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EMPTY RHETORIC: THE FAILINGS OF THE LCIA'S ETHICAL RULES FOR LEGAL COUNSEL
AND ALTERNATIVES

By
Christina Bustos*

I. INTRODUCTION

Ethics in international arbitration is a daunting gray area for insiders as well as outsiders.¹ Recently, arbitrator ethics has garnered significant attention from the international community.² On the sidelines, however, there has also been discussion of legal counsel ethics.

In the past, ethical rules were largely unnecessary because international arbitration proceedings were relatively infrequent, European-dominated, and predominantly “gentleman’s agreements” rather than true legal resolutions.³ Modern international arbitration, conversely, is becoming increasingly popular as a method for dispute resolution and is truly international in scope,⁴ with arbitrating parties often having no prior relationship or even sharing a common culture.⁵ As a result, more parties are

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¹ See Nathan M. Crystal & Francesca Giannoni-Crystal, “One, No one and One Hundred Thousand”... *Which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration*, 32 *MISS. C. L. REV.* 283, 318 (2013); see Sundaresh Menon, *Some Cautionary Notes for an Age of Opportunity*, 79 *ARB.* 393 (2013); see Doak Bishop & Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity, and Legitimacy*, 15 *ICCA CONGRESS SERIES* 400 (2010); see William W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 *ARB. INT’L.* 409, 428 (2014).

² See generally Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 *STAN. J. INT’L L.* 53, 121(2005).

³ Crystal & Giannoni-Crystal, *supra* note 1, at 286; see Menon, *supra* note 1, at 393; see Park, *supra* note 1, at 409.

⁴ See Crystal & Giannoni-Crystal, *supra* note 1, at 286 (“International Commercial Arbitration is not a niche anymore; rather it has become the preferred way to solve international disputes, many of which involve hundreds of millions, if not billions of dollars”).

⁵ Sundaresh Menon, *supra* note 1, at 393.

being exposed to or themselves engaging in “guerilla tactics” in arbitration⁶ which can result in inefficient, unpredictable, and illegitimate adjudication.⁷

In response to these issues, arbitral institutions have begun developing ethical guidelines for arbitration proceedings. One such institution is the London International Court of Arbitration (hereinafter “LCIA”), which included in its newly enacted rules an “Annex for Legal Representatives” that enumerates several ethical guidelines for legal counsel engaging in LCIA arbitration.⁸

In addition to the new Annex set forth by the LCIA, the International Bar Association (hereinafter “IBA”) has also noted the need for regulation of legal counsel ethics in the context of arbitration, as demonstrated by its own set of ethical guidelines for legal counsel.⁹ Although both the LCIA Annex and the IBA’s ethical guidelines provide a preliminary step for regulation, both fall short in addressing the core ethical issues persistent amongst legal counsel, including counsel engaging in guerilla tactics and confusion as to which ethical rules apply. There are four main flaws in the language of the LCIA Annex that seem to reveal weakness in the ideology behind the Annex.¹⁰ Even though the ideology behind the IBA Guidelines is more comprehensive than the LCIA Annex, it seems to be similarly flawed because it lacks authoritative language and provides rules that are vague at best.¹¹

Many scholars, counselors, and clients are opposed to increased ethical regulation.¹² The International Court of Arbitration (hereinafter “ICC”) as an arbitration forum, for example, does not articulate any ethical rules whatsoever, and its overwhelming popularity may be partly due to an aversion to increased ethical regulations.¹³ Still, lawyers are increasingly acknowledging the negative consequences a lack of ethical guidelines may have in international arbitration as a whole.¹⁴ Legal

⁶ Edna Sussman and Solomon Ebere, *All’s Fair in Love and War – Or is it? Reflections on Ethical Standards for Counsel in International Arbitration*, 22 AM. REV. INT’L ARB. 611, 615 (Guerilla tactics include running the clock, last-minute surprise tactics like introducing important arguments or affidavits for the first time on the “eve of the hearing,” and “abusing the arbitrators after a bifurcated hearing on liability in order to try to keep down the amount of damages on the quantum hearing.”)

⁷ See Crystal & Giannoni-Crystal, *supra* note 1; see Park, *supra* note 1.

⁸ The LCIA, formerly the City of London Chamber of Arbitration, has been in existence since 1892. The LCIA’s newly adopted Arbitration Rules came into effect October 1, 2014.

⁹ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. (2014).

¹⁰ INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION (2013).

¹¹ *Id.*

¹² *Id.*

¹³ INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION (2012).

¹⁴ See Crystal & Giannoni-Crystal, *supra* note 1; see Menon, *supra* note 1; see Bishop & Stevens, *supra* note 1; see Park, *supra* note 1.

scholars have identified two major concepts as ethical challenges facing counsel: “double deontology” and “inequality-of-arms.”¹⁵

Significant deficiencies exist in international arbitration regarding counsel ethics. More regulation will ensure stability, integrity, and efficiency for parties seeking arbitration. Legal scholars and practitioners have come up with several proposals, including a third party uniform code of ethical regulations and a “parties’ agreement.”¹⁶ While there is no perfect solution, an individualized “parties’ agreement”¹⁷ would be an effective and realistic approach to the current situation because both parties’ counsel will have a full understanding of exactly what they can and cannot do, resulting in a leveling of the playing field, curtailment of guerrilla tactics, increased legitimacy, and overall more efficient arbitral proceedings.

II. THE NEED FOR ETHICAL GUIDELINES

A. The Difference of Legal Values Across Cultures

The question of whether ethical rules for legal counsel are needed in arbitration remains a contested issue. Some international arbitration experts do not believe any additional rules are necessary because “the international arbitration bar has the reputation of being a quite civilized and ethical bar.”¹⁸ This positive reputation, however, may have only been a reality in the past, when international arbitration was a “niche way to resolve controversies.”¹⁹ Before the New York Arbitration Convention in 1958 allowed for expansion of international arbitration forums, international arbitration was “very European – and civil-law dominated – because of the location of the International Chamber of Commerce.”²⁰ With this common background and familiarity between parties, any cultural disparities were typically resolved by “gentlemen’s agreements” rather than legal determinations.²¹

¹⁵ See Sussman & Ebere, *supra* note 6 at 615.

¹⁶ A parties agreement refers to an arrangement that is constructed by and accepted by all parties to a transaction.

¹⁷ *Id.*

¹⁸ Crystal & Giannoni-Crystal, *supra* note 1, at 286.

¹⁹ *Id.*

²⁰ See George M. von Mehren & Alana C. Jochum, *Is International Arbitration Becoming Too American?*, 2 GLOBAL BUS. L. REV. 47, 49-52 (2011); The International Chamber of Commerce is based in France, and was based in France in 1958 as well.

²¹ Crystal & Giannoni-Crystal, *supra* note 1, at 286.

Since the creation of the New York Arbitration Convention, international arbitration has evolved and dramatically expanded.²² Now, arbitration has become the most popular way to solve international disputes, and its popularity is not confined to Europe; it is utilized globally.²³ Statistics indicate that over 80% of parties in pending LCIA cases are from outside of the United Kingdom, echoing a larger trend of “cross-border” arbitration.²⁴ International arbitration has become “culturally delocalized” in nature.²⁵ Globalization signifies that “gentlemen’s agreements” may no longer suffice to resolve cultural differences.²⁶ For example: “in civil law countries, witnesses are not prepared. Instead, the lawyer will nominate a witness for a particular topic and then argue the significance of that testimony.”²⁷ In Germany, “contacting non-party witnesses is actually unethical.”²⁸

Differences in legal cultures across borders can be significant. A few of the key difference include rules regarding witness preparation, rules dealing with client communications, and the divergence in the relationship between fellow lawyers.²⁹ The “clash between national ethical rules relating to pre-testimonial contact with [the] witness” is the “seminal and most familiar example used to illustrate the need for international ethical rules.”³⁰ In the United States, it is common practice for lawyers to prepare their witness to testify, but in many European countries such conduct is improper.³¹ In England, for instance, the Barristers’ Code of Conduct prohibits any

²² Crystal & Giannoni-Crystal, *supra* note 1, at 286.

²³ *Id.* at 286-287.

²⁴ Introduction, London Court of International Arbitration, *available at* <http://www.lcia.org/LCIA/introduction.aspx> (last visited Oct. 24, 2014).

²⁵ Bishop & Stevens, *supra* note 1.

²⁶ Crystal & Giannoni-Crystal, *supra* note 1, at 287.

²⁷ Crystal & Giannoni-Crystal, *supra* note 1, at 295.

²⁸ *Id.*

²⁹ Crystal & Giannoni-Crystal, *supra* note 1, at 292-293.

³⁰ *See* Rogers, *supra* note 2.

³¹ *See* Park, *supra* note 1.

rehearsal, practice, or coaching of a witness.³² In civil law countries, “witness preparation is generally even more restricted than in England, and often includes additional regulations and more stringent standards.”³³ In the United States, client communication is one of the most fundamental duties of the attorney.³⁴ The broad duty to maintain client communication is considered to be essential to fair and comprehensive representation.³⁵ Conversely, the French doctrine *sous la foi du Palais*³⁶ necessitates that an attorney may be required to keep confidential from his client communication from opposing counsel under certain circumstances.³⁷ In addition, a similar rule in Italy provides, “the correspondence that have been qualified as ‘confidential’ and any correspondence containing a settlement proposal cannot be produced at trial or referred to.”³⁸

Another example of ethical discrepancies in legal values is the divergence in the relationship between lawyers. The United States, for example, does not articulate any formal type of code of civility between lawyers.³⁹ It is uncommon for lawyers operating under the professional and ethical codes in the United States to be sanctioned for uncivil behavior toward each other.⁴⁰ The relationship between lawyers, however, is more heavily regulated in Europe than in the United States.⁴¹ For example, Article 23 of the Italian Code of Ethics states: “in litigation an attorney must inspire his or her conduct to

³² Barristers’ Code of Conduct R. 705, available at <https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/part-vii-conduct-of-work-by-practising-barristers/#contact>. (“A barrister must not:

- (a) rehearse practice or coach a witness in relation to his evidence;
- (b) encourage a witness to give evidence which is untruthful or which is not the whole truth;
- (c) except with the consent of the representative for the opposing side or of the Court, communicate directly or indirectly about a case with any witness, whether or not the witness is his law client, once that witness has begun to give evidence of that witness has been concluded.”).

³³ Crystal & Giannoni-Crystal, *supra* note 1, at 295 (citing Germany and France as examples of civil law countries with more restrictions than England).

³⁴ Crystal & Giannoni-Crystal, *supra* note 1, at 296.

³⁵ *Id.*

³⁶ “Sous la foi du Palais” literally translates to “evidence on Palace” but refers to confidentiality of counsel communication.

³⁷ Rogers, *supra* note 2.

³⁸ Italian Code of Conduct, Article 28.

³⁹ While there are no formal codes of civility between lawyers in the United States, arguably informal codes of conduct exist.

⁴⁰ Crystal & Giannoni-Crystal, *supra* note 1, at 297-298.

⁴¹ Crystal & Giannoni-Crystal, *supra* note 1, at 298; *see generally* CCBE Code of Ethics art. 5.1-5.9.

the duty of defense but without affecting as far as possible the comradeship among lawyers.”⁴² Put another way, lawyers from Italy will be under an obligation to promote comradeship and civility between themselves and opposing counsel, whereas lawyers from the United States will be under no such formal obligation.⁴³

B. The Rise of Guerilla Tactics

Because legal cultures can be highly distinctive, international arbitration forums often do not articulate uniform ethical rules for counsel to adhere to.⁴⁴ Failing to address this problem, however, can have negative implications. To gauge if counsel were taking advantage of a lack of ethical regulation, in 2011 the IBA’s Arbitration Committee⁴⁵ issued a survey regarding counsel ethics (hereinafter “IBA Survey”).⁴⁶ The survey 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.⁴⁷

There were 81 responders to the survey, and fifty-five, or 68%, checked “yes” and reported that they had experienced what they considered to be guerrilla tactics.⁴⁸ The most prevalent categories of guerrilla tactics responders identified were: (1) frustrating an orderly and fair hearing, (2) document production/disclosure, and (3) lack of respect, courtesy towards tribunal and opposing counsel.⁴⁹ Guerrilla tactics such as these seem to be on the rise.⁵⁰ International arbitration experts Edna Sussman and Solomon Eberé point out that, “in the past months we have seen reports of the arrest of a successful claimant by

⁴² Italian Code of Ethics, Article 23.

⁴³ See generally Crystal & Giannoni-Crystal, *supra* note 1.

⁴⁴ See generally INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION (2012).

⁴⁵ In 2008 the IBA Arbitration Committee formed a Task Force on Counsel Ethics in International Arbitration. The Task Force’s goal was to find out if the lack of guidelines for counsel ethics has had an effect on the fairness and the integrity of arbitration proceedings in the past.

⁴⁶ Sussman & Eberé, *supra* note 8, at 611.

⁴⁷ *Id.*

⁴⁸ Sussman & Eberé, *supra* note 8, at 612.

⁴⁹ Sussman & Eberé, *supra* note 8, at 613.

⁵⁰ *Id.*

a host state, fraudulent overstatement by over one billion dollars in a balance sheet submitted in arbitration, death threats against witnesses, and ex parte meetings of counsel for plaintiffs with the court-appointed ‘independent’ expert to plan and write the expert’s report.”⁵¹

The lack of ethical regulation for counsel in international arbitration creates an “uneven playing field” which seems to encourage guerrilla tactics and, as a result, threatens efficiency, which is one of the key benefits of engaging in arbitration, by making the proceedings inefficient, unpredictable, and illegitimate.⁵²

III. THE CHANGES TO THE LCIA ARBITRATION RULES AND IBA GUIDELINES FOR PARTY REPRESENTATION

On October 1, 2014 the LCIA’s new rules became effective. The previous rules did not contain any ethical rules for legal counsel.⁵³ An Annex was added to provide “General Guidelines for the Parties’ Legal Representatives.” The Annex is made up of seven sections:

Paragraph 1: These general guidelines are intended to promote the good and equal conduct of the parties’ legal representatives appearing by name within the arbitration. Nothing in these guidelines is intended to derogate from the Arbitration Agreement or to undermine any legal representative’s primary duty of loyalty to the party represented in the arbitration or the obligation to present that party’s case effectively to the Arbitral Tribunal. Nor shall these guidelines derogate from any mandatory law, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to a legal representative appearing in the arbitration.⁵⁴

Paragraph 2: A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator’s appointment or to the jurisdiction or authority of the Arbitral Tribunal known to be unfounded by that legal representative.⁵⁵

⁵¹ Sussman & Ebere, *supra* note 4, at 613; see Sebastian Perry, ISCID Claimant Behind Bars on Bribery Charge, *Global Arb. Rev.* (2010); see *Venture Global Engineering v. Satyam Computer Services Ltd.*, No. 9238, 2010 (Sup. Ct. India); see *Znamensky Selekcionno-Gibridny Center LLC v. Donaldson International Livestock Ltd.*, 2009 CanLII 51197 (Ont. S.C.); see *In re Application of Chevron Corporation et al.*, 709 F.Supp.2d 283 (S.D.N.Y. 2010).

⁵² Park, *supra* note 1, at 412.

⁵³ The LCIA’s previous rules were promulgated in 1998 (<http://www.lcia.org/LCIA/history.aspx>).

⁵⁴ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 1 (2014).

⁵⁵ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 2 (2014).

Paragraph 3: A legal representative should not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court.⁵⁶

Paragraph 4: A legal representative should not knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court.⁵⁷

Paragraph 5: A legal representative should not knowingly conceal or assist in the concealment in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal.⁵⁸

Paragraph 6: During the arbitration proceedings, a legal representative should not deliberately initiate or attempt to initiate with any member of the Arbitral Tribunal or with any member of the LCIA Court making any determination or decision in regard to the arbitration (but not including the Registrar) any unilateral contact relating to the arbitration or the parties' dispute, which has not been disclosed in writing prior or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal (if comprised of more than one arbitrator) and the Registrar in accordance with Articles 13.4.⁵⁹

Paragraph 7: In accordance with Articles 18.5 and 18.6, the Arbitral Tribunal may decide whether a legal representative has violated these general guidelines and, if so, how to exercise its discretion to impose any or all of the sanctions listed in Article 18.6.⁶⁰

These guidelines are intended to be binding for all LCIA Arbitration proceedings.

In 2013, the IBA Guidelines on Party Representation were adopted. The IBA Guidelines provide 27 rules for counsel, along with comments, divided into seven sections.⁶¹ Those sections are: Application of Guidelines, Party Representation, Communication with Arbitrators, Submissions to the Arbitral Tribunal, Information Exchange and Disclosure, Witnesses and Experts, and Remedies for Misconduct.⁶²

⁵⁶ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 3 (2014).

⁵⁷ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 4 (2014).

⁵⁸ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 5 (2014).

⁵⁹ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 6 (2014).

⁶⁰ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 7 (2014).

⁶¹ INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION (2013).

⁶² *Id.*

These guidelines do not govern all arbitration proceedings within the IBA, but if all parties agree, they can consent for the guidelines to apply to their proceedings.⁶³ Comparing the IBA Guidelines with the LCIA Annex illustrates the existing ethics framework for counsel in international arbitration.

A. Four Flaws in the Language of the LCIA's New Annex

1. "Should Not" Instead of "Will Not"

The Annex states that legal representatives "should not" engage or fail to engage in prohibited activities.⁶⁴ The language makes the rules seem like a suggestion rather than a mandatory set of ethics parties must oblige by. The use of the verb "should" signals that the rules are "merely precatory."⁶⁵ If legal counsel violates the rules of the Annex, he or she could certainly point to the language of the rules to support a proposition that the rules are mere recommendations for ethical conduct rather than mandatory Rules that can be sanctioned. The IBA Guidelines provide similarly weak verbiage, using the word "should" rather than "must."⁶⁶

2. Disclaimer Language in Paragraph 1

Paragraph 1 states that the rules are not meant to derogate any obligation the legal counsel has to the client, and similarly not meant to derogate any other rule or code of conduct that applies to legal counsel.⁶⁷ This signals to counsel that as long as their actions demonstrate either an effort to best represent their client or an effort to comply with another outside set of rules, they are not violating LCIA rules.⁶⁸ Differing sets of laws, professional rules of conduct, and ethical rules exist in the global legal community, and are available to justify counsel's conduct. Similarly, many types of conduct that could be considered unethical could easily be construed to represent an effort to most effectively and efficiently represent a client in arbitration proceedings. Thus, lawyers that violate these provisions may use this paragraph as an escape clause to avoid sanctions.

⁶³ INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION (2013).

⁶⁴ *See generally* LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. (2014).

⁶⁵ Crystal & Giannoni-Crystal, *supra* note 1, at 297.

⁶⁶ *See generally* INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION (2013).

⁶⁷ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 1 (2014).

⁶⁸ *Id.*

3. *Lack of Detail and Comprehensiveness*

The Annex articulates five specific activities that are prohibited, which signals to legal counsel that his or her ethical obligations are limited to those five activities.⁶⁹ Comprehensive ethical rules are essential to effectiveness.⁷⁰ Conversely, the IBA Guidelines articulate not five rules, but 27 rules in its guidelines for legal representatives.⁷¹ For example, the IBA's Guidelines include sets of rules to preserve witness integrity⁷² as well as rules that obligate legal representation to report any conflict in interest before the arbitration begins as well as during the arbitration proceedings.⁷³ Yet, some crucial detail remains left out. For example, Paragraph 5 states that legal counsel may not conceal any document ordered to be produced by the tribunal.⁷⁴ What if the tribunal fails to order production of a document, but production of that document is crucial to the integrity of the proceedings? Legal counsel may not feel they are ethically required to produce those types of documents. By the same measure, Paragraph 5 uses the word "documents," not evidence.⁷⁵ Accordingly, it's unclear whether the same rules apply to non-documentary evidence. The LCIA Annex fails to establish a comprehensive, detailed ethical framework for legal counsel to adhere to. Instead the Annex creates ethical loopholes.

4. *Lack of Real, Substantial Sanctions*

Rules that cannot be enforced have limited value.⁷⁶ This wisdom rings true with the sanctions set out in the LCIA. The sanctions referred to in Paragraph 7 come from the main body of the LCIA rules and can be summed up as four sanctions: (1) written reprimand, (2) written caution as to future conduct, (3) reference to the legal representative's regulation and/or professional body, and (4) any other measures deemed necessary by the tribunal to maintain its general duties.⁷⁷ The first two sanctions, written

⁶⁹ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. (2014).

⁷⁰ See generally Menon, *supra* note 1.

⁷¹ INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION (2013).

⁷² INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION R. 18 – 25 (2013).

⁷³ INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION R. 4-6 (2013).

⁷⁴ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 5 (2014).

⁷⁵ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 5 (2014).

⁷⁶ Jeffrey Waincymer, *Regulatory Developments in the Control of Counsel in International Arbitration – The IBA Guidelines on Party Representation in International Arbitration and the New LCIA Rules and Annex*, 30 ARB. INT'L. at 517 (2014).

⁷⁷ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. (2014).

reprimand and caution to future conduct, are ineffectual.⁷⁸ The threat of a warning with no other sanction will likely not deter legal counsel from engaging in unethical conduct. The third sanction exists independent of Paragraph 7, so it will likely be unproductive as well.⁷⁹ The last sanction, however, because of its broad language and discretion, could allow for meaningful sanctions. Unfortunately, the arbitrators with the discretion to impose sanctions are party-appointed. Therefore, arbitrators are unlikely to implicate the parties that chose them because sanctions would likely destroy any future relationship.⁸⁰ Arbitrators and arbitration forums need parties to select them. Therefore, they are not likely to harshly penalize parties for ethical wrongdoing, especially if the problem is caused by a cultural misunderstanding rather than foul play.

V. REACTIONS AND RAMIFICATIONS

The new LCIA Annex has sparked wide discussion in the legal community on what effect the Annex will have in the coming years. The response by the international arbitration community seems to be overwhelmingly positive, which is not surprising considering this is the first time an arbitral institution has included provisions specifically governing the conduct of counsel.⁸¹ The general consensus is that the LCIA Annex is beneficial because it offers more clear direction as to which actions can be taken by legal counsel during arbitration and which actions are to be avoided.⁸²

Still, some skepticism remains. Several international arbitrators have expressed apprehension that the sanctions are overly broad in authorizing tribunals to use any measure necessary.⁸³ Those commentators observe that “any measure necessary” might equate to “unknown and potentially severe consequences.”⁸⁴ Other commentators point

⁷⁸ See generally Crystal & Giannoni-Crystal, *supra* note 1; see generally Menon, *supra* note 1; see generally Park, *supra* note 1.

⁷⁹ Sapna Jhangiani & Khaled Moyeed, *How Far do the New LCIA Guidelines for Parties’ Legal Representatives and the IBA Guidelines on Party Representation Go?*, KLUWER ARBITRATION BLOG, available at <http://kluwarbitrationblog.com/blog/2014/05/21/how-far-do-the-new-lcia-guidelines-for-parties-legal-representatives-and-the-iba-guidelines-on-party-representation-go/> (last visited Nov. 25, 2014).

⁸⁰ See Menon, *supra* note 1.

⁸¹ De Brauw Blackstone Westbroek, *LCIA Trailblazer with Introduction of New Ethical Code of Conduct in 2014 Arbitration Rules*, available at <http://www.debrauw.com/newsletter/lcia-trailblazer-introduction-new-ethical-code-conduct-2014-arbitration-rules/> (last visited Oct. 24, 2014).

⁸² See Park, *supra* note 1, at 425.

⁸³ *Id.*

⁸⁴ Crowell Moring, *The Expediency, Ethics, and Express Powers of the Draft LCIA Arbitration Rules*, available at <http://www.crowell.com/NewsEvents/All/The-Expediency-Ethics-and-Express-Powers-of-the-Draft-LCIA-Arbitration-Rules>. (last visited Nov. 20, 2014).

to a problem in proving intent.⁸⁵ Paragraphs 3, 4, and 5 state that legal counsel should not knowingly engage in specific unethical behavior.⁸⁶ Paragraph 6 states that legal counsel should not deliberately engage in specific unethical behavior.⁸⁷ It is unclear what level of awareness rises to the level of knowingly or deliberately and whether complaints leading to sanctions are subject to a particular time frame or other constraint.⁸⁸ In general, critics seem to be wary of the ambiguity of the Annex's language because it translates to unpredictable outcomes. The legal community prefers stability and predictability over the unknown, and not knowing how the ethical rules in the Annex will be applied may cause some hesitation in choosing the LCIA as a forum.⁸⁹

Another problem debated by commentators is the ambiguity as to the level of power any international arbitration system or its arbitrators truly should have over counsel.⁹⁰ As previously discussed, traditionally, arbitrators, legal counsel, and clients came from more similar backgrounds and had more of a shared understanding amongst themselves which lessened the need for arbitrators to control legal counsel and provide clarification.⁹¹ This notion, however, has evolved over time as arbitration has become more global.⁹² Even so, the duty to regulate legal counsels' actions remain unclear. One tribunal constituted under the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") held that international tribunals have "inherent authority"⁹³ to exercise control over counsel to preserve the integrity of the arbitration.⁹⁴ Another ICSID tribunal, however, held that an arbitrator's power over counsel is limited, and should only be exercised on rare occasion.⁹⁵ Even within the same forum, it is uncertain how much discretion a tribunal may have in checking a legal counsel's actions.

⁸⁵ See Waincymer, *supra* note 64, at 548-549.

⁸⁶ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 3-5 (2014).

⁸⁷ LONDON COURT OF INTERNATIONAL ARBITRATION R. APP. ¶ 6 (2014).

⁸⁸ See Waincymer, *supra* note 64, at 548-549.

⁸⁹ See generally Crystal & Giannoni-Crystal, *supra* note 1; see generally Park, *supra* note 1.

⁹⁰ See Bishop & Stevens, *supra* note 1.

⁹¹ See generally Park, *supra* note 1.

⁹² *Id.*

⁹³ Inherent authority used in this context refers to authority possessed implicitly without being derived from explicit rules or law.

⁹⁴ See *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel (2008) (holding that ICSID tribunal did have power to exclude a party's choice of counsel).

⁹⁵ See *Rompetrol Group N.C. v. Romania*, ICSID Case ARB/06/3, Decision on the Participation of a Counsel (2010).

The IBA Guidelines are more comprehensive and instructive than the LCIA Annex. The IBA Guidelines articulate twenty-seven rules as compared to five, and the rules are more detailed. Thus, legal counsel who elect to abide by the IBA will likely feel they have a better understanding of what to expect as well as a higher expectation of fair proceedings, both crucial considerations. Another enticing aspect of the IBA Guidelines is that if parties mutually agree to use it, they sign the Guidelines before arbitration and therefore it becomes part of the contract to which they are legally bound.⁹⁶

IBA Guidelines, however, are still weak in certain areas. First, the guidelines have an opt-in program.⁹⁷ Parties only have to abide by the Guidelines if they choose for it to apply before proceedings begin. Second, like the LCIA Annex, the rules for legal counsel are “should” and “should not” rules. Even if the Guidelines binding through party agreement, parties could still argue that the Guidelines are merely suggestions rather than legitimate rules that in the event of noncompliance could subject counsel to sanctions.

A. Double Deontology & Inequality-of-Arms

Skepticism about both the LCIA Annex and the IBA Guidelines may add to the general aversion for any increased ethical regulation in international arbitration. This opposition may be partially responsible for the overwhelming popularity of the ICC as an arbitration venue.⁹⁸ The ICC does not provide any ethical rules for counsel, so lawyers can largely ascribe to whichever ethical code they choose. However, lawyers are increasingly acknowledging the negative consequences a lack of ethical guidelines may have in international arbitration, especially in the face of the growing popularity of international arbitration around the world.⁹⁹ A number of leading arbitrators and practitioners have described the ethical aspects of international arbitration as “a crisis that can threaten the legitimacy of international arbitration and in need of immediate redress.”¹⁰⁰ Two major concepts have been identified by legal scholars as ethical challenges facing counsel, “double deontology” and “inequality-of-arms.”¹⁰¹

⁹⁶ See Waincymer, *supra* note 64, at 517.

⁹⁷ INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION (2013).

⁹⁸ Institutions prefer the ICC at a rate of 50%. Data available at http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf (last visited Nov. 22, 2014).

⁹⁹ See Crystal & Giannoni-Crystal, *supra* note 1; see Park, *supra* note 1; see Waincymer, *supra* note 64.

¹⁰⁰ Rogers, *supra* note 2, at 5.

¹⁰¹ Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration 5* (Penn State Legal Studies Research Paper No. 18-2010), available at <http://papers.ssm.com/sol3/papers.cfm?abstract> (last visited Nov. 20, 2014).

Double deontology occurs when a lawyer is bound by more than one set of ethical requirements that are inconsistent with one another. The attorney is “faced with the prospect of professional discipline regardless of what action he takes.”¹⁰² Theoretically there are four ways to deal with double deontology: (i) adhere to personal moral standard, (ii) adhere to the ethical code of the home state, (iii) adhere to the ethical code of the host state, or (iv) adhere to some third party’s code of conduct.¹⁰³ The LCIA’s Annex and the IBA Guidelines are examples of a third party’s code of conduct designed to prevent the problem of double deontology.¹⁰⁴

Inequality-of-arms occurs when “attorneys who are bound by different ethical rules participate in a single international proceeding” which makes the proceedings “structurally unfair.”¹⁰⁵ Inequality-of-arms is what permits guerrilla tactics to be used, where one side may use the disparaging rules to gain an advantage against the other side.¹⁰⁶ Inconsistent enforcement of ethical rules among different legal cultures also plays a part in encouraging guerrilla tactics in international arbitration.¹⁰⁷

Several possibilities have been articulated as possible solutions to deciding what type of ethical code for counsel will solve the problems of double deontology and inequality-of-arms.¹⁰⁸ The most effective approaches to limiting these problems are promotion of a third party uniform code of ethical regulations, and gaining party agreement to existing regulations.¹⁰⁹ Both of these approaches will prove more effective than the “no-code” regime of the past, even though the third party uniform code approach is what the LCIA Annex and the IBA Guidelines seek to promulgate within their forums. There are significant problems with this approach, however, as illustrated by the “four flaws” of the LCIA Annex. The rules seem to be suggestions, and expressly provide that the guidelines are not meant to derogate from any mandatory law, rules of law, professional rules or codes of conduct. Also, there is “no guarantee that the disciplinary authorities in the various countries will accept the authority of an international code,”¹¹⁰ especially when the proscribed ethical rules likely contrast with that country’s code.

¹⁰² Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration* 5 (Penn State Legal Studies Research Paper No. 18-2010), available at <http://papers.ssm.com/sol3/papers.cfm?abstract> (last visited Nov. 20, 2014).

¹⁰³ *Id.* at 472.

¹⁰⁴ *Id.*

¹⁰⁵ Rogers, *supra* note 2.

¹⁰⁶ See Crystal & Giannoni-Crystal, *supra* note 1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 308.

The ‘parties’ agreement’ approach may be the most effective remedy. This is a contractual approach in which the parties would agree beforehand to which ethical code for counsel will apply to arbitration proceedings.¹¹¹ The strength of this approach comes from the concept that the “validity of arbitration flows from the agreement of the parties.”¹¹² The agreed upon ethical code could be included in the arbitration clause, similar to the way IBA Rules of Evidence have been adopted in international arbitration proceedings through the arbitration clause.¹¹³ Parties’ agreement provides increased regulation, but in a way that theoretically benefits all parties involved. If the chosen ethical code for counsel is expressly contracted for, both parties’ counsel will have a full understanding of exactly what they can and cannot do, resulting in a leveling of the playing field, curtailment of guerrilla tactics, increased legitimacy, and overall more efficient arbitral proceedings.¹¹⁴

More regulation will ensure stability, integrity, and efficiency for parties seeking arbitration. A practical and effective alternative to the LCIA Annex’s ethical guidelines is to provide for parties’ agreements which would establish, pre-arbitration, which ethical code or codes for counsel will apply in proceedings. This can be done efficiently by adding language to arbitration clauses that provides for which ethical code will apply to counsel.¹¹⁵ This is already common practice with rules of evidence, and will promote more transparency and a more level playing field for counsel engaging in international arbitration.¹¹⁶

VI. CONCLUSION

Some scholars and practitioners may believe that good arbitrators can bridge the cross-cultural divide with “established rules” and “informal understandings of how things should be done.”¹¹⁷ That may have been true in the past, but in a growingly complex and diverse legal world, a “good arbitrator” is not enough.¹¹⁸ One scholar expressed the need for increased ethical regulations eloquently, “Those lucky enough to be involved only in

¹¹¹ Crystal & Giannoni-Crystal, *supra* note 1 at 308.

¹¹² *Id.* at 310.

¹¹³ *Id.* at 309.

¹¹⁴ The positive benefits of employing “parties’ agreements” relies on high quality, comprehensive contracts. If the contracts are poorly written they will likely result in increased confusion and ineffectiveness.

¹¹⁵ Crystal & Giannoni-Crystal, *supra* note 1.

¹¹⁶ *Id.*

¹¹⁷ Park, *supra* note 1, at 425.

¹¹⁸ *See* Park, *supra* note 1, at 413-414.

smooth arbitrations may ask what the fuss is about, just as a healthy person often has difficulty understanding the needs of someone sick.”¹¹⁹

Arbitration forums should consider that more ethical regulation may be needed. More regulation will ensure stability, integrity, and efficiency for parties seeking arbitration. While the LCIA Annex provides positive ethical proposals for legal representation, in practice the rules will likely fall short to remedy the current ethical issues flourishing in international arbitration. There are four flaws that will likely impact the success of the Annex: (1) the language “shall not” rather than “will not,” (2) the general disclaimer in Paragraph 1, (3) lack of detail and comprehensiveness, and (4) a lack of real sanctions.

The LCIA rules came into effect very recently, so time will tell whether the rules will be successful in ensuring ethical legal representation in the arbitration process. However, the adoption of the LCIA Annex, even with its flaws, signals that arbitrating institutions will likely play a larger role in ethical regulation in the future.¹²⁰

¹¹⁹ Park, *supra* note 1, at 425.

¹²⁰ See Menon, *supra* note 1, at 393.