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ALL'S FAIR IN LOVE AND WAR – OR IS IT?
REFLECTIONS ON ETHICAL STANDARDS FOR
COUNSEL IN INTERNATIONAL ARBITRATION

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While the topic of ethics for arbitrators has been the subject of discussion and debate for many years, recently the subject of ethics for counsel in arbitration has been generating increasing attention. In the past two years the International Bar Association's Arbitration Committee issued a survey regarding counsel ethics;¹ two codes of ethics² and a checklist³ to guide counsel ethics in arbitration were also issued. Arbitral institutions are making rule changes that would further guide counsel conduct. "Guerrilla tactics" by counsel have been the theme of a growing number of scholarly writings⁴ and have been the subject of several international arbitration conferences.⁵

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¹ See International Bar Association Arbitration Committee, *Counsel Ethics in International Arbitration Survey* [hereinafter IBA Survey], available at <http://www.surveygizmo.com/s3/331908/IBA-Arbitration-Committee-Counsel-Ethics-in-International-Arbitration-Survey>.

² See Doak Bishop & Margrete Stevens, *Advocacy and Ethics in International Arbitration: International Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals*, in *ARBITRATION ADVOCACY IN CHANGING TIMES*, ICCA CONGRESS SERIES NO. 15 (Rio 2010) at 408 (Albert Jan van den Berg ed., 2011); International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards* (Sep. 27, 2010) [hereinafter Hague Principles], available at www.ucl.ac.uk/laws/cict/docs/Hague_Sept2010.pdf.

³ See Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 *DISP. RESOL. INT'L* 78 (Mar. 2009), available at www.gibsondunn.com/publications/Documents/Benson-CanProfessionalEthicsWait.pdf.

⁴ See Stephan Wilske, *Arbitration Guerrillas at the Gate – Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough*, in *AUSTRIAN Y.B. ON INT'L ARBITRATION 2011* at 315 (Christian Klausegger et al. eds., 2011); see also Gunther Horvath, *Guerrilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?*, in *id.* at 297.

⁵ See Vienna Arbitration Days 2010, Feb. 12 and 13, 2010, which dealt with "Guerrilla Tactics in Arbitration and Litigation"; see also the ICC Austria Conference,

While the term “guerrilla” literally means little war in Spanish,⁶ “guerrilla warfare” has come to mean a form of irregular warfare and refers to conflicts in which a small group of combatants including, but not limited to, armed civilians (or irregulars) use tactics such as ambush, raids and the element of surprise to harass a traditional army. In his classic *War and Peace*, Tolstoy reports on guerrilla warfare, apparently referring to a group that effectively used guerrilla warfare against Napoleon’s army to disrupt supply and communication lines in a war in Spain in the early 1800s. In the international arbitration context, different strategies, methods and tactics, ranging from poor behavior to egregious and even criminal conduct, have together been described as “guerrilla tactics.”

To explore whether the use of guerrilla tactics in international arbitration is really a problem of sufficient frequency and moment to warrant the attention it is now receiving with the promulgation of proposed ethical codes and institutional rule changes, we conducted an informal survey. We asked the following two questions:

1. As counsel in an arbitration or as an arbitrator, did you ever feel like one or both parties engaged in what you would call guerrilla tactics, whether technically unethical or not.
2. If your answer was yes, please describe a tactic you regarded as a guerrilla tactic.

I did not define guerrilla tactics on the theory that what needed to be discovered is whether counsel and arbitrators felt such tactics were being used and to learn what kinds of tactics they felt deserved to be labeled “guerrilla tactics.” This was not intended to be, and does not pretend to be, a statistically valid survey, but it is a reflection of 81 responses from practitioners around the world involved in arbitration as arbitrators or counsel.

Fifty-five survey responders out of the 81, or 68%, checked off the “yes” box and reported that they had experienced what they felt were guerrilla tactics and provided an example. It is significant that 32% of the survey responders, including many well known international arbitration practitioners, reported that they had not seen such tactics utilized. While this is undoubtedly a result of a different definition being applied to the term guerrilla tactics by different people, perceptions matter, and that 32% number is worthy of note. It was also my sense from reading the many responses, that those who said they had encountered such tactics, had seen them only rarely. The international arbitration bar is perhaps, generally speaking, a quite civilized and ethical bar. Indeed, several respondents volunteered that they saw guerrilla tactics employed to a much greater extent in litigation.

A Fine Line: How to Counter – and Employ Guerrilla Tactics in International Arbitration & Litigation, Nov. 12-13, 2010.

⁶ See THE COLUMBIA ENCYCLOPEDIA (6th ed. 2008), available at http://www.encyclopedia.com/topic/guerrilla_warfare.aspx.

However, attention must be paid to the fact that 68% reported that they had been subjected to or had witnessed guerrilla tactics. Moreover, the use of guerrilla tactics appears to be on the increase. In the past months we have seen reports of the arrest of a successful claimant by a host state,⁷ fraudulent overstatement by over one billion dollars in a balance sheet submitted in arbitration,⁸ death threats against witnesses,⁹ and ex parte meetings of counsel for plaintiffs with the court-appointed “independent” expert to plan and write the expert’s report.¹⁰ One must, accordingly, conclude that arbitration tactics are an issue that requires serious exploration.

This article addresses (1) the nature of the activities that might be classified as guerrilla tactics; (2) the recent proposals to guide the ethics of counsel in international arbitration; and (3) the responses from bar associations and institutions.

I. THE SURVEY RESULTS

The results of the survey are best analyzed by breaking down the responses into categories and grouping the behaviors that respondents considered to be guerrilla tactics.

- (i) *Document Production/Disclosure*: 19 out of 81 of respondents. Examples: Many respondents to the survey criticized the excessive use of the “leave no stone unturned” approach. Concomitantly, many respondents complained about another practice which consists of producing the requested documents at the last minute and/or burying the relevant documents in a pile of irrelevant ones, often in the midst of many multiple copies of the same document. One complained of the pages of a critical document spread out one page at a time through 18 boxes.
- (ii) *Delay Tactics*: 9 out of 81 of respondents. Examples: Instances of counsel advancing client or personal health concerns, when they were in fact perfectly healthy, or of counsel failing to truthfully represent the client’s availability for hearing appearances, were recurrent in the survey.

⁷ See Sebastian Perry, *ICSID Claimant Behind Bars on Bribery Charge*, GLOBAL ARB. REV. (Oct. 18, 2010).

⁸ See *Venture Global Engineering v. Satyam Computer Services Ltd.*, No. 9238, August 11, 2010 (Sup. Ct. India).

⁹ See *Znamensky Selekcionno-Gibridny Center LLC v. Donaldson International Livestock Ltd.*, 2009 CanLII 51197 (Ont. S.C.), available at <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii51197/2009canlii51197.html>.

¹⁰ See *In re Application of Chevron Corporation et al.*, 709 F.Supp.2d 283 (S.D.N.Y. 2010) (while this concerns a court action in Ecuador, there is a companion arbitration proceeding; in addition to the conduct cited, the senior executives of the claimant and two of the claimant’s lawyers were arrested during the court and arbitration proceedings. It must be noted that this case has an extensive subsequent and related history and the facts are hotly contested).

- (iii) *Creating Conflicts*: 7 out of 81 of respondents. Examples: Several respondents reported instances of changing counsel during the arbitration process to create a conflict with an arbitrator. Another reported a motion to disqualify opposing counsel right at the outset of the evidentiary hearing for alleged conflict of interest.
- (iv) *Frivolous Challenges of the Arbitrators*: 8 out of 81 of respondents. Examples: Respondents reported frivolous challenges to arbitrators such as on the ground that the arbitrator and one of the counsel attended a class together 25 years ago, or because the arbitrator and the opposing counsel share a bar association professional affiliation. Others reported that, after having sent abusive and inflammatory communications to the arbitrator or after having challenged the arbitrator, counsel then challenged the arbitrator for bias.
- (v) *Last-Minute Surprise*: 18 out of 81 of respondents. Examples: A significant number of practitioners who answered the survey recalled some form of last-minute surprise. Introduction of important arguments or affidavits for the first time on the eve of the hearing, or during the hearing or in reply (or post-hearing) submissions; ignoring pre-hearing deadlines for producing documents or witnesses and just showing up at the hearing with the evidence or a witness without any notice; last minute changes of claim; production of documents long sought on the eve of the hearing and the like were tactics frequently reported to destabilize the opposing counsel.
- (vi) *Anti-arbitration Injunction and other Approaches to Courts*: 12 out of 81 of respondents. Examples: Respondents reported filings of frivolous anti-arbitration injunctions; the initiation of criminal proceedings against party officers or counsel; litigation leading to fines imposed on the lawyers for the other side if they appeared at the hearing and a fraudulent insolvency filing.
- (vii) *Ex-parte Communications*: 5 out of 81 of respondents. Example: A party had secured an anti-arbitration injunction. The party then sent a letter (ex parte) directly to the arbitrator appointed by the opposing party, instructing him not to proceed with the arbitration or he would face contempt proceedings before domestic courts. Other ex parte communications with the arbitrators were reported.
- (viii) *Witness Tampering*: 7 out of 81 of respondents. Examples: The respondent party threatened a third-party witness that “he would never work again” if he came to testify in favor of the claimant. Another practitioner was involved in a case delayed for two years because opposing counsel was successful in scaring successive experts appointed in the case, filing different petitions against them before their professional body.

- (ix) *Lack of Respect, Courtesy towards Tribunal and Opposing Counsel*: 17 out of 81 of respondents. Examples: Abusing the arbitrators after a bifurcated hearing on liability in order to try to keep down the amount of damages on the quantum hearing; repeatedly complaining to the tribunal of a deprivation of due process every time there is a denial of an application; hyper-aggressive behavior asking for reconsideration of every ruling not in their favor; disparaging adversaries; constantly alerting the arbitrators that they may be overturned on “appeal” unless they are given access to certain information. Several reported abusive behavior towards opposing counsel.
- (x) *Frustrating an Orderly and Fair Hearing*: 25 out of 81 of respondents. Examples: Respondents reported many instances of such conduct: “Running out the clock;” raising (too) many objections in order to fluster opposing counsel; pretending to have documents in hand to scare witnesses into testifying as desired but actually holding blank pieces of paper; incorrect translations of pivotal documents; putting witnesses on the witness list whom counsel had no intention of calling to confuse the adversary and cover up who the real witnesses were; withdrawing the claim a day before the hearing, requiring a change in the order of proof and requiring counterclaimant to muster its case overnight; showing up at the hearing with boxes that appeared to be full of exhibits to intimidate the opposing party that were in fact empty; baiting witnesses and calling them liars; insisting upon the existence of supporting documentation but never submitting any.¹¹

Which of these would the reader classify as guerilla tactics? All would agree that the tactics identified present different level of reprehensibility.¹² Some are not only unethical, but unlawful acts. Others may not amount to criminal behavior but run counter to ethics rules. Yet other strategies serve to delay the proceedings, confer unfair advantage or obstruct an orderly hearing. Finally, some may reflect cultural differences and may constitute completely acceptable behavior in some jurisdictions. Are these tactics acceptable and appropriate behavior in the vigorous representation of one’s client? Is all fair in love and war? Or should guerrilla-like tactics, too, be addressed in any new ethical code for arbitration counsel in international arbitration?

¹¹ The number of respondents to all categories adds up to more than the 55 who stated that they had been subjected to guerrilla tactics because some respondents gave more than one example.

¹² See Horvath, *supra* note 4, at 297 (“Guerrilla tactics range from the completely illegal and inappropriate, such as witness intimidation and phone tapping, to the merely sly, such as ambushing the opposing party with new evidence or ex-parte conversations with arbitrators”).

II. HISTORY OF ETHICS PROPOSALS

While the topic of ethical standards for arbitrators in international arbitration has been the subject of codes and guidelines, major international arbitration providers are silent as to the question of ethics for counsel.¹³ It should be noted that a few guidelines exist nevertheless,¹⁴ including the *IBA Rules of Ethics for International Arbitrators (1986)*,¹⁵ the *Union Internationale des Avocats "Turin Principles" of 2005*,¹⁶ *IBA General Principles of the Legal Profession (2006)*,¹⁷ and the *Code of Conduct for European Lawyers*, prepared by the Council of Bars and Law Societies of Europe ("CCBE Code") (2006).¹⁸ However, these efforts do not provide meaningful guidance because they are either not specific to international arbitration, or do not address counsel conduct.

Many are of the view that this "ethical no-man's land,"¹⁹ is unsatisfactory. Consequently, while some commentators believe that there is no workable solution to this problem,²⁰ an increasing number, on the contrary, believe that the

¹³ See Benson, *supra* note 3, at 78 ("[T]here are no 'rules of conduct' applied generally to lawyers before an international arbitration tribunal. The major institutional rules of arbitration, including the ICC and LCIA Rules, are silent as to the conduct of a party's legal representative" (quoting V.V. Veeder, *The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith*, 18 *ARB. INT'L* 431, 433 (2002)).

¹⁴ For a review of these ethical codes, see Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Univ., Dickinson Sch. Of Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012 [hereinafter Rogers, *Ethics of Advocacy*]; see also Laurel S. Terry et al., *Transnational Legal Practice*, 42 *INT'L LAWYER* 833 (2008).

¹⁵ See International Bar Association, *RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS (1986)* (providing arbitrators with guidelines on how to behave in international arbitration; these are very broad guidelines, and more importantly, are specific to arbitrators, not counsel), available at www.int-bar.org/images/downloads/pubs/Ethics_arbitrators.pdf.

¹⁶ See Union Internationale des Avocats "*Turin Principles*" of 2005, (a general initiative, not arbitration specific), available at <http://www.abanet.org/cpr/gats/misc.html>.

¹⁷ See International Bar Association, *IBA GENERAL PRINCIPLES OF THE LEGAL PROFESSION (2006)* (a general initiative, not arbitration specific), available at http://www.ibanet.org/About_the_IBA/IBA_resolutions.aspx.

¹⁸ See Council of Bars and Law Societies of Europe, *CODE OF CONDUCT FOR EUROPEAN LAWYERS*, available at <http://www.ccbe.eu/index.php?id=32&L=0> (few provisions relating to conduct in arbitration).

¹⁹ Rogers, *Ethics of Advocacy*, *supra* note 14, at 1.

²⁰ See authorities cited in Rogers, *Ethics of Advocacy*, *supra* note 14, at n. 28. See also International Bar Association, *NEWSLETTER OF THE INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION*, Vol. 14 No. 1, at 11 (Mar. 2009) (recounting Audley Sheppard's opposition to the adoption of a global code, on the ground that it would be impossible to obtain consensus on rules that go beyond general statements of principle because local standards are sometimes fundamentally inconsistent with one another and cannot be

adoption of a code of ethics specific to the conduct of counsel in international arbitration is long overdue.

Michael Reisman and Detlev Vagts recognized the need for uniform ethical guidelines applicable to counsel in international arbitration long ago.²¹ Jan Paulsson proposed the idea in 1992.²² But only recently have “a number of other important scholars added their voices . . . [and the topic become] increasingly popular at international arbitration conferences.”²³

In reviewing this subject one must focus on what evils are sought to be corrected. A new ethics code can address two different areas of concern. The first are the tactics, which under some national codes or rules of professional conduct are unethical, while under other codes are not – a tension referred to as the double deontology problem. Where such conflicts exist counsel are faced with uncertainty as to which ethical code governs, while the parties whose counsel must answer to the more restrictive ethical mandate are at a disadvantage. The most familiar examples used to illustrate these significant divergences include witness preparation, disclosure, and ex parte communications.²⁴

The issues raised by conflicting ethical norms and the lack of any overarching ethical code for international arbitration were discussed by Doak Bishop in his keynote address at the ICCA conference in 2010. He concluded that “there is a current, compelling need for the development of a Code of Ethics in International Arbitration and for the adaptation of tribunals and institutions to the adoption of such a Code.”²⁵

reconciled). Those presenting at the ICC-YAF roundtable on September 29, 2010 expressed little enthusiasm for an international ethics code for counsel in international arbitration and speakers were of the view that the promulgation of such a code would undermine the effectiveness of existing codes and would represent a step backwards.

²¹ See Rogers, *Ethics of Advocacy*, *supra* note 14, at 2, *citing* W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 116-17 (1971); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT’L L. 250, 250 (1996) (describing problems in the Iran Claims Tribunal caused by lack of ethical consensus among attorneys).

²² See Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 AM. REV. INT’L ARB. 214 (1992).

²³ Rogers, *Ethics of Advocacy*, *supra* note 14, at 2.

²⁴ *Id.* at 3-5. For a discussion of several other areas of difference, see Benson, *supra* note 3, at 82-85 (also identifying as areas of difference lawyer communication with employees of an adverse corporate party, statements of fact to the tribunal known to be unsupported by the evidence, the obligation to advise the court of adverse legal authority, the nature of counsel’s obligation to assure production of responsive documents, obligation to report perjury). See also Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT’L L. 1035, 1038-39 (2009) [hereinafter Rogers, *Lawyers Without Borders*].

²⁵ Doak Bishop, ICCA, Keynote Address: Advocacy and Ethics in International Arbitration, at 1 (May 26, 2010) [hereinafter Bishop, Keynote Address], available at http://www.arbitration-icca.org/conferences-and-congresses/ICCA_RIO_2010/ICCA_RIO_2010_Doak_Bishop.html.

Indeed, practitioners should welcome the promulgation of such a code as it would clarify their obligations: without such an overriding ethical code there is no clear answer to the question of which ethical obligations are applicable – the ethical code of the home jurisdiction of counsel or the seat of the arbitration or some other law based on a conflicts of law analysis. Or are there no ethical obligations at all in this international no-man’s land? An internationally applicable code would level the playing field; counsel would know what both he or she could do or could not do as well what ethical obligations adversary counsel would have to adhere to;²⁶ and clients would more easily understand why certain actions could or could not be taken.

The second area of concern which the ethical codes can address is one directed at assuring a fair, efficient and honorable process. Many of the guerrilla tactics described above do not fall technically afoul of any rules traditionally thought of as governing ethics. This is a time of concern about the disenchantment of many corporate users with arbitration because it no longer delivers on its earlier promise of low cost and speed, attributes still sought for many cases. The promulgation of a code of conduct with provisions that not only resolve problems of conflicting ethical responsibilities but also foster cooperation and efficiency may serve not only to return civility and enhance fairness but also return arbitration to the fulfillment of its promise.

III. RECENT ETHICS PROPOSALS

While numerous efforts have been made recently to address the issues arising out of counsel conduct in international arbitration, this article discusses the three leading new proposed sets of ethical rules and guidelines for counsel:

(i) *The International Code of Ethics for Lawyers*²⁷

This proposed code adopts an approach of positing simple, elegant and essential rules in a short-form expression of each ethical duty. It is annotated to explain each proposed code provision, and cross references are provided to prior ethical codes where applicable.

(ii) *The Hague Principles on Ethical Standards*²⁸

These principles, the work product of the International Law Association and developed by a working group of approximately 30 experts in the

²⁶ It must be noted that there is a serious question as to whether adherence to an international ethics code for arbitration counsel that is not recognized with a provision in counsel’s home jurisdiction really protects counsel from being in violation of the ethical code of the home jurisdiction. See generally discussion in Rogers, *Lawyers Without Borders*, *supra* note 24.

²⁷ See Bishop & Stevens, *supra* note 2.

²⁸ See Hague Principles, *supra* note 2.

field, provides another proposed set of ethical rules, more specific in some respects and more general in others.

(iii) *The Checklist of Ethical Standards for Counsel in International Arbitration*²⁹

This proposal is presented in the form of a checklist to be reviewed at the start of the arbitration by all parties and is subject to the agreement of the parties. Any disagreements would be brought to the arbitrators for resolution. It would serve to level the playing field, as all would agree to the rules governing conduct for that arbitration. It would also serve to curb many of the guerrilla tactics described above, as counsel would be hard pressed not to agree to the “general conduct” provisions included, knowing that the arbitrators would learn of their unwillingness to abide by such mandates as not taking any action merely to delay, cause undue burden or harass another. The checklist is intended to empower the arbitrators to impose sanctions for violations of any agreed standards.

These three recent drafts introduce sets of rules and principles designed to further similar purposes:

(1) *Preserving the Legitimacy of the International Arbitration Process*

The large amounts at stake in modern arbitrations, the lack of transparency of the process, and the involvement of states as parties leading to greater public scrutiny, have created “a certain instability in the system that could result in a future crisis of confidence.”³⁰ The proposed sets of rules aim to remedy that looming crisis and renew the confidence of arbitration users in the arbitral system.³¹

(2) *Promoting Procedural Fairness*

As Detlev Vagts explains, “[I]t would not be workable to allow the counsel for opposing sides in a civil case to enter the courtroom subject to different rules. . . . It would not do to prohibit one lawyer from a civil-law jurisdiction from interviewing a witness before the trial while the American lawyer would not only

²⁹ See Benson, *supra* note 3.

³⁰ Bishop Keynote Address, *supra* note 25, at 11.

³¹ See Charles N. Brower & Stephan W. Schill, *Regulating Counsel Conduct Before International Arbitral Tribunals*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 488, 491 (Pieter H.F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010) (“The need for uniform rules concerning counsel conduct before international tribunals stems not only from a need to ensure that counsel and parties operate on a *level playing field*. At issue may ultimately be the *legitimacy of the international arbitral system* as a whole.”) (emphasis added).

be allowed to do so but would be guilty of professional negligence if he or she presented an un-interviewed witness.”³² While Article 4(3) of the IBA Rules for the Taking of Evidence attempts to reconcile this divergence, there are many other differences which continue to be problematic.

The proposed standards of ethics establish rules and guidelines to ensure a level playing field, where lawyers, irrespective of their home jurisdiction, are subject to the same rules. The rules tackle the most vexing procedural issues, such as witness communication, ex parte communication, and scope of disclosure.

(3) *Fostering an Atmosphere of Cooperation, Courtesy and Respect in Arbitral Proceedings*

The proposed rules also address the issue of civility in arbitral proceeding by policing counsel conduct towards the arbitral tribunal and between counsel.

In addition, these proposals also avoid the potential pitfall of adopting a “one-size-fits-all” approach. On the contrary, these rules encourage cooperation, giving the flexibility needed to accommodate procedural variations and modifications by the parties.

While all of these proposals generally seek to address the same problems, they differ in approach. The Benson Checklist is a radically different approach and can be used immediately without waiting for the resolution of the discussion of ethical codes, a process that will surely take years. It might be worthwhile for a few tribunals to experiment with using the checklist in an appropriate case. Reports on the success of the process, or its lack of success, could be shared with the arbitration community.

Careful thought should be given to how specific any new rules should be and cull from the best of the proposals made to date and refine and improve on them. Both the Bishop & Stevens Code and the Hague Principles provide an excellent foundation for the discussions that must follow. These authors take the position that unless the views of those who gather to assess an international code of ethics for arbitration counsel compel a conclusion that only a simple, short version will gain acceptance, more detailed proscriptions would be preferable. This is not love or war. Measures should be taken to foster a process that is as fair and efficient as possible. Specific guidance and the imposition of clearly articulated duties for counsel would do more to curb guerrilla tactics than loose general mandates. The final provisions should be vetted against the kinds of guerrilla tactics described above and a deliberate decision made as to which ones should be curbed and how best to word the new provisions to accomplish that goal.

³² Detlev Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 690 (2000).

IV. WHO AND HOW?

Who has the legitimacy to draft a universal code of ethics, and who could enforce a binding code of ethics are important questions. With regard to the drafting of such a code, Doak Bishop suggests that international bar associations, such as the ICCA or the IBA “appoint a working group of lawyers from different legal systems and geographical areas, including representatives of the major arbitral institutions, to consider [their] proposal, perhaps along with others, with a view toward building a consensus around a Code of Ethics that will have widespread support and can be adopted.”³³ He then suggests “the major arbitral institutions consider incorporating this Code into their Rules by reference.”³⁴ These are excellent suggestions.

With regard to the enforcement of such a code, as between courts, tribunals and arbitral institutions, Doak Bishop suggests that arbitral institutions adopt that role.³⁵ Cyrus Benson, however, suggests that tribunals should enforce these provisions, and if necessary impose sanctions.³⁶

Incorporation by reference of ethical rules by the arbitral institutions would be useful as an affirmation by parties of their acceptance of those ethical norms. It would enable counsel to move forward on the same footing as their adversaries and would give the arbitrators a yardstick against which to measure counsel’s conduct. Addressing these issues with institutional rules has precedent. For example, the ICDR addresses some of the concerns with its provisions; Article 7 of the International Dispute Resolution Procedures bars *ex parte* communications with the chair altogether and limits communications with the party-appointed arbitrators to the time before the selection of the chair and strictly limits the substance of those communications.³⁷ The ICDR Guidelines for Arbitrators Concerning Exchanges of Information, which will be incorporated into the ICDR rules when next amended, both seeks to put the parties on the same footing with respect to ethics and privilege and controls much of the document disclosure-related guerrilla tactics described above by establishing a limited scope for disclosure and empowering the arbitrator to exercise firm control.³⁸

³³ Bishop Keynote Address, *supra* note 25, at 15.

³⁴ *Id.*

³⁵ *Id.* at 14.

³⁶ See Benson, *supra* note 3, at 89 (“It is intended that violation of mandatory resolution (to the extent adopted) be subject to sanction by the tribunal”).

³⁷ ICDR INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, Art. 7, available at <http://www.adr.org>.

³⁸ See ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, available at <http://www.adr.org>.

But the institutions seem ill suited to accept the enforcement role.³⁹ The arbitrators can impose sanctions, where authorized, in the arbitral award; the institutions can just send a bill. While the nature of the sanctions that would be appropriate merits further consideration, it could include such measures as the drawing of negative inferences where such an inference would logically flow from the conduct in question or the imposition of monetary sanctions. While this is not a task arbitrators relish, they are in the best position to ensure a fair process.

V. OTHER INITIATIVES

There are several other related initiatives that are worth noting:

(1) *The IBA– Counsel Ethics in International Arbitration Survey*

The IBA Survey is intended to help the Task Force on Counsel Conduct in International Arbitration to investigate “the different and often contrasting ethical and cultural norms, standards and disciplinary rules that may apply to counsel in international arbitrations.”⁴⁰ The Task Force’s assessment was that “the lack of international guidelines and conflicting norms in counsel ethics undermines the fundamental protections of fairness and equality of treatment and the integrity of international arbitration proceedings.”⁴¹

The IBA Survey comprehensively explores the many areas of double deontology, inquires as to whether the responder believes it would be helpful to have guidance on specific issues, and asks how guidance should be provided. The survey deals for the most part with double deontology issues and touches only lightly on other aspects of guerrilla tactics with an inquiry about document disclosure issues. Nonetheless, the results of the IBA Survey will undoubtedly play an important role in determining the international arbitration community’s next steps on these important questions.

(2) *The ABA Ethics 20/20 Commission*

The ABA Ethics Commission⁴² is reviewing lawyer ethics rules and regulation in the context of a global legal services marketplace. It has not as yet addressed any arbitration-specific problems. The subject of the lack of consistency in ethical codes for counsel engaged in cross-border arbitration was presented for consideration and was reserved for future discussion.

³⁹ Domestic courts or local bar associations would not be suitable for enforcement as one of the purposes of international arbitration is to avoid reliance on local courts and local processes.

⁴⁰ IBA Survey, *supra* note 1.

⁴¹ *Id.*

⁴² For information about the ABA Ethics 20/20 initiative, see <http://www.americanbar.org>.

(3) *The Council of Bars and Law Societies of Europe*

The CCBE had established a working group to prepare recommendations/guidelines for the use of European lawyers in arbitration but has terminated this initiative.

(4) *The Revisions to the ICC Rules of Arbitration*

The revised arbitration rules issued by the ICC in 2011⁴³ may serve to limit many of the guerilla tactics identified above. The new rule with respect to the allocation of costs by the arbitrators may prove to be a powerful tool to ensure appropriate conduct. The new ICC Rules provide that:

- (i) The arbitral tribunal and the parties are to “make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.”⁴⁴
- (ii) “In making the decision as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.”⁴⁵

VI. CONCLUSION

Seize the moment. The current attention to addressing counsel’s ethical dilemma when subjected to conflicting or inconsistent ethical obligations and to assuring a fair and level playing field creates the opportunity to expand the ethical duties or standards of counsel in international arbitration to curb a broad range of guerrilla tactics. The inclusion of such standards would fill the vacuum which counsel happily fill when determined to win and willing to engage in what Stephan Wilske labels the “black arts.” The elimination of such tactics would not only reduce cost and expedite the arbitration but would, like the leveling of the other ethical duties, also serve to afford parties a more equitable process. It would also help to preserve arbitration as a dispute resolution mechanism that is respected and utilized with enthusiasm.

⁴³ ICC ARBITRATION RULES, *in force as of* Jan. 1, 2012.

⁴⁴ *Id.* Art. 22(1).

⁴⁵ *Id.* Art. 37(5).

