Conflicting Perceptions of Ethics in International Arbitration

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Abstract

The Chartered Institute of Arbitrators' Code of Professional and Ethical Conduct for Members which refers to the Oxford English Dictionary definition of "ethics", states that a code of ethics provides a set of moral principles according to which one should conduct one's affairs. Such an understanding conforms with the international arbitration community's embracing of self-regulation. While a uniform code of ethics in international arbitration does not officially exist, practitioners, arbitrators, and institutions have instead implemented a series of mechanisms for self-regulation by the profession. However, in analysing ethical obligations, leading international arbitration sources fail to recognise the diverse nature of the profession as necessarily inclusive of traders, other non-lawyers, and commercially, geographically, and ethnically diverse perspectives. This article will consider existing mechanisms for self-regulation, the importance of including diverse perspectives, and some suggestions for creating ethical standards which consider these and, in so doing, promote inclusivity.

1. Introduction

This joint article was conceived following the Chartered Institute of Arbitrators' (CIArb) European Branch's Annual General Conference held on 27–28 April 2018 in Lisbon. The theme of the conference was "the latest in" and various panels covered the most recent developments in the enforcement of arbitral awards, maritime ADR, sports arbitration, and arbitration in Lusophone jurisdictions.

The authors participated in the Young Members Group (YMG) panel, organised and chaired by Burcu Osmanoglu, FCIArb, appropriately entitled "Futurama of International Arbitration and the Emerging Need for Ethical Rules" in keeping with the forward-looking theme of the conference. During the panel, the authors presented their thoughts on these matters with a view to achieving a better understanding of the growing challenges of international arbitration, how they will shape its future and, in particular, the changing perspectives over the need for ethical rules. The panel itself, which included Kamal Sefrioui of Sefrioui law firm, Paris, was diverse, its members representing different backgrounds and nationalities, being admitted to the bars of the US, France, England, and Turkey, and having experience of various types of arbitration, both administered and ad hoc, and involving parties from all corners of Europe as well as North Africa and the Middle East.

A common theme emerged on the panel and from comments received from the floor: a perception of inadequacies in existing regulations, and in proposals for new ones, particularly

[*] The views expressed in this article are the authors' own and are not necessarily those of their employers, law firm, or of any organisation with which they are associated.

in encounters with lawyers and other stakeholders from different legal, commercial, and cultural backgrounds.

This theme was echoed during other sessions at the conference. The organisers had looked beyond Europe and invited speakers from other Lusophone jurisdictions. Professor Carlos Alberto Carmona, from Sao Paulo, spoke about failures of representativeness on the task force of the International Bar Association (IBA) which drew up the IBA's Guidelines on Conflicts of Interest in International Arbitration in 2004 and its revisions in 2014: it had just one member from Latin America in 2004[1] and three in 2014.[2] Professor Carmona has protested elsewhere about such cultural insensitivity in relation to the IBA's Guidelines on Party Representation.[3]

In a similar vein, Napoleão Casado Filho spoke about the "appetite" for the regulation of third-party funding (TPF), which has led to proposals for mandatory disclosure of TPF in all arbitrations worldwide.[4] In contrast, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) has made what he has characterised elsewhere as "a mere recommendation that is not encompassed by the institution's Procedural Rules".[5] Casado Filho has queried the "ostensible consensus within the arbitral community" in favour of mandatory disclosure, stating, "[g]enerally, I am cautious of consensus and unanimities".[6]

It was appropriate that criticisms of the IBA Guidelines, and similar "soft law", should be discussed at the CIArb conference in Lisbon. In February 2017, a Portuguese court, in relation to a domestic arbitration, had drawn attention to what it perceived to be the foreignness of the IBA Guidelines, and their inappropriateness in the Portuguese context. Caution should be exercised, the court said, when applying the Guidelines, to avoid "unjustified comparisons and uncritical importations of private foreign theories and usages, *maxime*, those from economies of common law countries".[7]

Feelings amongst arbitration communities that they have been ignored or misunderstood by rule-makers, coupled with a dissatisfaction with current regulations, deserve attention.

Most recently, US rapper and entrepreneur Jay-Z sought to temporarily stay a 200 million dollar American Arbitration Association (AAA) proceeding, arguing that the list of arbitrators provided by the AAA was not diverse enough and that the absence of "more than a token number of African-Americans renders the arbitration provision in the contract void as against public policy".[8] While he thereafter withdrew his request for a stay following the AAA's commitment to "identify and make available African-American arbitrators for consideration", his lawyers pointed out that his request was legitimate as only one out of the 18 African-American arbitrators thereafter identified was based in the relevant jurisdiction

[1] International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (2004).

[2] International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (2014) (2014 IBA Guidelines).

[3] Carlos Alberto Carmona, "Considerations on the IBA Guidelines on Party Representation in International Arbitration: a Brazilian point of view" (2014) *Les Cahiers de l'Arbitrage* 1, 29.

[4] ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration, The ICCA Reports No 4, The Hague, April 2018 (ICCA-Queen Mary TPF Report).

[5] Napoleão Casado Filho, "The Duty of Disclosure and Conflicts of Interest of TPF in Arbitration" *Kluwer Arbitration Blog*, 23 December 2017 <*http://arbitrationblog.kluwerarbitration.com/2017/12/23/duty-disclosure-conflicts-interest-tpf-arbitration/*> accessed 31 January 2019.

[6] Napoleão Casado Filho, "The Duty of Disclosure and Conflicts of Interest of TPF in Arbitration" *Kluwer Arbitration Blog*, 23 December 2017 <*http://arbitrationblog.kluwerarbitration.com/2017/12/23/duty-disclosure-conflicts-interest-tpf-arbitration/*> accessed 31 January 2019.

[7] Central Administrative Court South, 16 February 2017, 20011/16.3BCLSB, cited in Duarte Henriques, "Again the 'Incorporation of the IBA Guidelines into a Code of Ethics: an "Investment in Virtue"'?" *Kluwer Arbitration Blog*, 19 May 2017 <*http://arbitrationblog.kluwerarbitration.com/2017/05/19/again-the-incorporation-of-the-iba-guidelines-into-a-code-of-ethics-an-investment-in-virtue/*> accessed 31 January 2019.

[8] Cosmo Sanderson, "Jay-Z highlights lack of diversity among arbitrators" *Global Arbitration Review*, 29 November 2018 <*https://globalarbitrationreview.com/article/1177431/jay-z-highlights-lack-of-diversity-among-arbitrators*> accessed 31 January 2019.

and African-American arbitrators represent less than 2% of the AAA's roster for large complex cases.[9]

Dialogue, consultation and new ideas could help to overcome these problems and produce solutions, which could serve to improve not only ethical standards but also diversity and inclusivity in international arbitration. This article will address the following:

- Understanding ethics through the perspective of self-regulation.
- Inclusion of diverse perspectives in determining a notion of "self" for self-regulation.
- Existing mechanisms for self-regulation by arbitrators and counsel.
- Efforts towards an inclusive ethical standard for the diverse international arbitration community.

2. Understanding ethics through the perspective of self-regulation

The term "ethics" is difficult to define precisely. The word "ethics" is derived from the Greek word *ethos* (character), and the word "morality" from the Latin word *mores* (customs). Webster's Dictionary defines "ethics" as "the discipline dealing with what is good and bad and with moral duty and obligation"[10] and the Chartered Institute of Arbitrators states that a Code of Ethics "provides a set of moral principles according to which one should conduct one's affairs".[11]

What is clear from the practice of international arbitration is that the concept of "ethics" is deeply rooted. Indeed, many ethical principles such as independence and impartiality of arbitrators, are widely regarded as hallmarks of the international arbitration system.[12] In addition to arbitrators, all players in international arbitration, including lawyers, arbitral institutions, experts, witnesses, insurers, and now third-party funders and asset or conflict tracking companies, have ethical duties and are increasingly bound by regulations designed to enforce those.[13]

Ethics in international arbitration includes purely ethical considerations such as those included in the American Bar Association's Model Rules of Professional Conduct (ABA Rules) relating to conflicts of interest, confidentiality, advertising and solicitation, among other topics.[14] However, it also necessarily encompasses procedural aspects of international arbitration such as document production or evidentiary obligations, the validity of witness statements, instructions to experts, and obligations of fairness and impartiality as third party neutrals. Such rules can be found in binding sets of rules applicable to counsel and arbitrators,

[9] Jack Ballantyne, "Jay-Z drops bid to stay AAA case for lack of diversity" *Global Arbitration Review* 12 December 2018, <*https://globalarbitrationreview.com/article/1177946/jay-z-drops-bid-to-stay-aaa-case-for-lack-of-diversity*> accessed 31 January 2019.

[10] See <*https://www.merriam-webster.com/dictionary/ethic*> accessed 31 January 2019.

[11] See the Chartered Institute of Arbitrators, Code of Professional and Ethical Conduct for Members (CIArb Ethics Code October 2009), 1.

[12] See Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 90 ("The obligation of arbitrators to be impartial or independent is both obvious and imperative"). Under the UNCITRAL Model Law art 22, an arbitrator should disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence. Illustrating the diversity of perspectives on fundamental principles, the English Arbitration Act 1996 omits "independence". As Lord Saville, Chairman of the Departmental Advisory Committee, explained in his Donald O'May Lecture in that year, "This is a deliberate omission, not an oversight. To the extent that lack of independence gives rise to such justifiable doubts, there is no reason to add this word … If there are no justifiable doubts as to the impartiality of the arbitrator, why is his lack of independence objectionable?". See Lord Saville, "The Arbitration Act 1996" [1996] *Lloyd's Maritime and Commercial Law Quarterly* 502, 508. The London Court of International Arbitration (LCIA) Arbitration Rules 2014 nevertheless require disclosure by an arbitrator of any circumstances "likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence" (art 5.4).

[13] Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 225: "… regulation can be said to be a sustained and focused attempt to ensure that the conduct of arbitrators, attorneys, experts, and third-party funders comports with ethical standards in order to ensure the fairness of arbitral outcomes."

[14] American Bar Association, Model Rules of Professional Conduct (2016) (ABA Model Rules), adopted by the bars of all states of the US (except California).

such as the ABA Rules mentioned above, but also in "soft law" instruments such as the IBA Guidelines mentioned above.[15]

A major difficulty confronted by the multiple actors in arbitration has been deciphering and giving meaning to the precise content of a code of ethical conduct based on various factual scenarios. This is because international arbitration encompasses such a diverse, and often conflicting, array of requirements which necessitates reconciling situations where two or more ethical rules are in conflict with one another, also known as "double deontology".[16]

By definition, international arbitration is situated between different legal systems (or above them, one might say), and with actors from many different jurisdictions and legal persuasions.[17] It also involves different and overlapping communities centred around, for example, international trade associations, arbitral institutions, and university law schools, each with their own written, and unwritten, codes of conduct.[18] New arbitration communities are developing on the internet around the Kluwer Arbitration Blog and OGEMID, for example. For Professor Emmanuel Gaillard, such fora "strongly contribute to the shaping of values underpinning international arbitration".[19] Diversity has only increased with time, resulting in a greater body of potential ethical rules which could apply to international arbitration.

The preamble of the ABA Model Rules of Professional Conduct discusses the difficulty facing lawyers, stating that:

> "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."[20]

It is possible to imagine the competing interests at stake between such ethical obligations. For instance, a lawyer might have difficulty reconciling the obligation of confidentiality to a client versus the obligation to disclose a document to an opposing counsel or party so that it may be dealt with (and resulting due process considerations). Or the obligation of an arbitrator to act impartially or neutrally versus his or her obligation to conduct the proceedings expeditiously and efficiently. Or the obligation to provide access to documents versus the goal of keeping costs to a minimum.

However, despite widespread exposure to ethical considerations and numerous initiatives at the international level, there are no uniform rules of ethics in international arbitration for counsel and arbitrators alike. While new hybrid, international, and intersectional standards have become increasingly applicable in many arbitrations, this remains far from uniform. Likewise, there is no clear deterrent method for unethical conduct and no clear understanding of what is expected of arbitration practitioners. Indeed, survey respondents of the White & Case Queen Mary 2018 International Arbitration Survey ranked "lack of effective sanctions during the arbitral process" as the second worst characteristic of international arbitration.[21] The survey specifically highlights the recurrence of "various dilatory tactics employed by counsel that go unsanctioned either because the arbitrators are reluctant to order appropriate

[15] International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

[16] Doak Bishop, "Ethics in International Arbitration" ICCA 2010 Congress 2010, Rio, Keynote Address <*https://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf*> accessed 31 January 2019.

[17] See V Veeder, The 2001 Goff Lecture: "The Lawyer's Duty to Arbitrate in Good Faith" *Arbitration International* vol 18 4, 431, 438 ("… practitioners in the field of international commercial arbitration extend over the full rainbow colours of human diversity around the world; the legal representatives of parties do not usually share the same national legal culture or practise subject to the rules of the same professional body.").

[18] See eg the International Cotton Association, *Arbitrators Code of Conduct*, which was at issue in *Aldcroft v International Cotton Assoc Ltd* [2017] EWHC 642 (Comm), [2018] QB 725, discussed below.

[19] Emmanuel Gaillard, Freshfields Lecture 2014, "Sociology of international arbitration" *Arbitration International* vol 31 1, 1, 9 (Gaillard Freshfields Lecture).

[20] ABA Model Rules, Preamble and Scope, Preamble: A Lawyer's Responsibilities, para 9.

[21] White & Case Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) <*http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf*> accessed 31 January 2019 (White & Case Queen Mary 2018 Survey), 8.

sanctions" (termed the "due-process paranoia") "or because they do not possess the right instruments to do so".[22]

For some, a uniform ethics code or code of conduct in international arbitration is needed as no uniform rules currently exist and no consensus can be reached as to what the content of those rules should be.[23] For others, including international arbitrator Toby Landau, ethics relates to an area "deliberately left open and unregulated by previous generations of codifiers".[24]

Indeed, how could it be possible to have a uniform set of ethical rules in the world of international arbitration which is subject to such a myriad of institutional rules, applicable laws, and differing nationalities of actors and jurisdictions of practitioners? How might one justify from an enforcement perspective the creation of such a set of rules? Who currently formulates ethical regulations in the international arbitration community? What is their mandate and whom do they represent? *Quis custodiet ipsos custodes?* Could those who propose new rules be affected by conflicts of interest themselves?

These are all questions which deserve to be addressed by the users of arbitration, the commercial parties to whom this process belongs. As Emmanuel Gaillard has noted, "[t]here is no arbitration without parties or without arbitrators, but arbitration can exist without anyone else".[25] International arbitration can, and does, exist, even thrive, without lawyers and without institutions.[26] It comes in many different forms, both administered and ad hoc. It can involve teams of lawyers, three-member tribunals, and long hearings or it can be handled by a sole arbitrator on a documents only basis with submissions being drafted in-house by the parties or their insurers.

By its nature, arbitration is a system which lies outside national courts and which seeks to avoid regulations imposed by governments. When arbitration practitioners speak of "soft law", they most often mean regulations which have been formulated by members of the arbitration community, not "hard law" promulgated by governments. As noted by Gabrielle Kaufmann-Kohler, there is a "sliding scale of softness and hardness (or normativity) for all norms" and even when addressees of soft law norms do not perceive a norm to be binding, "they may choose to abide by it on their own accord", for example out of "respect for the authority of the 'soft lawmaker', social conformism, convenience, the search for predictability and certainty, the desire to belong to a group, and the fear of naming and shaming".[27]

As Professor Catherine A Rogers has noted, professional regulation of the various participants in international arbitration "must be endogenous, not exogenous, to international arbitration … While the term self-regulation is new, the dynamic of self-regulation is well worn into the very fabric of international arbitration".[28]

Regardless of the position taken, self-regulation in international arbitration must begin with an accurate, and inclusive, understanding of the self.

[22] White & Case Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) 8, 27.

[23] See eg Doak Bishop and Margrete Stevens, "The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy" ICCA Congress Series 15 391 (Albert Jan Van Den Berg edn 2011).

[24] Toby Landau, "A Pause for Thought" in Albert Jan van den Berg (ed), *International Arbitration: The Coming of a New Age?* ICCA Congress Series Vol 17 (Kluwer Law International 2013) 496–537.

[25] Gaillard Freshfields Lecture, "Sociology of international arbitration" *Arbitration International* Vol 31 Issue 1, 4.

[26] The Grain and Feed Trade Association (GAFTA), which administers arbitrations in the international grain and foodstuffs trade, largely without the involvement of lawyers either as arbitrators or as party representatives, reports a growing caseload. See the introduction to its directory of arbitrators 2018: *<https://www.gafta.com/ write /MediaUploads/Arbitration/Gafta-Arbitrator-Directory-2018.pdf>* accessed 31 January 2019.

[27] Gabrielle Kaufmann-Kohler, "Soft Law in International Arbitration: Codification and Normativity" [2010] *Journal of International Dispute Settlement* 1–17.

[28] Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 19.

3. Inclusion of diverse perspectives in determining a notion of "self" for self-regulation

Is it the beginning of the end? Sundaresh Menon, then Attorney-General of Singapore, asked this question in his opening address at the International Council of Commercial Arbitration (ICCA) Congress of 2012.[29] His question followed an overview of problems which might threaten international arbitration's "golden age". For example, perceptions of bias:

> "The 'usual suspects' in the industry may be arbitrator in one case and lawyer in the very next, often trading places in the process with another in the same select group."[30]

For Menon, the solution to "these problems of moral hazard, ethics, inadequate supply and conflicts of interests associated with international arbitrators" was a new "code of conduct and practice to guide international arbitrators and international arbitration counsel".

As noted above, no universal code of conduct has yet been established. "Double deontology" continues to raise difficult issues. However, "soft law", in the form of the IBA Guidelines, has gained wider acceptance and institutions, such as Singapore International Arbitration Centre (SIAC), have published their own codes of ethics for arbitrators.

When he came to deliver the keynote address at the SIAC Congress in May 2018, Menon CJ, as he by then had become, noted that there were now dozens of efforts at codes of ethics in circulation. Leadership was needed and he had a candidate:

> "I believe that arbitral institutions are uniquely suited to uphold standards of conduct and ensure fairness in arbitrations because of the tremendous influence they wield over the conduct of arbitrations."[31]

He praised the "General Guidelines for the Parties' Legal Representative" annexed to the 2014 London Court of International Arbitration (LCIA) Arbitration Rules, which "led the way". LCIA Rules art 18.5 requires parties to ensure that their legal representatives have agreed to comply with these guidelines.

LCIA Rules art 18 was considerably expanded in the 2014 revisions. The rule had previously been headed "Party Representation", not "Legal Representatives", and had confirmed that parties in an LCIA arbitration could be represented by anybody of their choice, whether a legal practitioner or not. The authors of a commentary on the 2014 LCIA Rules had this to say about the change:

> "The new provisions in Article 18 will be seen by some as a departure from the commercial character of the LCIA Rules. The presumption that the parties will appoint lawyers to represent them, and the Guidelines which it is the parties' duty to ensure are agreed by their lawyers (with the implicit further presumption that the arbitrators will be lawyers too), contributes to a general impression, which is new in this context, that an arbitration under the LCIA Rules is essentially an enterprise for lawyers."[32]

Menon CJ's speeches, including the quotations above, exemplify presumptions that remain current in discussions of ethics and regulation in international arbitration, notably the following:

[29] Sundaresh Menon, ICCA Congress in Singapore Keynote Address <*https://www.arbitration-icca.org/AV_Library/ICCA_Singapore2012_Sundaresh_Menon.html* > accessed 31 January 2019.

[30] Sundaresh Menon, ICCA Congress in Singapore Keynote Address <*https://www.arbitration-icca.org/AV_Library/ICCA_Singapore2012_Sundaresh_Menon.html* > accessed 31 January 2019.

[31] Sundaresh Menon, SIAC Congress 2018, Keynote Address <*http://www.siac.org.sg/69-siac-news/569-the-honourable-the-chief-justice-sundaresh-menon-keynote-address-delivered-at-the-siac-congress-2018*> accessed 31 January 2019 (Menon SIAC Congress Keynote Address).

[32] Shai Wade, Philip Clifford and James Clanchy, *A Commentary on the LCIA Arbitration Rules 2014* (London: Sweet & Maxwell 2015) 207.

- the international arbitration community is essentially comprised of lawyers;
- the most commonly appointed arbitrators simultaneously maintain practices as counsel;
- there are only a small number of international arbitrators; and
- all commercial arbitrations, at any rate all arbitrations of interest, are submitted to institutions.

Each of these presumptions is false. They arise, it is submitted, from a distorted, and exclusionary, notion of the composition of the international arbitration community.

The opening words of the first chapter of Professor Catherine A Rogers' book, *Ethics in International Arbitration* are:

> "International arbitration was founded by members of what Oscar Schachter called the 'Invisible College of International Lawyers'."[33]

As set out in textbooks, for example, by Gary Born, international arbitration's origins lie, not with modern legal scholars, but in antiquity: it was founded by merchants involved in international trade millennia ago.[34] In medieval Europe, trade fairs involved numerous itinerant or foreign merchants who resorted to arbitration for the resolution of their disputes, which Born suggests "appears to have been a direct forbearer of more modern forms of international commercial arbitration".[35]

Menon CJ recognised international arbitration's heritage in his SIAC keynote address in May 2018. He referred to the Liverpool Cotton Brokers' Association, which was founded in 1841 and has since become the International Cotton Association (ICA):

> "What started out as an informal meeting on Friday mornings, of cotton brokers who gathered to collect information for publication in their circulars, soon turned into a permanent organisation that facilitated the resolution of disputes between buyers and sellers without the need for recourse to the courts."[36]

It is Menon CJ's thesis, as articulated in his keynote, that the cotton association provided the "blueprint for the modern arbitral institution". This may be so, but the ICA is not an arbitral institution itself. It remains a trade association and, more than 175 years after it was founded, it continues to administer arbitrations between producers and merchants in the international cotton trade.[37]

As noted in the leading textbook on international commodity arbitration:

> "The basic characteristics of arbitration in the commodity trades are that it is never *ad hoc* but always within the framework of a system of rules and codes of conduct laid down by each trade, overseen by the secretariat of the relevant trade association and always conducted by persons who are, or who have been, engaged in the particular trade concerned."[38]

The continuing success of the ICA's arbitration service may be attributed to its closeness to the trade and to the association's careful stewardship of the trust of producers and merchants throughout its long history.

In 2014, it modernised its Arbitrators' Code of Conduct, introducing the "3 and 8 rule", which limits the number of appointments from the same (or related) party in a calendar year (the 3 rule) and the number of active ICA arbitrations in which an arbitrator is involved (the 8 rule).

[33] Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 17.
[34] Gary B Born, *International Arbitration: Cases and Materials* (Kluwer 2015) 2.
[35] Gary B Born, *International Arbitration: Cases and Materials* (Kluwer 2015) 14.
[36] Menon SIAC Congress Keynote Address.
[37] Anthony Connerty, "International Cotton Arbitration" (2013) 29(2) Arbitration Intl 295–318.
[38] Derek Kirby Johnson, *International Commodity Arbitration* (Lloyd's of London Press 1991) 7.

An arbitrator, whose practice consisted entirely of ICA arbitrations, sued the ICA, contending that both limbs of the 3 and 8 rule constituted an unreasonable restraint of trade. In *Aldcroft v International Cotton Assoc*,[39] the English Commercial Court held that the ICA's objectives of promoting a perception of impartiality and of avoiding delay in the production of awards were legitimate and that the mechanisms adopted by the ICA to meet them were reasonable.

There was no evidence of any party to an ICA arbitration raising the issue of repeat appointments before the introduction of the 3 and 8 rule. The judge considered that the ICA was entitled to be proactive. ICA representatives had visited members in India, Bangladesh, and Dubai and noted views that costs of ICA arbitration were too high and that references were taking too long to complete.

The ICA's initiative demonstrates that ethical and commercial concerns can coincide and can be met by proactive leadership. The priority here was the maintenance of trust between the arbitration service and its users.

The ICA administers a relatively small number of arbitrations but taken together, ad hoc maritime arbitrations and arbitrations administered by trade associations account for at least 90% of international commercial arbitrations in London,[40] the world's most popular seat according to the White & Case Queen Mary international arbitration survey 2018.[41]

Despite the important place which they continue to hold in the resolution of disputes arising from international commerce, and their wealth of experience built up over more than a century, the report of that survey, as with previous iterations, does not mention trade associations. Its sponsors, a US led multinational law firm, may not be interested in arbitration of this kind, which continues to prosper with minimal input from lawyers, but its absence from the report gives a false impression of the composition of the international arbitration community and of the community's opinions, including in relation to issues which are characterised as ethical.

In the book which they edited, *International Arbitration & Global Governance*, Walter Mattli and Thomas Dietz distinguish "two broad types" of international commercial arbitration, which they call universal and specialised.[42] The former is offered by centres which accept cases from a wide range of companies and industries while the latter "is conducted in forums established in specific industries by the respective international trade associations".

In his chapter, "International Arbitration and Efficiency", Dietz notes that the London Maritime Arbitrators Association (LMAA) and New York's Society of Maritime Arbitrators (SMA) "handle a significantly higher caseload than all universal arbitration tribunals together".[43]

Despite this diversity within the field of arbitration, discussions of ethics have tended to adopt a simplified approach, one that seeks to reduce the variety of the types of actors, focusing instead on a certain elite.

In their seminal work, *Dealing in Virtue*, Yves Dezalay and Bryant C Garth note that historically, in London:

[39] *Aldcroft v International Cotton Assoc Ltd* [2017] EWHC 642 (Comm), [2018] QB 725.

[40] The City UK Legal Services Report 2017, 33: excluding CEDR (mediation), 3710 international arbitrations in London in 2016, of which 3294 were LMAA (*<https://www.thecityuk.com/assets/2017/Reports-PDF/39ccc4245b/Legal-excellence-internationally-renowned-Legal-services-2017.pdf>* accessed 31 January 2019); GAFTA Arbitrators Directory 2018 (reports 984 arbitrations in 12 months—omitted by City UK from its report) (*<https://www.gafta.com/write/MediaUploads/Arbitration/Gafta-Arbitrator-Directory-2018.pdf>* accessed 31 January 2019). Not accounting for other trade associations or for ad hoc arbitrations in which the LCIA or ICC was providing services, LMAA and GAFTA arbitrations thus totalled more than 4000 in comparison to 368 with the ICC and LCIA.

[41] White & Case Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) *<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>* accessed 31 January 2019, 9.

[42] Walter Mattli and Thomas Dietz, *International Arbitration & Global Governance* (Oxford University Press 2014) 2.

[43] Walter Mattli and Thomas Dietz, *International Arbitration & Global Governance* (Oxford University Press 2014) 192.

> "International arbitration involved a relatively stable set of arbitral practices dominated by shipping, commodities, insurance and construction and by the legal institutions of the commercial bar."[44]

By the time of their writing, the English legal profession had had to "come to grips" with "international commercial arbitration as recognized by the ICC community".[45]

For Dezalay and Garth, then, as for Mattli and Dietz, the global arbitration community contained different communities within it, of which the "ICC community" was their chief interest. Their research was admirably thorough, at least at the seats which they chose to explore, but their target was, in the words of Pierre Bourdieu in his foreword "this new international elite, a *noblesse de robe*".[46] They noted that the work of these arbitrators was "rather glamorous" and "well-paid" with "nice places, like Paris or Geneva, and a first-class lifestyle".[47] They were proponents of the "small pool of arbitrators", asserting:

> "Only a very select and elite group of individuals is able to serve as international arbitrators."[48]

It is this elite, Dezalay and Garth's "ICC community", on which Professor Catherine A Rogers focuses in her book, *Ethics in International Arbitration*. For her:

> "International arbitrators are exceptionally talented individuals. Most speak multiple languages. They boast rich and multi-national educations from the world's most prestigious universities and often have experience in the highest echelons of diverse legal systems."[49]

Arbitrators appointed in the thousands of disputes arising from international commerce, the majority of which are handled outside the institutions, may well be exceptionally talented individuals but they have not always had the privilege of a multinational education. They are not even required to be lawyers. Mr Aldcroft, the cotton trade arbitrator mentioned above, is one example.

A similarly exclusionary approach was adopted by the ICCA-Queen Mary Task Force on Third-Party Funding (TPF) in International Arbitration, which sought to address the ethics of TPF. As n 170 to its report explains, in a reference to the White & Case Queen Mary International Arbitration Survey:

> "Notably, this survey, and related discussions in international arbitration, do not generally take account of practices in *ad hoc* and trade association arbitration, most notably in the maritime industry, which account for a large number of arbitrations every year. These are among the reasons why this Report does not seek to address funding in maritime arbitration."[50]

It may be questioned whether failures of inclusiveness occurring in other fora are a good reason to follow and extend them. However, another point of interest here is the Task Force's exclusionary notion of where "discussions in international arbitration" take place. Whilst it may be true that the elite, which Dezalay and Garth identified as the "ICC community", does not generally discuss other kinds of arbitration at the conferences which it organises,

[44] Yves Dezalay and Bryant G Garth, *Dealing in Virtue* (University of Chicago Press 1996) 129.
[45] Yves Dezalay and Bryant G Garth, *Dealing in Virtue* (University of Chicago Press 1996) 129.
[46] Yves Dezalay and Bryant G Garth, *Dealing in Virtue* (University of Chicago Press 1996) viii.
[47] Yves Dezalay and Bryant G Garth, *Dealing in Virtue* (University of Chicago Press 1996) 8.
[48] Yves Dezalay and Bryant G Garth, *Dealing in Virtue* (University of Chicago Press 1996) 8.
[49] Rogers, *Ethics in International Arbitration* (Oxford University Press 2014) 60–61.
[50] ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration, The ICCA Reports No 4, The Hague, April 2018, 84.

this is not true of the larger, diverse, and overlapping communities which deal with disputes arising from international commerce.[51]

The ICCA-Queen Mary Task Force had a number of funders in its membership but it did not include any insurers and it did not consult with insurers.[52] It nevertheless treated insurance as a form of TPF and decided to recommend that it be disclosed at the outset of an arbitration. One of the reasons which it gave was that conflicts could arise because an arbitrator may, for example, "own significant stock in an insurance company". [53] This image of an arbitrator as a person of unusual wealth fits squarely with Dezalay & Garth's "first-class lifestyle" profile but the Task Force's report provides no evidence that any such conflict has ever arisen in practice or that any arbitrators do, in fact, own "significant stock" in insurance companies.

Insurance policies used in international commerce, such as trade credit policies, may contain confidentiality undertakings, preventing the insured from disclosing them to other parties.[54] The Task Force's disclosure recommendation would conflict with such an undertaking but no mention is made of this problem or how it might be overcome. Insurers and their users could thus have the impression that the Task Force's report is more concerned with the "elite" than it is with ordinary arbitrations arising from international commerce.

The UNCITRAL Model Law does not take an exclusionary approach in its definitions of "international" and "commercial". On the contrary, its n 2 states:

> "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not."[55]

It goes on to provide that such relationships include, for example, any trade for the supply or exchange of goods, insurance, and carriage of goods or passengers by air, sea, rail or road.

Task forces, working groups, and committees which have mandates to study particular ethical issues on behalf of the international arbitration community, with a view to "self-regulation", should ensure that they have an inclusive notion of "self" and are representative of, and engage with, the whole of that community, wherever it is located and whether its arbitrations are administered or ad hoc.

4. Existing mechanisms for self-regulation by arbitrators and counsel

With such a diversity of actors in the international arbitration community, self-regulation becomes more difficult to put into practice in a unified manner. Self-regulation means that individual actors in the arbitral process such as counsel or arbitrators are themselves subject to a set of rules on their own conduct which they must abide by.

However, self-regulation necessarily will mean different things to different actors. Commercial parties may be subject to a different set of ethical rules than counsel or arbitrators who happen to be attorneys. For example, a corporation may subscribe to the

[51] eg the 20th International Congress of Maritime Arbitrators (ICMA) in Copenhagen in September 2017 brought together 250 delegates from 35 countries. Arbitral institutions from around the world were represented and their features and rules were discussed alongside those of the still dominant ad hoc London arbitration. See the ICMA XX programme on the congress's website: <*http://icma2017copenhagen.org/program/ICMA%20Program%20Web.pdf*> accessed 31 January 2019, also London International Disputes Week: <*http://lidw.co.uk/programme/*> accessed 27 February 2019.

[52] ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration, The ICCA Reports No 4, The Hague, April 2018, nn 83 and 197.

[53] ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration, The ICCA Reports No 4, The Hague, April 2018, 93.

[54] See eg Markel policy wording, cl D 3 at <*http://www.markelinternational.com/Global/Overseas%20-%20Asia%20Pac/Trade%20credit%20documents/Policy%20wordings/Generic%20Export%20and%20Commercial%20Perils%20(Shipments)_Wording.pdf*> accessed 31 January 2019.

[55] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985) n 2.

Chartered Institute of Procurement & Supply's Corporate Ethical Mark or Register or the UN Global Compact, follow the United Nations Guiding Principles on Business and Human Rights, or adopt a policy statement on human rights, labour rights, or social corporate responsibility.

Focusing, however only on the legal actors for the time being, a lawyer acting as counsel or arbitrator will necessarily be subject to rules which are not specific to international arbitration, yet may have an impact upon them as individual actors in the arbitral process, for example, the rules of a particular bar.

National bar association rules of ethics such as the ABA's Rules mentioned above (for example as implemented in the New York Rules of Professional Conduct) or the Règlement Intérieur National of the French Bar contain specific dispositions on ethics which directly govern arbitration as they are aimed specifically at regulating lawyers from those bars who act as arbitrators.

For instance, the New York Rules of Professional Conduct r 1.12 reads:

> b) "… a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as … an arbitrator.
>
> c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially … as an arbitrator."[56]

Similarly, the French Bar's Règlement Intérieur National rr 6.3.1 and 21.4.5 state:

> **"Rule 6.3.1:**
>
> Upon being entrusted with a mission as an arbitrator, [a lawyer] must respect the special rules which govern the arbitral procedure …, in particular the procedural deadlines and the secrecy of deliberations, … the adversarial principle and of the equal treatment of all concerned parties.
>
> **Rule 21.4.5:**
>
> The rules applicable to a lawyer's relations with a judge are also applicable to his [or her] relations with arbitrators …"[57]

However, the difficulty confronted with the application of national bar rules is that within a given arbitration, multiple sets of national bar rules may apply, but may be conflicting. Indeed, with counsel and arbitrators hailing from an increasingly diverse set of jurisdictions, and with practitioners often being dual qualified, a number of differing bar rules could apply in an arbitration to different actors therein.

One can imagine a situation in which a Chinese claimant represented by counsel from Singapore and an Italian respondent represented by counsel from Paris are presided over by an arbitral tribunal made up of a claimant-appointed Indian arbitrator, a respondent-appointed Brazilian arbitrator, and an Egyptian presiding arbitrator. The number of bar rules which would be implicated to determine a single ethical standard applicable to all would be dizzying. On many issues the national bar rules might be the same or at least similar, but in other instances various legal cultures may result in differing or conflicting standards. Such a scenario would not even take into account the situation in which counsel or arbitrators have multiple bar admissions in which case the issue becomes even more convoluted.

[56] New York State Supreme Court, New York Rules of Professional Conduct (1 April 2009), 74: r 1.12, Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals.

[57] Conseil national des barreaux, Réglement Intérieur National de la profession d'avocat (2005) arts 6.3.1 and 21.4.5.

Sometimes both lawyers subject to the rules of the same bar, acting on opposite sides of an arbitration can find themselves before a bar disciplinary committee in order to attempt to enforce ethical obligations concerning their respective conduct within arbitral proceedings.

Bar rules may contain procedural standards affecting the practice of arbitration, such as rules governing document production, witness testimony, or expert instructions. While such standards may not be classified as ethical rules per se, they invariably touch upon ethical considerations. For example, with respect to document production, there may be a conflict between US-style discovery and Redfern Schedules or even the integration of document production requests within a written brief as has been increasingly employed by arbitral tribunals. There may also be an ethical concern regarding whether an expert can be instructed by counsel to take certain factual assumptions into account in preparing a damages model.

With respect to witness testimony, there may be a conflict as to whether witness statements of party-representatives are admissible. Indeed, this scenario has been witnessed by one of the co-authors of this article on one occasion when dealing with French opposing counsel subject to French Bar ethical rules who erroneously suggested that because the rules only permitted very brief witness statements in the form of an *attestation* exclusively from neutral third parties in the context of French litigation proceedings, that such a standard should be applicable in international arbitration by virtue of the application of the French Bar rules to counsel. Readers will not be surprised that the arbitral tribunal in that case decided against such a suggestion.

In addition to bar rules, procedural standards affecting the practice of arbitration are also contained in "soft law" instruments such as the IBA Rules on the Taking of Evidence (IBA Rules)[58] and the recently launched Prague Rules on the Efficient Conduct of Procedures in International Arbitration which have attempted to present a civil law centric approach to counter the IBA Rules.[59] Such "soft law" instruments (and others) may be incorporated by reference either into the arbitration agreement itself, or into the Terms of Reference (in the case of ICC arbitration) or procedural orders adopted by the parties and/or the arbitral tribunal, or alternatively as persuasive guidance for decisions of arbitral tribunals.

Some such rules apply directly to arbitrators, for example:

- the IBA Rules of Ethics for International Arbitrators (1987);
- the Chartered Institute of Arbitrators' Code of Professional and Ethical Conduct for Members (2004); or
- the IBA Guidelines on Conflicts of Interest (2004, revised in 2014).

For instance, the IBA Rules of Ethics provide that "arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias".[60] It also prohibits arbitrators from accepting gifts from any party,[61] obliges them to avoid significant social and/or professional contacts with a party,[62] prevents them from accepting unilateral arrangements for fees or expenses,[63] and imposes an obligation upon them to keep deliberations confidential.[64] Much of the language found in these rules is now found in the rules and/or guidance notes of many arbitral institutions today. The treatment of bias and duty of disclosure were later encapsulated in the IBA Rules on Conflicts of Interest in International Arbitration.

The Chartered Institute of Arbitrators' Code of Professional and Ethical Conduct for Members, specifically Pt 2 thereof, discusses obligations relating to the conduct of members

[58] International Bar Association, IBA Rules on the Taking of Evidence in International (2010).

[59] The Prague Rules on the Efficient Conduct of Procedures in International Arbitration (2018) <*http://praguerules.com/prague_rules/*> accessed 31 January 2019.

[60] IBA Rules of Ethics for International Arbitrators (1987) (IBA Rules of Ethics) r 1.

[61] IBA Rules of Ethics for International Arbitrators (1987) r 5.5.

[62] IBA Rules of Ethics for International Arbitrators (1987) r 5.

[63] IBA Rules of Ethics for International Arbitrators (1987) r 6.

[64] IBA Rules of Ethics for International Arbitrators (1987) r 9.

"when acting or seeking to act as neutrals" (ie as arbitrators).[65] It discusses among other subjects arbitrators' behaviour, integrity and fairness, conflicts of interest, competence, information, communication, conduct of the process, trust and confidence, and fees.[66]

Other rules are established by arbitral institutions and adopted by parties in their arbitration agreements. Institutional rules often encompass ethical restraints, for example with respect to arbitrator impartiality and independence. For example, the ICC Rules along with their accompanying practice notes have clear ethical guidance on the proper conduct expected of relevant actors in arbitral proceedings. Arbitrators in ICC arbitrations are expected to fill out an ICC Arbitrator Statement of Acceptance, Availability, Impartiality and Independence under the 2017 ICC Rules.[67] Therein arbitrators are expected to indicate:

> "whether there exists any past or present relationship, direct or indirect, whether financial, professional or of any other kind, between [themselves] and any of the parties, their lawyers or other representatives, or related entities and individuals."[68]

Arbitrators are directed, in accordance with the ICC Rules art 11(2), to disclose:

> "… [A]ny facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."[69]

Specific guidance as to what types of situations might give rise to reasonable doubts as to an arbitrator's impartiality are included in the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration.[70] Aside from this section dealing with conflicts of arbitrators, the Note also provides guidance on ex parte communications of arbitrators, another ethical issue covered by the ICC institutional rules.[71]

In addition, arbitrators are expected to indicate their availability on the Statement of Acceptance, indicating precisely when they are unavailable using calendar months and crossing out unavailable time periods.[72] Each arbitrator must confirm that he or she:

> "can devote the time necessary to conduct [a given] arbitration throughout the entire duration of the case as diligently, efficiently and expeditiously as possible in accordance with the time limits in the Rules …"[73]

Such a standard is similarly present in other "soft law" instruments and institutional rules. For instance, the IBA Rules of Ethics in its r 2.3 states that arbitrators should accept an appointment "only if he [or she] is able to give to the arbitration the time and attention

[65] CIArb Ethics Code, Pt 2, Code Relating to the Conduct of Members when Acting or seeking to Act as Neutrals.

[66] CIArb Ethics Code, Pt 2, Code Relating to the Conduct of Members when Acting or seeking to Act as Neutrals rr 1–9.

[67] ICC International Court of Arbitration, 2017 Rules ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence <*https://iccwbo.org/publication/icc-arbitrator-statement-acceptance-availability-impartiality-independence-form/*> accessed 31 January 2019 (ICC Arbitrator Statement).

[68] ICC International Court of Arbitration, 2017 Rules ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence <*https://iccwbo.org/publication/icc-arbitrator-statement-acceptance-availability-impartiality-independence-form/*> accessed 31 January 2019, s 3—Independence and Impartiality, 2.

[69] ICC International Court of Arbitration, 2017 ICC Rules art 11(2).

[70] ICC International Court of Arbitration, *ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration* (30 October 2017) para 20. eg the arbitrator or his or her law firm represents or has represented (or alternatively acted against) a party or its affiliates, the arbitrator has acted as a director or board member of one of the parties, the arbitrator has a close personal relationship with counsel of one of the parties, the arbitrator has acted as arbitrator in a case involving one of the parties, or the arbitrator has been appointed as arbitrator by one of the parties in another case in the past, among other situations.

[71] ICC International Court of Arbitration, *ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration* (30 October 2017) para 34.

[72] ICC International Court of Arbitration, 2017 Rules ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence <*https://iccwbo.org/publication/icc-arbitrator-statement-acceptance-availability-impartiality-independence-form/*> accessed 31 January 2019 s 3—Independence and Impartiality 3–5.

[73] ICC International Court of Arbitration, 2017 Rules ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence <*https://iccwbo.org/publication/icc-arbitrator-statement-acceptance-availability-impartiality-independence-form/*> accessed 31 January 2019 s 2—Availability 1.

which the parties are reasonably entitled to expect".[74] Similarly, the SIAC Code of Ethics for an Arbitrator provides that an arbitrator must give the time and attention reasonably expected to a given case. Indeed, SIAC reserves the right to refuse the confirmation of a prospective arbitrator "should it take the view that the prospective arbitrator will not be able to discharge his [or her] duties due to such potential time constraints".[75] This begs the question whether an ethical obligation exists in the field of international arbitration for an arbitrator to be available in order to handle a case.

The SIAC Code of Ethics also contains guidelines regarding appointment, disclosure and bias of arbitrators, communications with parties, and arbitrators' fees among other topics.[76] It interestingly includes high standards regarding the conduct of arbitrators, including the arbitrator's obligation to "acquaint himself [or herself] with all the facts and arguments presented and all discussions relative to the proceedings so that he [or she] may properly understand the dispute".[77] The Code also has a disposition expressly prohibiting arbitrators from using any confidential information acquired during the proceedings.[78]

Another example of ethical rules included in institutional rules are those in the Code of Conduct for Arbitrators of the Chinese International Economic and Trade Arbitration Commission (CIETAC). There are some rather interesting and unique dispositions in this Code. For example, someone cannot serve as an arbitrator if he or she has previously discussed the case with either party prior to his or her appointment.[79] Indeed, this is a situation sometimes confronted by arbitrators in which they may be approached by counsel as a potential arbitrator, and told a bit about the case to determine whether he or she might accept a nomination. Under the CIETAC Rules, such conduct would be prohibited, as would the acceptance of gifts or meeting either party in private to discuss matters or accept materials relating to the case.[80] Under the CIETAC Rules, the arbitrator also has a heightened obligation to "review *all documents* and materials of a case carefully to find out the issues at hand" (emphasis added).[81] Indeed, in an extremely voluminous case in which thousands of pages of documents are involved, this may be a very difficult standard to meet.[82]

Finally, as mentioned above, the 2014 LCIA Arbitration Rules incorporate a set of ethical obligations which an arbitral tribunal may sanction the violation of.[83] Sanctions range from a simple "written reprimand" or "written caution as to future conduct in the arbitration" to "any other measure" necessary to fulfil the tribunal's duties.[84] While the rules provide that these obligations are secondary to the arbitration agreement and applicable law, a "legal representative" may be sanctioned for obstructive conduct such as repeat challenges to an arbitrator's appointment or a frivolous challenge to the tribunal's jurisdiction,[85] knowingly

[74] IBA Rules of Ethics for International Arbitrators (1987) r 2.3.

[75] Singapore International Arbitration Centre, Code of Ethics for an Arbitrator <*http://siac.org.sg/our-rules/code-of-ethics-for-an-arbitrator*> accessed 31 January 2019 (SIAC Ethics Code) r 1.2.

[76] The SIAC Code includes a requirement (r 5.1) that an arbitrator agree to the remuneration as settled by SIAC. Again, this begs the question whether such a requirement is really an ethical, rather than a contractual, matter.

[77] Singapore International Arbitration Centre, Code of Ethics for an Arbitrator <*http://siac.org.sg/our-rules/code-of-ethics-for-an-arbitrator*> accessed 31 January 2019 r 6.1.

[78] Singapore International Arbitration Centre, Code of Ethics for an Arbitrator <*http://siac.org.sg/our-rules/code-of-ethics-for-an-arbitrator*> accessed 31 January 2019 r 7.1.

[79] Chinese International Economic and Trade Arbitration Commission, Code of Conduct for Arbitrators art III.

[80] Chinese International Economic and Trade Arbitration Commission, Code of Conduct for Arbitrators art IV.

[81] Chinese International Economic and Trade Arbitration Commission, Code of Conduct for Arbitrators art VIII.

[82] Other arbitrator obligations under the CIETAC Rules include: not showing bias during a hearing or making "premature conclusions on key issues and avoid contention or confrontation with the parties" (art X), not disclosing "his or her own opinions or the deliberations of the arbitral tribunal to the parties" (art XIII), and being obliged to attend seminars or events organised for arbitrators by CIETAC and/or CMAC (art XIV).

[83] LCIA Rules art 18.5.

[84] LCIA Rules art 18.6.

[85] Annex to the LCIA Rules, General Guidelines for the Parties' Legal Representatives para 2.

making a false statement,[86] using false evidence,[87] concealing any document ordered to be produced,[88] or initiating contact with an arbitrator with respect to the arbitration at hand.[89]

However, it is doubtful how effective such sanctions may be. Indeed, one often-cited mechanism arbitrators have employed to subject the conduct of lawyers to control has been the awarding of costs to do so. Because an arbitrator has little enforcement power, he or she can wield the weapon of sanctioning a party for improper or unethical conduct by awarding costs in the other party's favour.

However, this mechanism has little impact in deterring unethical conduct by lawyers. This is because when awarding costs, arbitral awards rarely expressly state that costs are awarded due to unethical conduct. At times, a general reference is made to particular conduct, however it is difficult to isolate that conduct as being the result of an ethical violation. Many issues may be cited as collectively constituting conduct which warrants an award of costs in the other party's favour, yet it is rarely exclusively conduct expressly characterised as unethical that singularly results in awarding of costs as such.

Furthermore, by using costs as a mechanism to condemn unethical conduct, tribunals allow such conduct to take place prior to addressing it, if at all. Arbitrators or the applicable procedural rules in an arbitration rarely define which conduct is expressly prohibited. Their sanctioning of such conduct only intervenes at a very late stage of the proceedings, generally in a partial or final award. Such sanctioning may only intervene at the annulment stage by state courts who punish wrongful conduct (such as improper constitution of an arbitral tribunal or a violation of due process) after the fact. Therefore, there is no clear deterrent method for unethical conduct and no clear understanding of what is expected of arbitration practitioners.

Ethical considerations also often intersect with potential grounds for annulment under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. National courts will analyse many ethical issues in determining whether an award should be recognised or annulled, such as assessing whether a party was unable to present its case, whether the tribunal was improperly constituted, or whether a public policy exception applies (for example questions of corruption, money laundering, or bribery).

However, many sets of ethical rules make it a point to assert that the ethical standards put forth therein cannot be used as grounds for the setting aside of awards. For instance, the CIArb Code of Ethics discussed above states that it "shall not … provide grounds for judicial review or other legal action".[90] The IBA Rules of Ethics similarly states that "these guidelines are not intended to create grounds for the setting aside of awards by national courts".[91] Finally, the SIAC Code of Ethics for an Arbitrator also states that it is 'not intended to provide grounds for the setting aside of any award.'[92]

5. Efforts towards inclusive ethical standards for the diverse international arbitration community

Attempts at self-regulation by the profession can fail to incorporate a nuanced understanding of the diverse international arbitration community as described above. Some types of regulation may be appropriate for certain sections of the international arbitration community and not for others. Proponents of regulation for the entire community need to recognise, and be sensitive to, its diversity.

[86] Annex to the LCIA Rules, General Guidelines for the Parties' Legal Representatives para 3.
[87] Annex to the LCIA Rules, General Guidelines for the Parties' Legal Representatives para 4.
[88] Annex to the LCIA Rules, General Guidelines for the Parties' Legal Representatives para 5.
[89] Annex to the LCIA Rules, General Guidelines for the Parties' Legal Representatives para 6.
[90] See CIArb Ethics Code, Pt 2, Code Relating to the Conduct of Members when Acting or seeking to Act as Neutral, Introduction para iv.
[91] IBA Rules of Ethics for International Arbitrators (1987) Introductory Note, 1.
[92] Singapore International Arbitration Centre, Code of Ethics for an Arbitrator <*http://siac.org.sg/our-rules/code-of-ethics-for-an-arbitrator*> accessed 31 January 2019 r 7.2.

The French counsel mentioned above, who proposed to apply French bar rules to the submission of witness evidence in an international arbitration, may be compared to the English insurance arbitrator who accepted appointments in two overlapping arbitrations, arising out of the same incident, and involving one common party. Both appear to have assumed that their own ways of doing things, in their home jurisdictions, would be acceptable in an international arbitration.

According to Popplewell J, who heard and rejected the challenge to the insurance arbitrator in 2017 and had himself had an insurance law practice as a barrister before becoming a judge,[93] a fair-minded or informed observer should not have had any doubts about the impartiality of the arbitrator; and that if the US party, who brought the challenge, did have any such doubts, "it can only have been as a result of a fundamental misunderstanding of the nature of international arbitration in London governed by the [Arbitration] Act".[94]

Some eight years earlier, a division of the Court of the London Court of International Arbitration (LCIA) had decided a challenge involving an insurance barrister who had accepted repeat appointments, on the recommendation of the same solicitors, and had been instructed as counsel to one of the parties in another matter. According to the abstract of the decision, published by the LCIA:

> "The Division noted that, whilst fully conscious of the traditions and cultural norms of the London insurance market, and the local lawyers that serve it, the case at hand related to an international arbitration, albeit seated in London. Thus, whilst the applicable contractual and legal standard was that set out in the LCIA Rules and English law, it did not follow that a fair-minded and informed observer (through whose eyes the circumstances of the case were to be examined) should be as fully attuned with local traditions and culture as a member of the community, or wholly uncritical of it."[95]

Professor William W Park, former President of the LCIA Court, has similarly criticised English barristers for their traditions of appearing as counsel in an arbitration in which another member of the same chambers is acting for the opposite side or of sitting as arbitrator in a case where another member of the same chambers serves as advocate. He has drawn the following comparison:

> "In response to doubts about the ethics of their practice, some barristers suggest that outsiders just do not understand the system, characterizing the critique as naïve. Like a Paris waiter impugning a tourist's ability to speak French in order to distract him from insisting on the correct change, the critique aims to camouflage what is at stake. Often, however, outsiders do understand the mechanics of chambers. They simply evaluate the dangers differently."[96]

Professor Park has also drawn attention to the way in which two barristers from the same chambers can serve as arbitrators on a three-member tribunal and "exclude meaningful participation by the third member".[97] He has said:

> "… [W]hen busy barristers have the opportunity to save time by deciding as a twosome, the temptation exists that a 'short-on-time' card will be played to justify procedural

[93] See <*https://www.judiciary.uk/publications/mr-justice-popplewell/*> accessed 27 February 2019.

[94] *H v L* [2017] EWHC 137 (Comm); [2017] 1 WLR. 2280. Popplewell J's decision was upheld on appeal: *Halliburton Co v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, [2018] 1 WLR 3361. Permission has been granted for an appeal to the Supreme Court.

[95] LCIA Reference No 81160, Decision 28 August 2009 in [2011] Arb Int vol 27 3, 450.

[96] William W Park, "Arbitrator Integrity: The Transient and the Permanent" [2009] *San Diego Law Review* vol 46 No 3, 629, 686.

[97] William W Park, "Arbitrator Integrity: The Transient and the Permanent" [2009] *San Diego Law Review* Vol 46 No 3, 629, 688.

> irregularity, much as a street thief might invoke the 'short-on-cash' defense to explain bag snatching."[98]

A similar sense of exclusion can arise in, and in relation to, task forces, working groups and committees which study ethical issues, and formulate new regulations, on behalf of the international arbitration community, as noted above. For various transnational arbitration communities, which are close to the trades which they serve, and in which law professors do not sit as arbitrators, do not write the leading textbooks, and appear only occasionally as experts on foreign law, explanations as to why academic lawyers have mandates to propose new regulations, which will affect those communities alongside others, can sound just as strange and unconvincing as those of Professor Park's Parisian waiter and street thief.

Arbitration communities are entitled to raise questions about such mandates, the representativeness and inclusiveness of task forces, and, indeed, about their potential conflicts of interest. The symbolic capital of participants (Dezalay and Garth) will be enhanced amongst the elite if they draft and publish recommendations for new "soft law" along the lines for which the elite has already demonstrated an appetite. On the other hand, if they consulted members of the wider international arbitration community, and learned from them, and if they looked at issues from objective and empirical standpoints, they might be compelled to conclude that new proposals for regulations were either unnecessary or relevant only to the elite.

At the same time, individual, transnational and overlapping arbitration communities have already made their own rules, which can question assumptions made for them by such bodies as the IBA. Innovative rules also have the potential to broaden the "small pools" of arbitrators.

In a perceptive but neglected article, an Australian academic noted that international arbitration depended on networks and on the trust which networks foster and engender:

> "… [A]rbitrator appointment in international commercial arbitration occurs via transnational networks of community comprising relationships of interpersonal trust between individuals, who are dealing in power over subjective arbitrator information."[99]

Dezalay and Garth's "ICC community" is one such network. The International Cotton Association (ICA) is another. Both are entitled to make rules for themselves. In the ICA's case, its "3 and 8 rule" (see above) was introduced after extensive study of rules relating to repeat appointments in other associations, and other types of arbitration, and after consulting its users in different countries.[100]

Repeat appointments are acceptable in some communities, as the IBA Guidelines on Conflicts of Interest have recognised. Footnote 5 explains:

> "It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice."[101]

The final caveat is critical: not all parties in "certain types of arbitration" can be expected to be familiar with customs and practices of their dominant community. Such a clash of cultures was visible in the US party's challenge to the English insurance arbitrator in *H v*

[98] William W Park, "Arbitrator Integrity: The Transient and the Permanent" [2009] *San Diego Law Review* vol 46 No 3, 629, 688.

[99] Magdalene D'Silva, "Dealing in Power: Gatekeepers in Arbitrator Appointment" [2014] *Journal of International Dispute Settlement* 5, 605.

[100] *Aldcroft v International Cotton Assoc Ltd* [2017] EWHC 642 (Comm), [2018] QB 725.

[101] International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (2014) r 3.1.3 n 5.

L/Halliburton v Chubb described above.[102] Networks have to be sensitive to their own limits and to what they need to do to foster trust.

Halliburton might have had more trust in an LCIA Rules arbitration with the possibility of having a challenge heard by an international division of the LCIA Court, as in the LCIA reference described above.[103]

As the ICA decided, there is no need for a community's pool of arbitrators to remain small. They can look to other trades and networks for candidates, as the judge noted in his decision in *Aldcroft*.[104] They should also diversify their own lists of arbitrators, promoting younger members, women, and geographically and ethnically diverse individuals, for example.

The ICA could have relied on the exception for commodities arbitrations in n 5 to the IBA Guidelines. Instead, it ignored the IBA's small pool exception and devised rules which were not only appropriate for its own arbitration community but which have the potential to introduce new arbitrators to that community and to widen the experience and horizons of its long serving arbitrators.

This impetus for ethical rules, changing an arbitration community's traditions in order that it should continue to retain the trust of new generations of members, came from straightforward commercial realities and from listening to the real users of arbitration.

6. Conclusion

The "soft law" described above has not met with success in every arbitration community. Proponents of regulations can speak of "consensus" without proving that they have it and they can be content to consign different arbitration communities to footnotes.

As a vast transnational network of more than 16,000 members worldwide, many of whom are not lawyers, the Chartered Institute of Arbitrators is well placed to foster trust across borders and communities and to enforce its own standards. Its members should not be shy of challenging the elite.

[102] *H v L* [2017] EWHC 137 (Comm), [2017] 1 WLR. 2280; *Halliburton v Chubb* [2018] EWCA Civ 817, [2018] 1 WLR 3361.

[103] Paul Stanley QC has suggested the possibility, in comments on this case published on his chambers' website, "… that parties will increasingly insist on institutional rules which will place challenges in the hands of bodies which are better attuned to the standards expected by those who use arbitration than the English courts are perceived to be." <*https://essexcourt.com/publication/halliburton-v-chubb-2018-ewca-civ-817/*> accessed 31 January 2019.

[104] *Aldcroft v International Cotton Assoc Ltd* [2017] EWHC 642 (Comm), [2018] QB 725.