughout the entire proceedings, and not only at the hearing. While any form of equivocation is typically unwelcomed in any aspect of an arbitration, it is arguably *most* unwanted when it comes to process, as the rules by which the game is played must be fair and clear for all involved in order for the game to be played fairly at all. Thus, as an arbitrator, and more specifically as the president of a tribunal, it is important to ensure that the mechanics of the procedure by which the dispute is resolved are well thought out and account for all circumstances. After all, being 'conspired against' by counsel, clients and co-arbitrators *really* only becomes an issue when any of these entities' actions go beyond the standards acceptable in arbitration.

Maintaining a fair and just process throughout an arbitration normally requires strict adherence to the general notions of good faith and equal treatment of parties. Such an observation may be readily drawn from the obvious conclusion that no process may be contemplated to be 'fair' or 'just' where it benefits one party to the detriment of another, or where it allows for, or promotes, a party's deviance or commission of foul play. Any such threats to the integrity of an arbitration may usually be said to fall within one (but sometimes more) of three broad groups of issues: arbitrator misconduct, counsel misconduct, or parties approaching the proceedings in bad faith. By way of example, a scenario that involves conduct from two of these groups of issues might be where the relationship between counsel and arbitrator is one which gives rise to justifiable doubts regarding the impartiality and independence of the arbitrator, or one which incites a real danger of arbitrator bias.<sup>1</sup> In this case it is practically likely that any duty to avoid such a conflict will rest mostly with the arbitrator, however it is possible to see that the impropriety may realistically exist on the part of both the arbitrator and counsel.

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<sup>1</sup> United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, article 12.

The actions of the arbitrators are usually those most closely watched by anyone involved in an arbitration, as well as by the courts and professional bodies. Thus, while arbitrator misconduct is typically more easily identifiable, and bears quite serious repercussions for the arbitrator(s) found to have misconducted themselves, counsel misconduct often goes unnoticed, and the consequences for the counsel concerned - if any - are often uncertain. In continuing this trend of ambiguity, party misconduct (by intentionally acting in bad faith) is even more difficult to diagnose and discipline accordingly.

In light of the immense importance of a fair and just process and the confusion that surrounds many of the threats to such a procedure, this paper will identify and address some of the common problems under each of the three abovementioned categories, as well as the attempts that have been made to thwart their impact on the arbitral process and the relative effectiveness of such solutions. However, in considering any potential resolutions to these problems which tarnish arbitration, the age old adage which has been noted by many arbitration practitioners in the past must be borne in mind: we must be careful to cure the disease, and in doing so, not kill the patient.

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## **2. Arbitrator Misconduct**

The astronomical increase in both international and domestic trade and commerce witnessed in the past few decades and the sheer size of the corresponding disputes which have evolved from such activity mean that arbitrators today, more than ever, have a heavy responsibility resting on their shoulders. This is exacerbated by the absence of the possibility of an appeal to a court on a point of law, which means that arbitrators are under considerable pressure to get it right the first time.

The disputes that find their way to arbitration are increasingly high value and complex, especially as institutions develop procedures to enable consolidation of disputes arising out of related contracts or involving multiple parties. Alongside the inevitable challenges and difficulties that arise from handling arbitrations of this complexity, arbitrators are faced with the procedural consequences of lawyers who are often willing to go to any length to satisfy their clients' expectations. Tribunals are quite often faced with more procedural issues than would arise in a first instance case in the courts, and are compelled to give seemingly unmeritorious applications more attention than would a judge.

Given these difficulties, the overwhelming majority of arbitrators do perform commendably in navigating the arbitration through the procedural minefield often created by the parties, and arriving at the correct destination on the merits of the dispute. In light of these difficulties, and given the enormous growth in the use of arbitration, a number of concerns regarding the conduct of arbitrators have come to the attention of the global arbitration community in recent times. Such concerns include that arbitrators face a temptation to be biased towards a particular party in an arbitration, or class of party, in an effort to become more appealing for reappointment purposes, or that a number of arbitration practitioners work as

both counsel and arbitrators, or share chambers/firms/offices with other practitioners who are involved in the same arbitration, which might also give rise to concerns of bias. More generally, however, there is a fear amongst the arbitration community that there is simply insufficient disclosure of arbitrators' conflicts of interest. In terms of party favouring, criticisms regarding the 'repeat player' type of arbitrator have abounded, however the arbitration community has refuted such accusations, claiming that they are not only overstated but also rare amongst the end users of arbitration.

In an attempt to thwart the potential impact of such problems, it has been suggested that a universal code of conduct and practice should be developed for arbitrators, and that such a code would ensure a level of oversight and accountability for arbitrators that would in turn provide a greater level of reassurance, not only to the end users of arbitration, but also to fellow arbitration practitioners and, ultimately, to the courts. It is quite likely that the creation and implementation of such a code would benefit the arbitration profession greatly - at a minimum, ensuring that all arbitrators abide by the same high standards that most currently abide by would certainly improve the public's perception of the profession.

In this context, there are various 'hard' and 'soft' laws which attempt to regulate arbitrator conduct in Australia and New Zealand, as well as in other international jurisdictions.

## **2.1 The Legislative Position on Arbitrator Conflicts in Australia and New Zealand**

To begin our analysis on arbitrator conduct, it is helpful to first look at the 'hard' Australian and New Zealand legislative construction of the most hotly discussed issues with respect to arbitrator ethics: conflicts. Issues of conflict of interest and disclosure by arbitrators in domestic and international arbitrations in Australia are essentially governed by article 12 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (**Model Law**), which provides:

- "(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
- (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

The terms of article 12 are given effect by Australia's *International Arbitration Act 1974* (Cth) (**IAA**), and captured by sections 12(1) - (4) of the State/Territory based *Commercial Arbitration Acts* (**CAAs**). New Zealand's *Arbitration Act 1996* (NZ), which governs both international and domestic arbitrations in New Zealand, adopts these terms as they are in sections 12(1) and (2). However, the Australian legislation goes beyond the scope of the Model Law. Article 12 of the Model Law is supplemented at section 8A of the IAA, which clarifies the circumstances in which 'justifiable doubts' arise:

- "(1) For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration.
- (2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration."

The same provisions apply to domestic arbitrations, with sections 12(5) - (6) of the CAAs being cast in identical terms.

In substance, these latter provisions employed by the Australian legislation capture claims of both "actual" and "apprehended" bias. Actual bias would arise during the conduct of the arbitration as it flows from the actual manifestation of the conduct of an arbitrator. A claim of actual bias would be made out where "the complaining party satisfies the court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavourably towards him, for reasons peculiar to that party, or to a group of which he is a member".<sup>2</sup>

On the other hand, imputed or apprehended bias is the perception of *possible* bias that arises out of the circumstances of the arbitrator, and would ordinarily be present prior to the arbitral proceedings. As such, concerns about apprehended bias are the source of the disclosure obligations that attach to arbitrators. Thus, although apprehended bias concerns the *appearance* of partiality rather than requiring proof of *actual* partiality, the test applied here is objective and does not depend upon the subjective concerns of the parties to the proceedings. Interestingly, neither Australian nor New Zealand law provides for separate standards of disclosure for presiding arbitrators and co-arbitrators.

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<sup>2</sup> *Bremer Handelsgesellschaft mbH v Ets Soules et Cie and Anthony G Scott* [1985] 1 Lloyd's Rep 160 at 164 per Mustill J.

## 2.2 The 2004 IBA Guidelines on Conflicts of Interest in International Arbitration

Moving away from the 'hard' law and into the field of 'soft' law, the global arbitration community's experience with the ethical standards published by the International Bar Association (**IBA**), the Guidelines on Conflicts of Interest in International Arbitration (**IBA Conflicts Guidelines**) and the Rules of Ethics for International Arbitrators (**IBA Ethics Rules**), has shown that a standardised set of expectations for arbitrators is likely to make it easier for arbitrators to ensure that they do not find themselves in breach of any ethical norms. What has also been experienced in the case of the IBA publications, and which is likely to occur with any similar standardised codes, is a reduction in parties' vexatious and unmeritorious claims for procedural error. This added benefit arises from the simple fact that codes clarify the differences between acceptable and unacceptable behaviour, thereby removing (not completely, but nevertheless to a large degree) any blurred lines between the two categories.

The IBA Conflicts Guidelines were developed between 2002 and 2004 by a Working Group consisting of the Arbitration and ADR Committees of the IBA. The IBA Conflicts Guidelines were produced in response to a growing need for guidance in relation to the identification, disclosure and effects of arbitrator conflicts of interest arising in international arbitrations.

The Working Group consisted of members from 14 different States, representing both civil and common law jurisdictions. Part of the preparation for the initial draft of the IBA Conflicts Guidelines consisted of the preparation by each member of a National Report, detailing the general policy of the relevant State in regards to arbitrator bias, the presence or not of a standard of disclosure, the position of the State in comparison to the particular rules of the 1987 IBA Ethics Rules relating to conflicts of interest (Rules 3 and 4),<sup>3</sup> and a discussion of Article 6 of the European Convention on Human Rights. In addition, each individual member was required to draw up its own definition of the policy of bias and disclosure.

The IBA Conflicts Guidelines went through two drafts before the final version was published in July 2004. The first draft was produced following discussions between the members of the Working Group alone. The second draft was the result of the comments, criticisms, suggestions and input of a larger range of participants, including various international arbitral institutions. The Working Group subjected the second draft to a "hazardous operation review", whereby the opinions of leading practitioners around the world were sought and many of their suggestions were incorporated in the third and final version of the IBA Conflicts Guidelines. In an effort to maintain contemporaneity, which doubles as evidence of continued progress in the field of arbitrator conduct regulation, the IBA has established a taskforce for the review and updating of its Conflicts Guidelines and is contemplating the establishment of a taskforce for the revision of its Ethics Rules.

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<sup>3</sup> Per the introduction to the IBA Conflicts Guidelines, it is important to note that the IBA Ethics Rules cover more topics than the IBA Conflicts Guidelines. Thus, they remain in effect as to subjects that are not addressed by the IBA Conflicts Guidelines, however are superseded insofar as they overlap with the IBA Conflicts Guidelines.

The result of the labours of the Working Group was a set of guidelines which, although it draws on local standards, seeks to put forward a general standard of best international practice in relation to the identification and management of conflicts of interest of arbitrators participating in international arbitrations. In addition, it has been suggested that the IBA Conflicts Guidelines may also be of use to local courts and legislatures in the evaluation of conflicts where the judge-made law lacks clarity.

The IBA Conflicts Guidelines were designed to provide greater clarity and uniformity to the approach to conflicts of interest, in order to ensure that conflicts are identified where they arise, and managed appropriately. In this way, the IBA Conflicts Guidelines have not only aided in the ethical management of conflicts which pose a threat to the independence and impartiality of an arbitrator, but they also assist in preventing overly zealous parties from successfully challenging an arbitrator, and thereby disrupting and delaying the arbitration, where the situation does not pose a conflict. The IBA Conflicts Guidelines thus have a useful role to play both as protectors and moderators of challenges to arbitrators by parties.

In their introduction, the IBA Conflicts Guidelines make it clear that they do not supplant national laws. When evaluating potential conflicts of interest, the national laws and any arbitral rules applicable to any given arbitration must, of course, be given preference over the IBA Conflicts Guidelines to the extent of any inconsistency. However, the IBA Conflicts Guidelines, which examine the issues of impartiality and independence in considerable detail and from an international perspective, are intended to and indeed have the potential to effectively support and work alongside those laws, and fill the gaps where necessary and appropriate.

In drafting the IBA Conflicts Guidelines, the Working Group considered it important that the abstract principles be accompanied by realistic and concrete examples in order to aid in their practical application to international arbitrations. Together, based on case law and their own experiences, the members of the Working Group listed various recurring situations which were divided into three colour-coded categories:

- **Green list** - no conflict of interest; no need for disclosure.
- **Orange list** - the circumstances may give rise to justifiable doubts in the eyes of the parties as to the independence and impartiality of the arbitrator. Disclosure should be made in order to evaluate any potential conflict of interest, however disclosure will be purely to open the discussion and will not raise any presumption of disqualification. Parties may raise objections within 30 days of the disclosure, after which time the right to challenge the arbitrator is deemed to have been waived.
- **Red list** - the circumstances do give rise to justifiable doubts in the eyes of the parties as to the independence and impartiality of the arbitrator. Situations are divided into "waivable" (where the party may waive the right to challenge if certain



considerations are met, but must do so explicitly) and "non-waivable" (actual conflicts, where parties have no right of waiver).

Whilst the lists of situations enunciated in the IBA Conflicts Guidelines are by no means exhaustive, they do provide a good starting point for disclosure and for management of conflicts and thus, are able to serve as a benchmark of sorts for the evaluation of bias and partiality on the part of arbitrators.

Like the IBA Ethics Rules, the IBA Conflicts Guidelines specify that the independence and impartiality of an arbitrator should be determined objectively. Thus, an arbitrator should decline to act or step down where the circumstances give rise to justifiable doubts as to his or her independence and impartiality in the eyes of a reasonable third party with knowledge of the relevant facts. Where the arbitrator fails to step down, he or she should be disqualified. On the other hand, a subjective test should be applied in relation to the standard for disclosure. That is, disclosure should be made of circumstances which give rise to justifiable doubts in the eyes of the parties as to the independence and impartiality of the arbitrator.

The IBA Conflicts Guidelines stress that the mere fact of disclosure will not lead to disqualification of the arbitrator. This is an important point, as it shifts the focus from the revelation of actual conflicts, to the evaluation of potential conflicts. Disclosure under the IBA Conflicts Guidelines aims to be a springboard for open discussion between the parties. Under the older IBA Ethics Rules, which are now superseded in this regard, however, it is stated that failure to make disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification. Further, the IBA Conflicts Guidelines require that disclosure of potential conflicts be made regardless of the stage at which they become known. Thus, disclosure should not be avoided simply because the arbitration is already underway. Under the IBA Conflicts Guidelines, evaluation of potential conflicts is the paramount concern.

### **2.3 The 1987 IBA Rules of Ethics for International Arbitrators**

In the realm of the IBA's 'soft' law publications, given that arbitrator conflicts are now dealt with exclusively by the IBA Conflicts Guidelines, it is of no real use discussing the aspects of the IBA Ethics Rules which pertain to this subject. Instead, the other aspects of arbitrator conduct which the IBA Ethics Rules address would be much more appropriate for assessment, namely, acceptance for appointment, communications with parties, diligence duties, and involvement with settlement proposals.

Before any discussion is commenced, however, it is worth noting that these rules, as published by the IBA in 1987, have now become quite dated. For example, in no place do they address the issues that arise out of the use of technology, and their treatment of often complex issues such as arbitrator fees and confidentiality is sometimes underdeveloped. While it is true that such issues are either dealt with substantively by the institutional or other rules by which an arbitration is governed, or by legislation, it is

for the broader conceptual approach that the IBA Ethics Rules take that they have been understood to serve as more of an overarching collection of principles and guidelines which arbitrators should keep in mind when discharging their duties, rather than an exhaustive set of rigid rules and scaffolds for implementation by arbitrators. In this way, the title of the document might come across as a little misleading, and it may have been more appropriate for the IBA better to have re-established the rules as more of a 'code' or 'guidelines' for arbitrator ethics. This may well be one of the results of the IBA's committee for the review and revision of the rules if that endeavour is eventually pursued - only time will tell.

Nevertheless, the rules do remain useful, as they go to the core of an arbitrator's duties and provide some level of guidance. For example, the rules relating to acceptance of appointment (Rule 2) and arbitrators' duties of diligence (Rule 7) have as much meaning today as they did in 1987. These rules overlap somewhat, as they both focus on the requirements that arbitrators only accept an appointment if they are fully satisfied that they are competent to determine the issues in dispute, and if they are able to devote to the arbitration the time and attention that it requires. Rule 7 clarifies that the purpose of such requirements is so that the costs of the arbitration are not allowed to rise to an unreasonable proportion of the interests at stake in the dispute. This is a common fear of modern parties choosing to settle their disputes via arbitration and a recently well voiced criticism of the arbitration process as a whole. As such, these rules have remained quite relevant, and do well to assist in keeping both prospective and already appointed arbitrators in check.

Communication with parties is another important aspect of an arbitrator's duties, and it is no coincidence that Rule 5 of the IBA Ethics Rules, the rule that governs arbitrator-party communications, is the longest of them all. It is important that arbitrator-party communications are conducted in a way that is fair to all parties involved in the arbitration, and this typically means that arbitrator-party communications should be made in the presence of *all* parties to an arbitration, and never unilaterally. To this end, Rule 5.3 of the IBA Ethics Rules provides that arbitrators should avoid *any* unilateral communications regarding the case with any party or its representatives, and if such communication does occur, arbitrators should inform all other parties and arbitrators of its substance.

The Chief Justice of Singapore, His Honour Sundaresh Menon, spoke recently at a London School of Economics debate of his experiences with respect to unilateral arbitrator-party communications and the disasters that they bring for party relationships and effective dispute resolution.<sup>4</sup> In his speech, His Honour noted that such arbitrator behaviour has been commonly experienced in Asian arbitrations, with arbitrators sometimes going so far as to advise counsel on strategy and provide input into the merits of their case. At this point, His Honour also noted that such behaviour would not likely be seen in

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<sup>4</sup> The debate was titled "Is Self-Regulation of International Arbitration an Illusion?" and is available at [http://www.youtube.com/watch?v=\\_ShMaMWmHZ8](http://www.youtube.com/watch?v=_ShMaMWmHZ8).

arbitrations in other parts of the world, and it is these discrepancies between legal cultures that require uniform, effective and *enforceable* global rules as to arbitrator conduct generally, and as to arbitrator-party communications specifically.

An interesting omission of the IBA Ethics Rules is any attempt at the regulation of arbitrator-arbitrator communications at *any* point throughout an arbitration - before, during, or after. It has been suggested by many in the profession that there should be a system to manage these communications, and it is not difficult to envisage certain scenarios where, for whatever reason, two of three arbitrators in a tribunal may communicate and develop their reasoning together in neglect of the third arbitrator. Such conduct will not necessarily be detrimental to any of the parties directly, however it may have an indirect adverse impact on the costs of the arbitration and the otherwise efficient resolution of the dispute, as the relationship between arbitrators may sour and become unworkable. At this stage, there appears to be no formal standard of regulation for arbitrator-arbitrator communication, with the only form of governance stemming from the commercial disadvantages and impracticalities that may result from poor inter-tribunal communications as mentioned above. While this has recently been a widely discussed issue amongst the global arbitration community, it is unlikely that it has only become an issue as of late. Such concerns have more than likely existed since before the drafting of any formal regulations of arbitrator conduct, including the IBA Ethics Rules, and it is a wonder that none seek to address this important aspect of arbitration. Perhaps, as mentioned above, the proposed review and revision committee of the IBA will turn their mind to this issue in the future.

Finally, the issue of arbitrator-party communication also arises in the context of arbitrators' involvement in settlement proposals. Rule 8 of the IBA Ethics Rules provides that in the context of party settlement, arbitrators may make proposals for settlement to both parties simultaneously and preferably in the presence of each other, since the discussion of settlement terms with any one particular party in the absence of any of the other parties will likely result in the arbitrator's disqualification from the remainder of the arbitration. In this case, the repercussions of unilateral arbitrator-party communications are exacerbated given the obvious increase in severity of such communications in circumstances of settlement.

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### **3. Counsel Misconduct**

The extraterritorial condition of international arbitration brings with it great difficulty in defining which disciplinary system and rules of ethics would be applicable to the conduct of counsel acting on behalf of a party in an international arbitration. This difficulty also extends to the determination of which authority would police that misconduct, and enforce the sanction, if any. The lack of a uniform and enforceable code of ethics to regulate the legal representatives' activity in international arbitration has led to several unresolved questions: should the arbitral tribunal refer to the ethical standards of the jurisdiction, or

jurisdictions, where the counsel has been admitted to practice, or is it more appropriate to rely on the standards of the seat of the arbitration, taking into account that the counsel may not even be familiar with them? Counsel in arbitrations, especially international arbitrations, may come from completely different ethical standards backgrounds to one another, and choosing only to apply one such standard may result in an unequal treatment of both counsel and parties to the dispute.

Arbitral tribunals are continuously exposed to the question of whether the tribunal has a deontological obligation over the conduct of parties' legal representatives. The answer to this question, which, more specifically, centres upon exactly what may constitute ethical misbehaviour from counsel and what the arbitral tribunal's power to impose sanctions related to such misconduct is, is not currently found in any arbitral institution's rules. In this context, the assessment of costs should not be considered as a direct policing instrument to control the conduct of counsel - such an approach does not really go to the root of the problem, as it ends up practically affecting the parties more than having any positive impact on counsel's behaviour.

Arbitral tribunals have often confronted the issue of the counsel misconduct, with decisions leading to different, and sometimes conflicting or contradictory results. Indeed, some arbitral tribunals have declared themselves as competent to dismiss a lawyer, either by relying on general principles of ethics or in their obligation to treat parties fairly and equally. Contrarily, other international arbitral tribunals have found that the tribunal should not be, and is not entitled to such a power. A further consideration relates to whether the inherent power of the arbitral tribunal to preserve the integrity of the proceedings implies a power to exclude counsel from the arbitration for acts of misconduct.

The confusion in the way this aspect of international arbitration has been handled in the past reveals a need for the creation of some form of uniform code of ethics which is applicable to the particular conditions of international arbitration. The creation of such a set of rules would assist in preventing the arbitral tribunal from (somewhat) arbitrarily deciding on which set of ethical rules are to be applied to an arbitration. Such a set of rules would also assist in diminishing the lack of uniformity and transparency in arbitrators' decisions regarding counsel misconduct.

It is a reality that international arbitration continues to expand as international transactions become more frequent and more complicated. Thus, it is important that the confidence that international parties have put, and continue to put, in it is well preserved. The introduction of a uniform code of ethics for counsel would contribute well in preventing the loss of parties' confidence in the process and in ensuring that impunity does not become the norm, for when parties agree to arbitrate their disputes, they expect that the arbitral tribunal will do its best to guarantee a transparent and fair procedure.

The creation of a uniform code carries with it numerous areas of uncertainty; in particular, questions abound as to how such a code would be implemented and enforced. For instance, would it require incorporation into the arbitration rules of the major arbitral institutions, and, correspondingly, would this

strengthen the respective institutions' powers over the arbitrations which they administer? The answer to this question would be given in part by whether the functions assigned to the institution are so extended - that is, should the institution be limited to a mere *supervision* of the arbitral tribunal's use of the code, or should the institution play a more hands on role and be in *charge* of enforcement and sanctions on counsel? In any case, it is certain that the global arbitration community would not expect the intervention of national courts into the arbitral proceedings to police counsel conduct; this would likely cause extra delay and expenses, and would also likely result in inconsistent and arbitrary decisions.

There are many and various considerations which would require to be effectively attended to by a uniform code. It should ensure that no sanctions imposed have a negative effect on the parties acting in good faith; for example, imposing sanctions such as disregarding evidence, or drawing adverse inferences because of counsel's misbehaviour during the procedure. Furthermore, attempts to regulate counsel conduct must also take into account the reality of international arbitration's culture and the practices which have been developed. Thus, it remains a fact that a reputational factor between lawyers acting as arbitrators and as counsel may affect their decisions regarding the imposition of sanctions. This issue gives some force to the argument that, in the interests of impartiality, the arbitral institution should be the decision maker in the context of counsel misconduct.

Various attempts at the regulation of counsel conduct in international arbitration have been introduced by the IBA. Despite their status as 'soft' guidelines that are not binding in any sense, they act as a good reference point for arbitral tribunals and signify conscious efforts in the regulation of counsel ethics in international arbitration. In a more binding sense, the LCIA has recently announced that it will soon introduce a regulatory scheme for counsel conduct in the new edition of its arbitration rules - an astounding innovation in the area. These various attempts are discussed below.

### **3.1 IBA Guidelines on Party Representation in International Arbitration and IBA International Principles on Conduct for the Legal Profession**

The IBA has, for a long time, been committed to the improvement of ethical standards in international arbitration. Its most recent input into the area, which concerns counsel conduct specifically, was the release of the IBA Guidelines on Party Representation in International Arbitration (**IBA Party Representation Guidelines**). The IBA had also previously introduced the International Principles on Conduct for the Legal Profession (**IBA Legal Profession Principles**) which, although not explicitly relating to arbitration, also apply to the conduct of counsel in international arbitration.

On 25 May 2013, the IBA Party Representation Guidelines. In 2008, the IBA Arbitration Committee established the Task Force on Counsel Conduct in International Arbitration<sup>5</sup>. The Guidelines do not intend to displace applicable mandatory laws, professional or disciplinary rules, or agreed arbitration

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<sup>5</sup> IBA Guidelines on Party Representation in International Arbitration, Preamble.

rules<sup>6</sup>, or to concede the arbitral tribunal powers such as the type that bars or professional bodies may have. Also, the IBA Party Representation Guidelines do not intend to undermine the counsel's duty of loyalty to its client or its obligation to present its case to the arbitral tribunal. In stark contrast, the guidelines strive to maintain the integrity and fairness of the arbitral proceedings.

The IBA Party Representation Guidelines' are of a contractual nature, and the parties may adopt them in whole or in part in the arbitration agreement or subsequently. The arbitral tribunal must determine if it has the authority to rule on matters of party representation and to apply the guidelines, and it may ask for the parties' agreement to be able to rely upon them. Interestingly, the IBA Party Representation Guidelines hold that 'an obligation or duty bearing on a Party Representative is an obligation or duty of the consequences of the misconduct of its Representative'<sup>7</sup>.

IBA Party Representation Guidelines 4 to 6 entitle the arbitral tribunal to exclude a party representative from participating in all or part of an arbitration if compelling circumstances so justify and if it has found that it has the required authority to do so. Guidelines 7 and 8 establish that a party representative should not engage in *ex parte* communications concerning the arbitration, and that it is not improper to have an *ex parte* communication with a prospective arbitrator to determine his 'expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest' (in case it is the prospective presiding arbitrator, with the agreement of the other party). Also, it is not improper to have such communication 'for the purpose of the selection of the Presiding Arbitrator'. However, counsel must not seek the views of the prospective arbitrators on the substance of the dispute.

IBA Party Representation Guidelines 9 to 11 deal with the submissions made by the parties' representatives to the arbitral tribunal. By these guidelines, counsel must not make any knowingly false submissions, and party representatives should not submit witness or expert evidence knowing it to be false. Several non-exhaustive remedial measures are considered by the IBA Party Representation Guidelines in the case of knowledge of such misconduct, including advising the witness or expert to testify truthfully, taking reasonable steps to deter the witness or expert from submitting false evidence, correcting or withdrawing the false evidence or urging the witness or expert to do so, and withdrawing as party representative if the circumstances so warrant. Considerations of confidentiality and privilege may prevent counsel from correcting false submissions of fact previously made to the tribunal<sup>8</sup>.

Regarding document production, the IBA Party Representation Guidelines require counsel to inform their client of the need to preserve documents which are potentially relevant to the arbitration. Counsel are required to explain to the client the necessity of producing such documents, and potential consequences of failing to produce, and advise and assist the client to ensure that a reasonable search is made for documents. Further, counsel should not make requests to produce, or object to any requests to harass or

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<sup>6</sup> IBA Guidelines on Party Representation in International Arbitration, guideline 3.

<sup>7</sup> IBA Guidelines on Party Representation in International Arbitration, Comments to Guidelines 1-3.

<sup>8</sup> IBA Guidelines on Party Representation in International Arbitration, Comments to Guidelines 9-11.

cause unnecessary delay. Finally, party representatives should not suppress or conceal documents requested by another party or that the party has undertaken or been ordered to produce, or advise the party to do so<sup>9</sup>.

IBA Party Representation Guidelines 18 to 25 provide that the parties' representatives should make any potential witness aware of the right to inform or instruct his/her own counsel about the contact and to discontinue the communication with the party representative. Guideline 19 establishes that a party representative may assist witnesses in the preparation of witness statements and experts in the preparation of expert reports, but he/she must seek to ensure that it reflects the witness' own account of facts and circumstances or the expert's own analysis and opinion. Within those limits, counsel may meet with witnesses and experts to discuss and prepare their prospective testimony. Payment is only permitted for expenses reasonably incurred in preparing to or testifying at a hearing, reasonable compensation for the loss of time incurred and, reasonable fees for the professional services of a party-appointed expert.

Finally, IBA Party Representation Guideline 26 defines the remedies the arbitral tribunal may resort to if it finds that a party has committed an act of misconduct, and guideline 27 sets out a non-exhaustive list of elements the tribunal should take into account when addressing issues of misconduct such as the nature and gravity of the misconduct, the good faith of the counsel, relevant considerations of privilege and confidentiality, and the potential impact on the rights of the parties.

The IBA Guidelines are complemented by the application of the IBA Legal Profession Principles, adopted on 28 May 2011, which superseded the IBA International Code of Ethics 1988. The IBA Legal Profession Principles consist of ten principles that the IBA conclude as 'common to the legal profession worldwide'<sup>10</sup>. These principles aim at establishing a generally accepted framework to serve as a basis on which lawyers' codes of conduct may be established.

When drafting these principles, the IBA considered national professional rules from states throughout the world, the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, and the Universal Declaration of Human Rights<sup>11</sup>.

The IBA Legal Profession Principles are intended to act as a constitution of sorts in the regulation of counsel conduct, and apply equally to all forms of alternative dispute resolution and litigation where legal representatives are involved. The principles read as follows:

***1. Independence.** A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall*

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<sup>9</sup> IBA Guidelines 12-17.

<sup>10</sup> Commentary on IBA International Principles on Conduct for the Legal Profession, May 2011, p. 10, §2.

<sup>11</sup> Commentary on IBA International Principles on Conduct for the Legal Profession, May 2011, p. 10, §4.

*exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.*

**2. Honesty, integrity and fairness.** *A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.*

**3. Conflicts of interest.** *A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.*

**4. Confidentiality/professional secrecy.** *A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.*

**5. Clients' interest.** *A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.*

**6. Lawyers' undertaking.** *A lawyer shall honour any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.*

**7. Clients' freedom.** *A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.*

**8. Property of clients and third parties.** *A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.*

**9. Competence.** *A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.*

**10. Fees.** *Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.*

In general, the IBA Legal Profession Principles call for counsel acting in an international arbitration to observe the relevant rules regarding each principle when engaging in the practice of law outside the jurisdiction in which he/she is admitted to practice. In fact, the IBA refers to a 'double deontology' which commits the counsel to 'observe applicable rules of professional conduct in both home and host



jurisdiction<sup>12</sup>. The IBA Commentary on the principles stipulates that where there is any inconsistency between the rules of ethics from the jurisdiction where the counsel is admitted to practice and the jurisdiction of the seat of the arbitration, the stricter rules should be complied with. This might appear to work well in theory, however it must be appreciated that certain rules, when actually complied with, might present either unforeseen austerity or slackness. This is an issue that is not, and quite frankly *cannot* be, dealt with by the principles.

### **3.2 Update to the LCIA Rules - Behavioural Framework and Sanctions Imposed on Misbehaving Counsel**

The LCIA will soon present its new arbitration rules (**New LCIA Rules**) after having revised its 1998 version. Particular attention should be paid to the introduction of the following two rules entitling the arbitral tribunal to directly exclude misbehaving counsel from the arbitration, either in whole or in part:

***Rule 18.5:** In compliance with its general obligation to participate in the arbitration in good faith, each party shall seek to ensure that its legal representatives shall comply at all times with the general guidelines contained in the Annex to the LCIA Rules.*

***Rule 18.6:** In the event of a complaint by any party against a legal representative to the Arbitral Tribunal or upon its own initiative, the Arbitral Tribunal may consider (after consulting the parties and granting that representative a reasonable opportunity to comment upon the allegation against him) whether or not he has engaged in a serious or persistent violation of the general guidelines and, if such violation is found by the Arbitral Tribunal, it may order that legal representative to be excluded from the arbitration, in whole or in part.*

An annex to the New LCIA Rules titled "General Guidelines for the Parties' Legal Representatives" will also be included in the new edition, and this will set out ethical standards for legal representatives appearing for parties to a LCIA arbitration. The guidelines in the annex to the New LCIA Rules intend to influence the good conduct of the parties' legal representatives within the arbitration. Further, it has been suggested that under the New LCIA Rules, the arbitral tribunal will be able to consider *proprio motu* if a legal representative has violated the guidelines.

The LCIA Court Rules Sub-Committee, which is in the process of preparing the new edition of the rules for issue, has suggested that the guidelines are an attempt to ensure that parties' legal representatives discharge their duty with integrity, honesty and efficiency, and do not engage in activities designed deliberately to produce unnecessary delay, expense, or to obstruct the arbitration or jeopardise the award. The guidelines will also contain dispositions regarding the parties' legal representatives' obligations to "always act in good faith, maintaining the dignity of the arbitral process". The guidelines will also include

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<sup>12</sup> Commentary on IBA International Principles on Conduct for the Legal Profession, May 2011, p. 14.

provisions on the obligation of counsel to participate in good faith with regard to requests and orders for document production and not to conceal any document which is ordered to be produced by the tribunal.

Further dispositions that the Sub-Committee is planning to introduce in the guidelines relate to acting with courtesy, treating with respect all members of the arbitral tribunal and all other legal representatives, not knowingly making false statements to the arbitral tribunal or the LCIA Court, not assisting in the presentation of or relying upon any false evidence, and not initiating unilateral communications relating to the arbitration or the parties' dispute during the arbitration with any member of the tribunal or of the LCIA Court.

The LCIA initiative appears to be a positive inspiration for other arbitral institutions to set up their own ethical rules or guidelines regarding the parties' representatives' conduct. Only time will tell whether, and how much, the new LCIA guidelines will influence parties' and counsel's behaviour. However, various questions remain about their practical application. For instance, the behaviour and misconduct condemned by the New LCIA Rules leaves open the possibility that the rules, instead of preventing the parties and counsel from engaging in activities that cause unnecessary delay and expense, may be used as a tactical weapon for the same purpose.

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#### **4. Parties Not Approaching Proceedings in Good Faith**

Finally, the threat that parties who approach arbitrations in bad faith pose is of significant concern to the global arbitration community. While the results of acting in 'bad faith' (or, put more appropriately, *not* acting in good faith) are generally easily observed, it is much more difficult to pin down an exhaustive explanation of this nebulous concept and what, exactly, might constitute corresponding conduct. Further, whether such conduct can, in fact, *be* regulated is an issue that is currently being hotly debated, for who would be responsible for enforcing a set of standards and imposing sanctions for their breach? With respect to the imposition of sanctions against recalcitrant parties, it must be remembered that arbitration is ultimately a creature of agreement. With regard to enforcing a universal set of standards, as with the regulation of counsel conduct, jurisdictional problems arise. Again, it is seen that significant and difficult questions abound!

Before any analysis of good faith in arbitration is proffered, however, it is first necessary to develop a basic understanding of the concept more generally. To this end, a definition would assist - however several definitions exist. In any case, it is helpful to note that good faith is not a new concept - it is implied in many types of contract in the United States and many civil law systems in Europe. However, given that good faith is a relatively new concept in Australia and New Zealand (unlike the United States, where it has been the subject of much discourse for well over a century), the obligations it imposes on parties are still somewhat unclear.

In Australia, there has been strong authority to suggest that good faith is a general rule, applicable to every single contract, that each party agrees, by implication, to do all such things as are necessary on its part to enable the other party (or parties) to have the benefit of the contract.<sup>13</sup> This idea approaches the issue from a *positive* action perspective, requiring parties to contracts to actually *do* something. However, approaching the issue from a more *negative* perspective - that is, requiring parties to *not* do something - it has also been held that the law implies the concept of good faith in a negative covenant agreed by the parties to not hinder or prevent fulfilment of the purpose of the express promise to which the contract relates.<sup>14</sup> Although Australia has applied general rules applicable to contract, it has so far refused to imply a general obligation to act in good faith in contractual performance.

The position in New Zealand is slightly less convincing. Like Australia, it too does not currently recognise an explicit general obligation of good faith, and there is a paucity of judicial comment on the issue. As noted by some academic commentators,<sup>15</sup> the main judicial comment on the doctrine of good faith was by Thomas J in 1992, where His Honour stated in obiter that he "would not exclude from our common law the concept that, in general, the parties to a contract must act in good faith in making and carrying out the contract".<sup>16</sup> Unfortunately, His Honour's dicta was struck out in a series of subsequent cases,<sup>17</sup> and thus New Zealand's relationship with the concept of good faith has hung in limbo ever since.

Notwithstanding its measurable imprecision and lack of clear judicial authority, at least some form of concept of contractual good faith has been recognised in both Australia and New Zealand, among other international jurisdictions, and thus its potential extension to, and influence on, parties to arbitration is a worthy consideration. After all, the instrument which gives rise to the arbitration is the arbitration agreement, which is itself a contract, and so the extension of good faith obligations to parties to arbitration is a logical one. Further, in the international arena, the concept of good faith has a solid footing in international law.

In Australia's domestic arbitration regime, the CAAs, section 24B imposes upon parties general duties of good faith. It is interesting to note that neither Australia's international arbitration regime nor New Zealand's *Arbitration Act 1996* (NZ) contain any equivalent provisions. Section 24B of the CAAs provides that:

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<sup>13</sup> *Butt v McDonald* (1896) 7QLJ 68 at 70-71.

<sup>14</sup> *Byrne v Australian Airlines Ltd* (1995) 131 ALR, per Brennan CJ, Dawson & Toohey JJ at 428.

<sup>15</sup> J Edward Bayley, *A Doctrine of Good Faith in New Zealand Contractual Relationships*, University of Canterbury, 2009.

<sup>16</sup> *Livingstone v Roskilly* [1992] 3 NZLR 230, at 237.

<sup>17</sup> See, for example, *Isis (Europe) Ltd v Lateral Nominees Ltd* (High Court, Auckland, CP 444/95, 17 November 1995), at 6 and *Archibald Barr Motor Company Ltd v ATECO Automotive New Zealand Ltd* (High Court, Auckland, CIV 2007-404-5797, 26 October 2007), at [79].

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

*(2) Without limitation, the parties must:*

*(a) comply without undue delay with any order or direction of the arbitral tribunal with respect to any procedural, evidentiary or other matter, and*

*(b) take without undue delay any necessary steps to obtain a decision (if required) of the Court with respect to any function conferred on the Court under section 6.*

*(3) A party must not wilfully do or cause to be done any act to delay or prevent an award being made.*

However, the legislation does not equip the tribunal with any corresponding enforcement powers. It might be possible to derive such powers from sections 19(2) and 19(6) of the CAAs, which allow the tribunal to conduct the arbitration in a manner it considers appropriate subject to any party agreement, and provide for the enforcement of an order made or direction given by the tribunal in the course of arbitral proceedings, respectively, but this is unclear. Further, while section 2A of the CAAs and article 2A of the Model Law stipulate that regard is to be had to the observance of good faith in the interpretation of the respective laws, this reference is in more of a broad, overarching and conceptual nature rather than a standalone or concrete idea.

Thus, of particular interest, and importance, is how exactly an arbitral tribunal may wield the concept. By this very implication, it is readily observed that the influence of the concept of good faith is not limited to any particular role/s in an arbitration - it is likely to have some impact on arbitrators, the parties to the dispute, as well as anyone else participating in the arbitral proceedings.

As Cremades notes, it is difficult to find any international arbitration award not based on, or that does not at least mention, good faith - but its omnipresence does not mean that it is clearly understood, that we know how to use it, or that we are able to predict how an arbitral tribunal may apply good faith in a particular case.<sup>18</sup> Thus, it appears there has been an acceptance of the principle of good faith in international arbitration, however it is not clear what the concept of good faith in this context actually

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<sup>18</sup> Bernardo M. Cremades, *Good Faith in International Arbitration*, Am.U.Int'l.L.Rev. 27:4 at 761.

means. The tribunal's ruling in the investor-state arbitration of *Methanex v United States* (2005) may assist in answering this difficult question:<sup>19</sup>

*"...in the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of 'equal treatment' and procedural fairness".*

Thus, to provide some form of conclusion, Cremades considers that "the duty to arbitrate in good faith is infringed upon when improper pressure is applied to the arbitrators, when illegally obtained evidence is used, when the principle *non venire contra factum proprium* is violated, when anti-suit injunctions are abused, when the arbitrators are challenged for the sole purpose of obtaining a delay or when the proceeding is delayed as a consequence of the refusal to pay the arbitration costs and expenses".<sup>20</sup> Such a list of indecent dealings is by no means exhaustive, however it does provide for us some clarification of what standard of behaviour is required.

Assuming the above to be true, what then are the repercussions for parties who venture beyond the illuminated path in their conduct? Another question arises as a precondition to this question: do arbitral tribunals even have the authority to order sanctions for parties who have acted in 'bad faith'?

The latter of the above two questions arose in the United States domestic arbitration of *ReliaStar Life Insurance Co v EMC National Life Co* (2009).<sup>21</sup> In this case, the arbitral tribunal awarded costs and fees against the losing party (EMC) because it found it to be lacking in good faith, despite an *express* provision in the parties' arbitration agreement that each party to the arbitration would pay their own costs and fees. The award was upheld by the United States Second Circuit Court of Appeals on appeal. In its decision, the Court held that the parties' agreement regarding the payment of their own costs and fees could be fairly understood as based upon the general notions of good faith dealings and, because the underlying assumption was that both parties would act in good faith and that it was broken, the clause did not prohibit the arbitral tribunal from issuing such a sanction.

The obvious tension between party autonomy and an arbitrator's discretionary authority was once again raised in this case, although this time in the context of good faith. On this issue, Professor Moses comments that arbitrator power to sanction bad faith conduct is necessary in order to accomplish a major

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<sup>19</sup> *Methanex Corp. v United States*, Final Award of the Tribunal, as Bernardo M. Cremades, *Good Faith in International Arbitration*, Am.U.Int'lL.Rev. 27:4 at 788.

<sup>20</sup> Bernardo M. Cremades, *Good Faith in International Arbitration*, Am.U.Int'lL.Rev. 27:4 at 788.

<sup>21</sup> Docket No 07-0828-CV (2d Cir April 2009).

goal of arbitration - that is, the quick and efficient resolution of disputes.<sup>22</sup> In furtherance of Professor Moses' contention, there was dicta from one of the appeal judges that, although it formed part of a dissenting judgment, confirmed that parties not acting in good faith is:<sup>23</sup>

*"...the heart of the issue. As arbitration becomes more like litigation, with more obstructive and dilatory tactics used by parties, arbitrators need to be able to control the process by having the ability to effectively sanction, and thereby discourage, bad faith conduct".*

While this case is obviously not binding on Australian or New Zealand courts, it serves to inform our jurisprudence on this interesting and important aspect of arbitration.

In terms of what types of sanctions should be available at the arbitral tribunal's discretion, given that parties acting in bad faith often results in increased costs to the arbitration, it is arguably most appropriate for an arbitral tribunal to impose any such increase in costs on the party whose conduct caused the increase in costs.<sup>24</sup> There has, however, been much discussion on the appropriateness of other types of sanctions that might be used, namely those in the area of fines and punitive damages. The general consensus at this stage is that such sanctions should not be allowed to be imposed by arbitral tribunals.

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## **5. Conclusion: So How *Should* We Regulate Conduct?**

The discussion above leads to a simple conclusion: to administer a fair and just process throughout an arbitration, the conduct of the various parties involved, including the arbitrators, must be regulated to a significant degree. Finally, the issue then turns on the precise *method* of regulation to be implemented - should this take place via institutional rules, as the LCIA has suggested, or international arbitration guidelines, such as those previously (and recently) published by the IBA? Some arbitration practitioners and commentators have supposed that an extension of the regulations of domestic bar associations might suffice, while others have advocated a unification of such regulations into a single global regulatory scheme.<sup>25</sup> In any case, the old proverb which speaks of the various ways to skin a cat applies here too - but it is worth noting the various benefits and complexities associated with each technique, and the reasons for which any one of them may be either more easily implemented or more effective in its results.

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<sup>22</sup> Margaret L Moses, *Arbitrator Power to Sanction Bad Faith Conduct: Can it be Limited by the Arbitration Agreement?*, (2010) 84 ALJ 82.

<sup>23</sup> Above n22, at 83.

<sup>24</sup> The tribunal's power to do this is found in section 33B of the CAAs in Australia's domestic arbitration regime and section 27 of the IAA in Australia's international arbitration regime, and in section 6 of New Zealand's *Arbitration Act 1996* (NZ).

<sup>25</sup> See, for example, His Honour Sundaresh Menon's keynote address to the International Council for Commercial Arbitration (ICCA), 2012.

There is much controversy in the arbitration world as to the most correct method, and any in depth analysis of the pros and cons of each system of regulation would require a paper of its own. However, to provide some general commentary and to highlight the debate on foot, the following is put forward:

## **5.1 Institutional Rules**

As discussed above, the inclusion of a regulatory scheme for conduct in institutional rules will first be attempted by the LCIA in its forthcoming latest edition of its arbitration rules. An interesting question to ask at this point is whether this will have any impact on parties' agreements to be governed by the rules, and thus how effective they will be - the risk being that parties wishing to avoid procedural over-regulation may choose against them, or against arbitration altogether. Nevertheless, from the viewpoint of the advocate for conduct regulation, it is convenient to have a regulatory scheme neatly placed within institutional rules for the obvious reason that it then becomes *enforceable*. As parties agree from time to time to engage in arbitrations under any such institutional rules, the regulatory scheme for conduct embedded within them will automatically become binding upon them, their counsel, and their arbitrators, and no more needs to be done.

## **5.2 Arbitration Guidelines**

The IBA's various guidelines provide instructive insight as to how the multiple entities involved in an arbitration should behave are detailed and immensely helpful, but they are exactly that - guidelines. Having been likened to a 'toothless tiger', such guidelines are only ever enforceable upon the various actors in an arbitration if parties expressly agree to them - that is, in *addition* to whatever arbitration rules they choose to be governed by. This may present quite an inconvenience to parties at the arbitration agreement stage as a result of the evaluations, negotiations and consultations that will naturally arise in the process of incorporating further contractual terms into their agreement. The main problems with such 'soft law' are thus obvious. On a much more positive note, the advantage such guidelines present is the ability to meld aspects of regulation from multiple jurisdictions globally into one set of standards. Organisations such as the IBA have been tremendously successful at this, often liaising extensively with representatives from various jurisdictions to arrive at what would appear to be a good balance of standards from each jurisdiction.

## **5.3 Domestic Bar Associations**

Domestic bar associations present an established means of regulating the conduct of legal professionals in their respective jurisdictions, but whether such regulation translates well into the international arena is subject to some doubt. The main advantage arising from the extension of their regulation is that lawyers will be well versed in the ethical standards required by the bar association in their relevant jurisdictions and can simply behave themselves in a like manner in any international dispute in which they are involved. This means that there will be no confusion on the part of the individual lawyer as regards

his/her conduct obligations, but considerable confusion is likely to come about when lawyers from different jurisdictions are involved in the same arbitration as what is acceptable in one jurisdiction may not necessarily be acceptable in another. Common law and civil law discrepancies may also add fuel to the fire. This significant drawback is likely to outweigh the advantage of hometown familiarity accorded the individual lawyer.

The above summary brings into focus the important issues that surround the question of the most appropriate means of regulation, and it is obvious why such debate continues. In the author's opinion, something of a mix of the above methods is required to ensure a form of effective regulation; enforceable in the sense of institutional rules, all-encompassing in the nature of global guidelines, and somewhat already familiar to lawyers in the character of domestic bar association regulations. While it is unlikely that this question will be settled in the near future, the global arbitration community would benefit greatly from its timely resolution, as it has already taken far too long in the history of arbitration to get to the point at which we find ourselves with this issue, and if left to linger for too much longer, it may escape our grasp yet again.