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I. Setting The Scene

1. The Trends We Are Facing

In a way, international commercial arbitration as we know it is the child of the Cold War: private justice – a difficult concept at the best of times – was the only option during a time when state justice was, or at least was perceived to be, beholden to mutually exclusive political systems. Trade between the two systems relied on private arbitration by generous leave of governments – the stunning success of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is Exhibit A to this proposition.

Today, the Cold War is (largely) history. The new order turned out to be much more diverse and messier than initially assumed by many, but for business it is still more uniform than before. Arbitration continued to flourish thanks to increased international trade and lingering distrust of state courts. But then the financial crisis of 2008 hit, which heralded a new age of pervasive government intervention and regulation. At present, this new mega-trend is reaching international arbitration – very conspicuously so in the area of investor-state dispute settlement, with demonstrators out in the streets in Germany and elsewhere. It is also lapping at the feet of international commercial arbitrators.
Singapore, a major arbitration venue, is spearheading the attack against unshackled private justice. In his electrifying keynote address to the 2012 ICCA Congress in Singapore, the then Attorney-General and current Chief Justice of Singapore, Sundaresh Menon, called for a strict regulatory framework, including "a code of conduct and practice to guide international arbitrators and international arbitration counsel" – as a first step towards "a more robust regulatory system".¹ Three years later, his successor as Attorney General, VK Rajah, doubled up, by calling for a "comprehensive, transnational ethical code" that regulated contentious ethical and procedural issues in detail and would be enforced against counsel and arbitrators alike by arbitration institutions.² This call for the regulating of conduct and sanctioning of arbitrators and counsel was taken up by Nobel laureate Mohammed ElBaradei at the opening of the 2016 ICCA Congress in Mauritius.³

Separately, there is growing unease within parts of the international arbitration community about counsel conduct.⁴ Two slogans catch the mood: A perceived need to "level the playing field" and a perceived onslaught of "guerrilla tactics"⁵. There is some confusion, however, between the two: "Guerrilla tactics" is in essence about misconduct, about bad faith – an issue of personal ethics. "Unlevel playing field" is about technical procedural rules – if one soccer team is allowed also to play with their hands or to field twelve players instead of eleven, they are advantaged, but not unethical. These two concerns are often mixed up in the discussion, with the outcome that has to be expected: Confusion, misunderstandings, even emotions. The mix-up is particularly unhelpful for (potential) new users who are looking for advice, not finger-wagging.

This second trend is maybe not yet a mega-trend, but it is gaining traction and is also at the heart of the present panel.

2. Ethics vs. Clash of Legal Cultures

These issues feed the current global dispute about counsel ethics in particular. Here is a typical misunderstanding: bar rules are not ethical rules in the common sense. Two

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² See quotes in GAR, June 24, 2015, “Singapore AG shares vision of a less adversarial future”.
³ See GAR, May 9, 2016, “Welcome to AfrICCA”.
cases that are often cited to illustrate the need to regulate counsel conduct are Hrvatska6 and Rompetrol7,8

Both cases concerned investment treaty arbitrations under the ICSID Rules.9 In the Hrvatska case, ten days before a two-week hearing, counsel for Slovenia informed the arbitral tribunal that a QC would also attend the hearing on behalf of Slovenia. That barrister was a door tenant at the Essex Court Chambers where the tribunal's chairman was practicing. Both declared that they had no other connection. Claimant, through its U.S. counsel Hunton & Williams, expressed concern: "For Claimant who, like many throughout the world, is entirely unfamiliar with the English legal system, the fact that the President of the Tribunal [...] and counsel for the Respondent are members of the same 'Chambers', is a matter of great concern and a circumstance which could cast an unwanted 'cloud over these proceedings'." Respondent, through its English counsel Allen & Overy, begged to differ: "It is by no means unusual in international arbitrations for a barrister to appear as advocate before an arbitrator who is from the same chambers. [...] there is no justifiable cause for concern on the part of the Claimant." All the same, counsel acknowledged that it would have been "sensible and prudent" to disclose the QC's attendance earlier.

From their different points of view, both were right, of course. Caught in this quandary, the arbitral tribunal, after careful analysis, decided to exclude counsel "in the interest of the legitimacy of these proceedings", based on the view of a "reasonable independent observer" under the very specific circumstances of the case which created a "substantial risk of a justifiable apprehension of partiality". The tribunal felt that either the chairman had to resign or counsel had to cease to participate. While neither the ICSID Convention nor the ICSID Arbitration Rules regulated this situation, the tribunal considered that it had an "inherent power to take measure to preserve the integrity of its proceedings", which included the power to close lacunae in the procedural rules, and that the principle of immutability of a properly constituted tribunal required that counsel had to withdraw.

In the similar Rompetrol case, claimant was represented by Salans & Associés. The lead counsel subsequently left private practice and thus withdrew and, a few months later, was replaced by Mr. Barton Legum as new lead counsel on behalf of Salans. Respondent objected on the grounds that Mr. Legum had previously been employed by a firm in which one of the arbitrators was a partner. Respondent applied for an order

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6 Hrvatska Elektroprivreda d.d. v. Republic of Slovenia (ICSID Case No. ARB/05/24) (henceforth "Hrvatska"): Ruling of the arbitral tribunal dated May 6, 2008 regarding the participation of David Mildon QC in further stages of the proceedings.

7 The Rompetrol Group NV v. Romania (ICSID Case No ARB/06/3) (henceforth "Rompetrol"): Decision of the arbitral tribunal dated January 14, 2010, on the Participation of a Counsel.


9 Article 14(1) of the ICSID Convention requires that all ICSID arbitrators "should be persons of high moral character [...] who may be relied upon to exercise independent judgment". Article 57 of the Convention provides for challenges to arbitrators on the basis that the arbitrator has exhibited "a manifest lack of the qualities" required by Article 14(1) of the Convention.
requiring claimant to remove Mr. Legum from the case and to forbid him from participating in it in any way.

The Rompetrol tribunal discussed the Hrvatska decision, acknowledging that, "in compelling circumstances" "to safeguard the essential integrity of the entire arbitral process", a tribunal could exercise control over the parties' representation even in the absence of an explicit provision in the legal texts. However, the integrity of the process is only at risk if there could be apprehension about potential bias of the tribunal. Whether counsel is independent or impartial was not relevant. Since respondent had not questioned the integrity of the arbitrators, Rompetrol could be distinguished from Hrvatska, leaving open what powers over counsel the arbitral tribunal would really have under the ICSID arbitration framework: “[I]n sum, the Tribunal can find in the circumstances before it no basis for any suggestion that it should interfere in the choice by Claimant of its counsel for these proceedings, or indeed for any suggestion that the preservation of the integrity of these proceedings require it to consider doing.”

In these two cases, counsel and arbitrators were all highly regarded members of reputable law firms and barristers' chambers. The discussion was not really about ethics or integrity. Counsel did not act in bad faith; they were not trying to derail the arbitration. Particularly in the Hrvatska case, it was just a clash of legal cultures: no more, no less. In a globalized world such clashes of legal traditions are bound to become more frequent and will inevitably raise questions of equality of arms.

3. The IBA Guidelines on Party Representation in International Arbitration

The most visible and also most contentious result of the two (mega-)trends is the IBA's recent Guidelines on Party Representation in International Arbitration 2013 (the "IBA Guidelines"). At the outset, they were broadly welcomed as an important and timely measure of self-regulation. However, once more and more practitioners had the chance to take a closer look at the IBA Guidelines, disenchantment soon set in. Recent articles and comments often strike a decidedly critical tone.

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10 Rompetrol, op. cit. fn. 7, para. 27.
The IBA Guidelines were initially conceived as a high-level code of ethics, drawing on the so-called "Rio Code" that was presented to the 2011 ICCA Congress in Rio de Janeiro by Doak Bishop and Margrete Stevens for discussion.\textsuperscript{13} The Rio Code, which remained a draft, was consciously and explicitly based upon the 1988 IBA International Code of Ethics\textsuperscript{14} and the 2006 Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe (CCBE)\textsuperscript{15} and, as such, was not very contentious.\textsuperscript{16} One could quibble over one or the other rule or wording, but on the whole, the Rio Code represented minimum deontological standards that lawyers from most jurisdictions could, by and large, identify with.

A similar concept of minimum ethical standards was later implemented by the London Court of International Arbitration (LCIA) in the Annex to the revised 2014 LCIA Arbitration Rules (the "LCIA General Guidelines"), albeit loaded with a controversial provision that authorized the arbitral tribunal to investigate and sanction counsel for breach of such standards.\textsuperscript{17}

Under the umbrella of the IBA, however, this initial concept of general ethical principles eventually morphed into detailed guidelines with procedural rules that were largely informed by a broad U.S. notion of counsel ethics. This morphing went largely unnoticed by large sections of the international arbitration community. One reason was the haste with which the IBA Guidelines were adopted: As is usual in such projects, not all members of the Task Force were equally involved, or even at all involved. The members of the IBA Arbitration Committee only had three weeks within which they could comment on the draft, \textit{i.e.} between January 14 and February 4, 2013; a few selected individuals and institutions only had a few days or weeks more (over the 2012 year-end holiday period).

This was not a public hearing as would have befitted such a seminal document intended to change international arbitration as we know it in many, if not most parts of the world. Few people bothered to look at the draft given that the topic, as it was generally perceived to be at the time, – \textit{i.e.} minimum ethical standards for counsel conduct – seemed uncontroversial and definitely not something that could be problematic for all self-respecting members of the IBA Arbitration Committee. Most arbitration specialists only realized much later what was really in the final draft,
including members of the Task Force itself. By then it was already too late to stop the formal adoption of the Guidelines by the IBA, which took place just three months later.

The take from this is quite simple: The IBA Guidelines have to be judged on their own merit, they cannot be propagated as the combined wisdom of the global arbitration community. It is not the famous wisdom of the crowd that informed this product of the IBA, as is sometimes suggested.

Anecdotal evidence suggests that there is broad support among U.S. lawyers, with equally broad opposition in many civil law countries and a checkered picture in England, Sweden and other jurisdictions. Last fall, the IBA undertook a survey of some of its guidelines, including the Guidelines on Party Representation. Results are expected to be presented at the IBA Conference in Washington in September of this year. According to GAR, Julie Bédard, the chair of the Task Force for the IBA Guidelines, reported in a preliminary assessment for the 2015 IBA Conference in Vienna that the survey showed "signs of 'popular resistance against the very notion' of having guidelines regulating counsel conduct". Other surveys indicate that the IBA Guidelines are indeed used in practice. A non-systematic survey undertaken by Christopher Lau SC for the ICCA 2016 Congress suggests occasional use "in equal measure, either by agreement of the parties or by order of the arbitral tribunal", although the incorporation of the IBA Guidelines "has usually been by way of 'guidance'", i.e., not as binding rules. The 2015 Queen Mary International Arbitration Survey also indicates some use, with 24% of respondents reporting to have seen them used in practice. It is not clear, however, what "use" meant. There is a crucial difference between referring to a set of rules or guidelines to underline an argument, on the one hand and declaring them binding in specific arbitration proceedings, on the other hand. There is little issue with the first kind of use, not least because several of the specific provisions in the IBA Guidelines are indeed uncontroversial. It is mostly the use in the latter sense, i.e. as a binding and enforceable instrument including the meting out of sanctions for misconduct of a party representative, that raises serious concerns. The proof of the pudding is in the eating, as the saying goes, and, in my view, the proof of the IBA Guidelines is in the sanctioning for misconduct of counsel.

Presently, an increasingly vocal opposition against the IBA Guidelines is forming, in Europe and beyond, spearheaded by the Swiss Arbitration Association (Association

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18 At a CPR national dispute resolution conference on February 17, 2016 in New Orleans, a snapshot vote on the IBA Guidelines after a short panel discussion showed that 75% of the (U.S.) participants considered the IBA Guidelines to codify best practices, while 25% voted against.

19 A three-country conference (Austria, Liechtenstein, and Switzerland) on September 19, 2014 in Zurich showed unanimous rejection of the IBA Guidelines in spite of a favorable presentation by a member of the Task Force.

20 GAR, October 7, 2015, “Should the IBA name and shame slow arbitators?”.

21 See Christopher LAU, [in this Yearbook Title and page to be added].

22 School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, 2105 International Arbitration Survey: Improvements and Innovations in International Arbitration, p. 35 (www.arbitration.qmul.ac.uk/docs/164761.pdf, last accessed May 15, 2016).
Suisse de l'Arbitrage, ASA, but by no means limited to the continental European arbitration community.

Also one of the authors who initially commended the IBA Guidelines confided to me recently that he had changed his mind in the meantime. In Asia, the skepticism towards the IBA Guidelines is palpable. At a recent conference in Shanghai, a well-known Chinese arbitrator called the IBA Guidelines "a strange animal" from a Chinese perspective; and Michael Hwang, from Singapore, dismissed them straight away: "In my opinion, the IBA Guidelines will go nowhere."

The IBA Guidelines are paradigmatic for an idea that was well-meant and widely supported at the outset, but took a wrong turn when ethics and procedure got mixed up and combined with a perceived need to sanction deviations.

Thus, the IBA Guidelines do not herald the end of the discussion about counsel conduct, but rather the beginning of a hopefully healthy global debate about counsel conduct and the need, if any, to regulate it on a global level. By kick-starting this debate they serve an important purpose even though they turned out to be unexpectedly controversial.

Whatever one thinks of the IBA Guidelines: The genie is out of the bottle. The issue of counsel conduct and how to deal with it is now on the table and needs to be addressed. This paper attempts to explore what the issues really are, by whom and how they should be addressed and how the international arbitration community might approach both the leveling of the playing field and achieving equality of arms. The IBA Guidelines will be used to illustrate the difficulties and risks involved in such an endeavor.

In my opinion, the issue is not whether arbitration "soft law" is generally a bad idea. Although there is a palpable feeling within the arbitration community that arbitration might be suffering from an overdose of rules and guidelines, such soft laws are especially helpful to newcomers to the arbitration community, not least to users from African countries. While quantity is an issue, the main concern ought to be quality. Unfortunately, experience shows that quantity impacts quality: The more expert groups, task forces and drafting committees jostle for members and attention, the lower the active participation of experienced practitioners tends to be – the result often being non-representative and/or poorly drafted documents that receive insufficient reviews by
the larger community. The IBA Guidelines, which is the topic of the current discussion, is Exhibit A to this proposition.

II. Leveling the Playing Field

1. What Playing Field?

Leveling the playing field seems to be a no-brainer. It is hard to argue against it. Of course, everybody wants to level the playing field. Not to do so would be just not cricket, to use an English sports metaphor that befits a playing field.

However: What field should be leveled? In the current discussions, there is an unfortunate confusion between leveling the field on which two teams meet and leveling the whole world through the imposition of global standards. In sports, global standards are very convenient if not outright necessary, since international competitions continuously pit the same athletes against competitors from many countries. To define the rules of the game anew every time would just not work. However, regional differences can still survive. English rugby does not need to adopt U.S. football rules, although the two sports are closely related. If it did, sports would be the poorer for it.

In arbitration, there are no world championships. The winner of an arbitration proceeding does not go on to fight another winning team in the quarter finals. Thus, there is no intrinsic need to play by the same rules all over the world. Thankfully, there is room for diversity and, thus, a free market of arbitration ideas. A free market is the incubator of progress. Also free markets need rules to combat abuse, but these rules need to be justified.

Imagine an arbitration procedure in Geneva between a francophone African state and a French supplier or imagine an arbitration procedure in Mauritius between a Kenyan and a South African company: Does it matter what the bar rules in New York or in Hong Kong say? Should a (US-inspired) legal hold automatically apply at the outset and force the Kenyan company to recall all laptops and blackberries and copy their contents before a tribunal has even been constituted? What about preparation of witnesses? What about an "Upjohn warning" (many seasoned arbitration specialists have never even heard of this before, let alone practiced it, but it is now, even in an enhanced form, enshrined in Guideline 19 of the IBA Guidelines)? If there are French counsel on both sides, there would be no need to level the playing field by introducing U.S. deontology.

Thus, we do not need to level the world if we can level the hearing room. Equality of arms has to be assessed in an individual procedure between specific parties and based on the peculiarities of each case. Or, as the Board of ASA put it:

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28 See below at III.10.
29 Ibid.
6. To the extent that differences exist in practices of party representation and ethical rules relating to them, it appears preferable to recognise the differences and respect diversity rather than seeking uniformity by promoting “guidelines”. The first step for professional arbitration practitioners is to seek to understand the differences and to work with them. Remaining concerns about the “level playing field” are not best addressed by injecting into the arbitral process a set of detailed guidelines which are in part rooted in procedural institutions that are unwelcome in arbitration. ASA finds that fair and equal treatment for the parties is best ensured by way of minimum standards or, if this were found to be necessary, in the context of arbitration rules and their application. ASA is eager to cooperate constructively in efforts to foster this approach.30

2. Maximum Leveling or Minimum Standards?

Let us assume, for argument's sake, that equality of arms really does require leveling the playing field on a global basis. This raises an interesting conundrum: Doesn't global leveling mean raising standards everywhere to the highest mandatory standard on any possible issue in any possible jurisdiction? Indeed, if taken seriously, leveling the playing field is not a one-dimensional issue as is often inferred in discussions: When we look at professional duties of counsel everywhere, the field is not slanted, but hilly. One counsel might face stricter standards on one issue, the other on another issue. Sometimes, bar rules and professional traditions might even be contradictory. In such instances, there is no global solution for lack of commonality of standards.

From the outset, trying to find global standards is a dauntingly complex comparative law exercise. There are likely only so many legal systems that can be taken into account by one task force. For instance: Can the IBA Guidelines be applied against a South African counsel without at least arguably running afoul of some local mandatory provision? And if they cannot: Where is the level playing field for the Kenyan counsel on the other side?

Just recently, I sat as an arbitrator in a case where one party submitted the usual witness statements that were drafted with the help of counsel, while the other only submitted a document wherein the witness had filled in his answers to questions submitted to him in writing by counsel. It turned out that this counsel (and his party) hailed from a jurisdiction where any discussion on the merits of testimony between counsel and a witness is prohibited. This counsel faced the risk of being sanctioned by his bar if he had relied on Guidelines 20 or 24 of the IBA Guidelines on witness statements and witness preparation.31

30 See GEISINGER, SCHNEIDER and DASSER, op. cit. fn. 23, p. 5, Conclusion 6.
31 Guideline 20 reads “A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.” Guideline 24 reads “A Party Representative may, consistent with the principle that the evidence given should reflect the Witness’s own account of relevant facts, events or circumstances, or the Expert’s own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.”
Thus, leveling the global playing field, if taken seriously, would result in a stifling accumulation of restrictions nobody would like even if it were feasible. It can be burdensome enough when the problem of double deontology in a specific case leads to doubled deontology, *i.e.* when the mandatory provisions of two different bar systems applying to the two counsel in a simple case have to be cumulated; it becomes unmanageable if there is multiplied deontology by stacking all mandatory provisions applying to counsel in any jurisdiction.

Thankfully, equality of arms and a level playing field do not require global highest standards. Global minimum standards that would ensure basic fairness suffice — as was the idea of the Task Force when it started drafting the IBA Guidelines.

Minimum standards can deal with real ethical issues: Don't lie, don't cheat, don't tamper with evidence and the like. These mantras are important in order to send a message that arbitration is not a free-for-all in which parties or counsel may, for example, hijack proceedings via fraudulent conduct. Beyond such basic ethical principles, what is needed is not global maximum standards but transparency about various existing practices so that parties and/or the arbitral tribunal can decide on an informed basis how to level the playing field in the particular circumstances. The general principle of subsidiarity requires that room for diversity remains safeguarded as far as possible, thereby granting users the broadest possible choice for dispute resolution. This market-oriented approach calls for an "arbitration tool box," not global procedural rules.

A liberal approach neither handicaps nor gives an advantage to counsel from one jurisdiction or the other. Any potentially relevant difference in deontological rules between counsel in the same proceedings can be addressed with the arbitral tribunal. It is then the arbitral tribunal's task to ensure a level playing field in light of the specific circumstances of the case. For one particularly thorny issue, witness preparation, this approach is explicitly recognized in the official Comments to Guidelines 18-25. If it is deemed to work there, why should it not work everywhere?32

In the example I mentioned above, if counsel had drawn my attention to his deontological restrictions on contacting witnesses, I could have imposed similar restrictions on the other side as well, *in extremis*, by excluding witness statements and witness preparation and interrogating the witnesses myself — an approach that is well known in some jurisdictions and often very efficient and, in any case, much less antagonistic than the usual direct/cross-examination routine.

Or, if one side is represented by U.S. counsel who feels obliged to inform his client of a need to preserve documents even in the ordinary course of business, the arbitral tribunal can, in the first procedural order, issue instructions to the parties about whether and, if so, what measures both parties need to take to preserve potentially relevant documents.

32 See further at III.10 below.
Of course, not all arbitrators might be capable of or willing to provide the necessary instructions. But these arbitrators should be invited to take additional training or simply be avoided by counsel and parties.

The key is arbitrators' reputation in dealing with issues that arise in cross-cultural arbitrations, not sanctioning of counsel.

III. Deficiencies of the IBA Guidelines on Party Representation

1. Preliminary Remarks

The IBA Guidelines are the result of a well-meant attempt to correct certain deficiencies in international arbitration. Even if they fail to reach that goal, by so doing they provide important lessons for the future. To say "No" to the IBA Guidelines as they are currently drafted should not be an aim in itself, but the start of a process that will hopefully lead to finding a better solution. What that solution will look like is not clear, but it certainly will build on the experience with the IBA Guidelines and could even be a thoroughly revised second edition of the current Guidelines. Again, the crux is not that the IBA issued guidelines on party representation, although many practitioners would want to see rather fewer than more guidelines. The real crux is the content of the IBA Guidelines. The result of a rethink could look similar to the solution adopted by the LCIA in its 2014 Rules, but could also mean strictly separating arbitration procedure from supervision of counsel. An attempt at sketching the course towards a solution will follow in the next chapter.

This chapter will explore what might explain the controversial nature of the IBA Guidelines. For the purpose of this panel, it will focus on the weaknesses, not the strengths. It is thus consciously one-sided and intended to foster a discussion. Conversely, it does not attempt a complete enumeration of potential deficiencies as this would be beyond the scope of the present paper.

2. Lack of Focus Due to Divergent Purposes

Legislation often suffers from a multitude of purposes and political aims. It is no different with arbitration soft law. When the interests are aligned and all participants share the same vision, there is a good chance of a useful outcome, even if there are divergent views on some of the issues. The IBA Rules on the Taking of Evidence (1999, 2010) and the IBA Guidelines on Conflicts of Interest in International Arbitration (2004, 2014) are prime examples. They are broadly accepted, very often taken into

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33 See also BAIZEAU, op. cit. fn. 12, p. 356.
34 See above at I.3, fn. 27.
35 For a different approach to the IBA Guidelines that follows their structure rather than their deficiencies, see DASSER, op. cit. fn. 12.
account, even if not followed verbatim, and even accepted by some state courts as useful tools.36

With regard to counsel conduct, there was and is no such common sense of purpose. The result is a muddle. One symptom of this muddle is the divergence between the official IBA statement of purpose and one of the current main lines of argument of the IBA Guidelines’ proponents: While the latter focuses on the need to level the playing field, the former focuses on honesty:

"The IBA Guidelines on Party Representation in International Arbitration (the ‘Guidelines’) are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings."

This is about fighting abuse, not about leveling the playing field by imposing specific procedural rules. Fighting abuse is, of course, a worthy purpose. The argument about leveling the playing field reaches beyond that purpose. In addition, a failure to define what is meant by leveling the playing field might well hide a diversity of purposes behind this argument.37

Merging ethics and procedure incidentally creates a powerful selling argument for proponents of leveling of the playing field and might help explain why the IBA Guidelines sailed through without substantial opposition until it was too late: Nobody would dare to speak against honesty, and nobody can afford to be viewed as being against fighting abuse. An instrument ostensibly designed to combat dishonest counsel behavior is a worthy project that cannot be seriously objected against. In discussions, opponents of the IBA Guidelines are sometimes confronted with accusations of fostering abuse. It would, in my opinion, be more helpful to the future of arbitration if the discussion focused on the content of the IBA Guidelines instead.

3. Unclear Basis

According to its Preamble, the IBA Guidelines are essentially contractual in nature. In other words: If you like them, adopt them. If you don't like them, simply ignore them.

"The use of the term guidelines rather than rules is intended to highlight their contractual nature."38

See, e.g., the Swiss Federal Tribunal’s reference to the IBA Conflicts Guidelines as "a valuable tool, capable of contributing to harmonize and unify the standards applied in the field of international arbitration to conflict of interest issues, and one that will undoubtedly exert influence on the practice of arbitral institutions and courts" in DFT 4A_506/2007 of March 22, 2008, cons. 3.3.2.2.

See above II.1 on what “leveling the playing field” can mean.

This renders the IBA Guidelines toothless: As Michael Hwang aptly put it at an ASA Conference in 2014: "Turkeys don't vote for Thanksgiving". Dishonest lawyers would rarely sign off on the IBA Guidelines unless by mistake or because they realize the great potential of abusing the deficiencies of the IBA Guidelines themselves.

In any case, according to Guideline 1 a party representative would sign for his or her party, not for him- or herself. Arguing that the arbitral tribunal is contractually authorized to sanction the representative would infer a contract at the expense of a third party. There is no such thing.

Nonetheless, the IBA Guidelines were from the outset being touted as "best practices". Best practices are not really voluntary. One does not need to opt into best practices. It is not even easy to opt out, at least not without raising questions about ulterior motives.

In this context, it is important to note that the IBA Guidelines were essentially drafted by a small circle within the IBA, with the membership at large having no real say in the drafting. It appears that, at least, certain provisions of the IBA Guidelines have escaped thorough scrutiny within the IBA.

Nonetheless, the IBA Guidelines themselves provide the basis for a best-practices approach: Guideline 1 explicitly extends the contractual nature to soft law or even hard law:

"1. The Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings." (emphasis added)

In other words, even if the parties (and their counsel) object to the application of the IBA Guidelines, the arbitral tribunal is still invited to apply them if it deems itself to be

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39 See HWANG and HON, op. cit. fn. 12, p. 658.
40 See below at III.12.
42 Above I.3.
somehow authorized to do so.\textsuperscript{43} The source of such an authorization could, in practice, if not in theory, well turn out to be the vague concept of “best practices”.

There is an additional wrinkle to this: In discussions, proponents of the IBA Guidelines sometimes dismiss critique of specific rules by alleging that the IBA Guidelines are essentially a checklist: They allow the participants of an arbitral procedure to discuss issues they consider relevant: ticking the boxes. Hence, users do not need to adopt the IBA Guidelines wholesale. This argument allows avoiding discussions of some of the more unfortunate provisions in the IBA Guidelines. But it is not a persuasive argument.

First, it is contrary to the argument that the IBA Guidelines as a whole are best practices. Best practices are not a neutral checklist that allows you to say “Yes” or “No” to the various items at your own discretion. According to its Preamble, the IBA Guidelines are “inspired by the principle that party representatives should act with integrity and honesty”\textsuperscript{44}, they are not meant to be neutral.

Second, it does not even pass the famous duck test: If a bird looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck. Or conversely, if a document does not say it is a checklist, if it does not look like a checklist and if it was not presented as a checklist, then it probably is not a checklist. The IBA Guidelines are not drafted as a checklist – although in a potential revised version, they might be some day.

\textbf{4. Trying Too Much}

Beyond stating some obvious and uncontested principles, the IBA Guidelines also regulate procedural details that have nothing to do with counsel ethics.

A case in point is the notorious \textbf{Guideline 12} that imposes the duty on counsel to “\textit{inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration}”.

This is not a rule about ethics and, in effect, is not just about counsel either. There is nothing unethical about automatically deleting email-boxes of employees that have left the company a long time ago, customarily reusing old back-up tapes for new back-ups or destroying hard discs of old laptops under internal IT-guidelines. There are even very good business, legal, and regulatory reasons for doing so.

Ethics become an issue if conscious destruction of crucial evidence is concerned. It is sometimes argued that Guideline 12 is only about preventing parties from consciously shredding evidence at the outset of arbitration and thus above any critique. Maybe, but

\textsuperscript{43} Gary Born rightly comments that the IBA Guidelines “provide little guidance as the circumstances where such action by a tribunal would be appropriate (or necessary)”, BORN, \textit{op. cit.} fn. 12, p. 2855.

\textsuperscript{44} Preamble, at p. 2.
if that was indeed the idea behind Guideline 12 – and that is a big If – then its wording should be urgently revised. In its current wording, Guideline 12 severely disrupts the ordinary course of business of the 99% of compliant parties, while probably not bothering very much the 1% of parties bent on abuse. It is thus alien to arbitration, the traditional idea of which is not to disturb the ordinary course of business.

5. Achieving Too Little

To the extent that the IBA Guidelines were intended to harmonize ethical rules of counsel, they are a non-starter. Guideline 3 acknowledges that much. The IBA Guidelines cannot, and do not purport to, override national bar rules, say, or any other mandatory rules on ethics. They merely add more rules to an already cluttered “teenager’s bedroom” as Gary Born memorably put it.

For example, the "primary duty of loyalty to the party" acknowledged by Guideline 3 might be difficult to reconcile with the duties under Guidelines 10 and 11 to correct erroneous submissions of fact or evidence, including withdrawal of false evidence or even withdrawal as party representative. How can an arbitral tribunal sanction counsel who defends him- or herself with this prevailing duty of loyalty?

Further, leveling the playing field is not as easy as the drafters might have imagined. Let us again take Guideline 12 as an example: There is some (albeit very limited) merit in the argument that U.S. counsel are under a duty to advise their clients to preserve documents. The idea of leveling the playing field by subjecting all users of arbitration to US-style document preservation and production has unintended consequences, though: Let us assume that both a U.S. and an Egyptian party are required to preserve all, including internal documents, and to produce all potentially relevant ones. This sounds fair. However, that is likely not the case. A U.S. party accustomed to document production in U.S. litigation will have internal rules and traditions that reduce the risk of a damaging document being produced at all or, if produced, preserved for the long term. The employees and advisors of the Egyptian party might not have been as circumspect, and potentially ambiguous or outright damaging emails might still be available many years after they were produced. If both parties now produce their internal documents, there is a high risk that the Egyptian party will appear worse than the U.S. counterparty, simply because it was not prepared and had not sufficiently sanitized, for instance, its internal board minutes or deleted its emails in time. The U.S. party might also just have destroyed damaging documents long before the arbitration started because it expected discovery, while the Egyptian

Guideline 3 reads: “The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a Party representative’s primary duty of loyalty to the party whom he or she represents or a Party representative’s paramount obligation to present such Party’s case to the Arbitral Tribunal.”

Quoted in “From no man’s land to a teenager's bedroom”, GAR, September 17, 2014; See also BORN, op. cit. fn. 11, at p. 2855, commenting that Guideline 3 leaves “the scope and applicability of the Guidelines uncertain”.

See also BAIZEAU, op. cit. fn. 12, p. 349.
one might be taken by surprise when it receives a letter from opposing counsel about the need to immediately implement a legal hold.

Moreover, many known guerrilla tactics cannot be addressed by the arbitral tribunal anyway. Examples are tactical challenges of arbitrators, nomination of ill or obstructionist arbitrators, or using state court proceedings to interfere in arbitration proceedings. Even worse, by their very existence the IBA Guidelines may actually invite guerilla tactics.48

Thus, imposing the IBA Guidelines on the international arbitration community will not make bad counsel behavior vanish from the face of the earth. It is even doubtful whether there might be any noticeable positive effect. In any case, the IBA Guidelines are not a panacea; they cannot allow the international arbitration community to declare the job done and relax. If counsel conduct is really a problem, the IBA Guidelines can, at best, only be one arrow in the quiver. They will not make weak arbitrators much bolder, nor passive arbitrators active managers of the proceedings. Neither will they convert cheating and lying counsel. In essence, they are largely window-dressing.

6. Psychologically Unnecessary

Strong arbitrators don't need to sanction. Weak arbitrators don't dare to sanction.49 Most arbitrators I spoke with have never felt the urge to sanction. Neither have I. Undeniably there are situations where counsel conduct is objectionable. However, an arbitral tribunal has many means at its disposal, short of formally accusing counsel of misconduct with all the ensuing complications.

A prime example is Guideline 13, which prohibits requests to produce documents that are made "for an improper use, such as to harass or cause unnecessary delay". If counsel requests 20 additional email boxes, he or she will naturally not argue that this is a move simply meant to harass. Instead, he or she would submit that this measure might be helpful in finding the truth – in pursuit of a well-established "leave-no-stone-unturned"-strategy. How can a tribunal ever expect to prove the contrary? An arbitral tribunal does not, however, need to label a document production request as "harassing" and filed "for an improper purpose"; it would simply dismiss such a request as overly broad or untimely, and get on with the proceedings. At best, it would indicate to the parties that it will be unlikely to accept any further similar requests, thereby sending the same message without entering into hopeless discussions about harassment and improper purposes.

Another example is Guideline 26, arguably the core provision: The specific sanctions provided for by Guideline 26 are actually surprisingly tame:50 (a) admonishing counsel,

48 See below III.8.
49 DASSER, op. cit. fn. 12, p. 58.
50 See also Tom CUMMINS, "The IBA Guidelines on Party Representation in International Arbitration – Levelling the Playing Field?", 30 Arbitration International (2014), p. 429, p. 455: "the remedies for misconduct [...] are underwhelming".
(b) drawing appropriate inferences in assessing the evidence and legal arguments, (c) apportioning costs between the parties.

Sanction (a) is a matter of course and done all the time: Counsel posing inappropriate leading questions to witnesses are admonished to stop doing so, counsel resorting to inappropriate language are admonished to tone it down, and so on. There is no need to investigate; to grant everybody the right to be heard, possibly even at a separate hearing; and to officially label something "misconduct". Thus, the necessity and practical weight, if any, of Section (a) of Guideline 26 is questionable.

Sanction (b) is the arbitral tribunal’s task anyway and has nothing to do with counsel misconduct. In practice, if an arbitral tribunal finds indications of tampering with a witness, it will discount that witness’s testimony. If a document is shown to be forged, it will not be taken as evidence. Period. The arbitral tribunal will hopefully not even think of opening an official procedure to investigate and sanction counsel for manipulating evidence. It simply does not matter for the substance of the dispute whether a document was forged by the party or its counsel, when and for what purpose and whether counsel knew or should have known about it. If somebody is curious about "whodunit" he or she can often report counsel to a national bar supervisory authority or a public prosecutor.

Sanction (c), which is about apportioning costs, is again within most arbitral tribunals’ discretion: Under most rules, the arbitral tribunal has at least certain discretion in allocating costs. If the arbitral tribunal wants to make a point, it could mention that, when deciding upon the cost consequences, it took into account, for instance, the fact that one party submitted unnecessarily long or numerous requests resulting in wasted resources. There is no need to formally accuse counsel of misconduct.

What remains is the right of the arbitral tribunal "to take any other appropriate measure" (Guideline 26(d)). As explained below,51 if this provision is meant to be as broad as it is drafted, it is against general principles of law. If, on the other hand, it is meant to be construed as narrowly as the corresponding Article 18.6 of the LCIA Rules, it is unnecessary: Guidelines 26 and 27 are not required in order for an arbitral tribunal to be able to take measures it can take anyway based on its inherent powers to maintain the integrity of the proceedings.52

Thus, the IBA Guidelines are not necessary in order for an arbitral tribunal to take the measures contemplated by Guideline 26. Conversely, they might even make it more difficult for these measures to be taken, as Ugo Draetta has observed: If Guideline 26 is taken at face value, an arbitral tribunal can no longer take an adverse inference or

51 Just below at III.7.
52 See, e.g., HWANG and HON, op. cit. fn. 12, p. 661, who argue for far-reaching inherent powers of the arbitral tribunal to sanction counsel if really necessary to prevent “process-destroying” behavior by counsel.
apportion costs with a view to (party and/or counsel) conduct without giving the parties advance notice and granting them the right to be heard.53

7. Not Sufficiently Executed

As further explained below54, the IBA Guidelines fail to cope with the conundrum that counsel is not as such subject to the arbitral tribunal's jurisdiction – beyond the normal, explicit or inherent powers of the arbitrators to direct the procedure.

It goes even further than that: Although Guideline 26 explicitly addresses proceedings directed against counsel, it only provides for the parties to be heard, but ignores the counsel's own right to be heard. Interestingly, at the very end of the official Comments, it is noted that the impugned representative should also be heard, as if the Comments trump the Guidelines.55 The drafters of the LCIA Rules were more careful: Article 18.6 of the LCIA Rules explicitly stipulates the representative's right to be heard. It seems that the Task Force had originally also provided for counsel to be heard, but that this wording was – perhaps inadvertently – deleted at the very end of the drafting process.

There is another interesting difference to the LCIA Rules: Article 18.6 provides that the "Arbitral Tribunal may decide [...] whether or not the legal representative has violated the general guidelines" (emphasis added). Thus, the arbitral tribunal might also simply ignore an allegation of misconduct and carry on with the task of deciding the parties' dispute on the merits.

Conversely, the IBA Guidelines do not mention any such discretion of the arbitral tribunal regarding counsel conduct. Guideline 12 does include the word "may", but from the grammatical standpoint only for the apportioning of sanctions, arguably not for the investigation. As a consequence, counsel might as well argue that, assuming that the parties had agreed upon the applicability of the IBA Guidelines, the arbitral tribunal is legally required to investigate potential misconduct of opposing counsel and that any failure to do so could render an award on the merits susceptible to a challenge for failing to adhere to the parties' agreement. The argument might seem outlandish at first sight, but state courts – even in very developed jurisdictions – sometimes seize upon arguments that arbitration practitioners would deem inappropriate. A recent German decision setting aside an award due to a partial deviation by a prominent arbitral tribunal from an earlier agreement between the parties about document production might serve as a warning.56

Further, Guideline 26(d) provides for "any other appropriate measure" as possible sanction against counsel. This is dangerously broad. From a legal perspective it is inadmissible: Punishable conduct needs to be specified under the principle of nulla

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53 DRAETTA, op. cit. fn. 12, p. 340.
54 Below at III.12.
55 Comments to Guidelines 26-27.
poena sine lege certa. The fact that Guideline 26 does not provide for any recourse by counsel against the sanctions to another adjudicatory body does not help either. All in all, Guideline 26(d) is a surprising provision, especially when one takes into consideration that it stems from a lawyers' organization.

Also in this respect the drafters of the LCIA Rules were more circumspect. Article 18.6 also uses the expression "any other measure" but explicitly limits this discretion to the measures that the arbitral tribunal can take anyway in the context of the general conduct of proceedings (Article 14 LCIA Rules).

8. Potentially Counterproductive

Practitioners sometimes shrug their shoulders and say: So what, even if the IBA Guidelines fall short, why bother to object? We should bother. One of the main reasons why there is an increasing backlash against the IBA Guidelines is their potential to foster guerrilla tactics.57

It is easy to envisage that dishonest counsel sanctioned under the IBA Guidelines and/or his or her party are (almost by definition) likely to strike back and try to derail the arbitration by, for instance, challenging the arbitrator(s) or the award, either at the place of arbitration or in enforcement proceedings. Sanctions just provide more grounds for obstruction. Even if some arbitrators might feel the urge to sanction obstreperous counsel, they should resist that urge and simply get on with the proceedings.

Apart from that: It is a time-honored tactic of dishonest lawyers to accuse opposing counsel of misconduct in order to deflect from their own misconduct or, if his or her own misconduct is exposed later on, to be able to label the (honest) opposing counsel's accusations as a mere "tit-for-tat" reaction. This offense-is-the-best-defense tactic often works: An arbitral tribunal faced with counsel accusing each other of misconduct often decides not to bother and dismisses both complaints as a mere distraction.

Even if the accusing counsel does not intend to hide or defend his or her own misconduct, the IBA Guidelines provide counsel playing hardball with ample ammunition. Let us take the innocuous-looking Guideline 9 as an example: “A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.” There is clearly nothing wrong with that in principle. However, together with Guideline 26, which provides for investigations and sanctions, but does not, at least not explicitly, provide for the arbitral tribunal's discretion not to investigate,58 counsel can turn any legal brief into an object of investigation. Which 100-page brief does not contain the odd wrong or misleading statements of fact or could at least be argued to contain such wrong or misleading statements? The traditional remedy against factual errors in a brief is the other party's right to reply – a right even protected by the

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57 See, e.g., HWANG and HON, op. cit. fn. 12, p. 658 et seq., citing the potential for abuse as one of the main reasons why the IBA Guidelines will not become widely accepted in their view.

58 See above III.7.
European Court of Human Rights. In addition to that, and unnecessarily so, Guideline 9 could invite counsel to assert that the (alleged) error in the opponent's brief was a conscious lie by counsel and needs to be investigated and sanctioned.

This might all sound a bit outlandish. Unfortunately, it is not. Such tactics do exist. We should not foster them.

9. **In Conflict With Attorney-Client Privilege**

A striking feature of the IBA Guidelines is how they repeatedly ignore attorney-client privilege – again quite surprising for a lawyers' organization.

Several guidelines explicitly address the communications between counsel and his or her party: **Guidelines 12, 14, 15, 16 and 17** require counsel to advise and assist his or her party in certain ways (concerning the need to preserve documents, how to produce documents, not to conceal evidence). In addition, **Guideline 27(f)** requires the arbitral tribunal to take into account in all cases "the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct".

All of these issues are protected by attorney-client privilege. The IBA Guidelines are silent on the question of how the arbitral tribunal is expected to investigate such issues. The arbitral tribunal might ask counsel what he or she told the client, but counsel cannot answer without the client's consent (which is unlikely to be given) and, under some bar rules, is not even required to answer if the client does provide the consent. Actually, the mere fact that an arbitral tribunal dares to ask about privileged communications with a party can seriously undermine the confidence of the parties and their counsel in the integrity of the arbitral process. An arbitral tribunal should never even think of pitting a party representative against the party.

This also means that Guidelines 12 and 14-17 might remain dead letter, unless they are construed as implying duties of the parties themselves and not just those of counsel. This is also sometimes suggested but would be far beyond the legitimate scope of the IBA Guidelines, namely regulating the conducts of the party representative.

And finally, **Guideline 3** explicitly acknowledges the priority of the duty of loyalty to the party. What if counsel defends him- or herself with the argument that the conduct was justified under that duty? Counsel would not need to specify why exactly that duty required the conduct, because doing so would most probably violate his or her secrecy obligations. Is the arbitral tribunal willing to evaluate this defense? Such evaluation

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59 Article 6.1 European Human Rights Convention reads in relevant part as follows: "In the determination of his civil rights and obligations [...], everyone is entitled to a fair [...] hearing [...] by an [...] impartial tribunal [...];" see Judgment of the European Court of Human Rights, Nideröst-Huber vs. Switzerland of February 18, 1997, 18990/91, Reports 1997-I, p. 108, para. 27.

60 Guideline 27 provides that "in addressing issues of Misconduct, the Arbitral Tribunal should take into account..." (emphasis added).
would, in many, if not all, cases require investigating the communications between counsel and party and thus be a no-go unless everybody cooperates. Moreover, it would require taking evidence about the national bar rule in question and its application to the specific facts of the case at issue.

10. Too Parochial

At the outset, the idea was to codify globally accepted standards of good counsel conduct. It did not turn out that way. At a 2014 arbitration conference in New York that included a panel on ethics, a local litigation partner of a first-tier law firm wondered why I took issue with the IBA Guidelines. After all, he said, the IBA Guidelines just reflect how he would be expected to conduct himself in a New York court anyway. That, I answered, is exactly the problem. I am not suggesting in any way that the rules on counsel conduct before a New York court are wrong. It is not about right or wrong, good or bad. It is about being appropriate or inappropriate in a given context. Some rules might fit perfectly in a New York court, other rules in a Zurich court, still others in a Nairobi court. Problems arise when the rules that have been developed within a particular legal system, for a particular purpose, are imposed on other legal systems with other purposes. Frictions are to be expected.

A standard counter-argument is that the Task Force was comprised of lawyers from many legal systems and that the whole IBA Arbitration Committee was consulted. The latter was, for all practical purposes, not really true, as mentioned. The former is true, but I am told that not all members of the Task Force had equal opportunity to pay close attention to the drafting, and that not all views were equally taken into consideration. In any case, the result speaks for itself.

The most obvious evidences of a U.S. bias are the provisions on document production and witness testimony (Guidelines 12-25). Specific examples already mentioned are the Guidelines 12 (inferring a legal hold) and 19 (the U.S.-American "Upjohn warning", which is alien to the arbitration process, arguably even in the U.S.)\(^{62}\), but even more so the way the Comments were drafted. It is interesting to note the difference in how document production and witness testimony are treated. With regard to document production, deontological rules are stricter in the U.S. and a few other countries when compared to many other jurisdictions; with regard to witness testimony, it is the other way round.

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\(^{61}\) Above at I.3.

\(^{62}\) Guideline 19 requires counsel essentially to inform a potential witness at the outset that he or she has the right to remain silent and to instruct his or her own counsel. It is derived from the U.S. Supreme Court decision in the case *Upjohn Co v. United States* 499 U.S. 383 (1981). Such a warning might be appropriate in exceptional circumstances where there is a specific risk of self-incrimination, but not in any run-of-the-mill commercial arbitration where potential criminal sanctions against a party's employees are nowhere in sight, and scaring potential witnesses into shutting up does not serve anybody's interests.
With regard to document production, the higher U.S. standard is adopted into the IBA Guidelines, because otherwise "the disparity in access to information or evidence may undermine the integrity and fairness of the arbitral proceedings." 63.

With regard to witness testimony, basically anything goes, at least as long as the Upjohn warning is provided, although in many civil law jurisdictions there are at least some limits on coaching of witnesses. Guideline 24 even explicitly allows counsel to help prepare the witness’s or expert’s testimony. According to the official Comments, this includes "practise questions and answers." 64 This suggests U.S.-style witness preparation that would even be prohibited under English and other common-law bar rules, let alone civil-law ones. 65 Many practitioners question whether such practice, which is standard in the peculiar context of U.S. jury trial litigation, does not even infringe upon the integrity and fairness of the arbitral proceedings. The official comments do not raise this issue. Rather, they give short shrift to counsel from jurisdictions with stricter rules on witness preparation: "If a Party Representative determines that he or she is subject to a higher standard than the standard prescribed in these Guidelines, he or she may address the situation with the other Party and/or the Arbitral Tribunal." 66

Indeed, counsel can address the arbitral tribunal if there is a perceived unlevel playing field, thereby allowing the arbitral tribunal to perfectly safeguard the integrity and fairness of the proceedings. But why only on witness testimony and not also on document production? At the very least, this comment inadvertently shows that there is no need for guidelines to level the playing field. Addressing the tribunal for specific instructions is an efficient alternative that is explicitly recognized by the IBA Guidelines themselves.

Also, the recourse to sanctioning by the arbitrator is typical for some jurisdictions, but not for others. In many countries, counsel cannot be sanctioned by the courts but only by the competent professional bodies (bar councils, supervisory authorities). Or the courts simply do not make use of such powers even if they have them. The urge to sanction does not come naturally to many civil law lawyers and judges. Directing the proceedings, yes. Investigating and sanctioning counsel, no.

It is also surprising that a common-law inspired legal hold slipped into the IBA Guidelines dealing with Party Representation after it had been extensively discussed and consciously dismissed as inappropriate in international arbitration in the drafting of the IBA Rules on the Taking of Evidence 2010, where it would have been better placed. Moreover, a duty to preserve documents and sweeping discovery duties as its

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63 Comments to Guidelines 12-17, at p. 12.
64 Comments to Guidelines 18-25, p. 15. According to Gary Born, these Comments "make clear that witness 'preparation' follows the U.S. model" (BORN, op. cit. fn. 12, p. 2862).
66 Comments to Guidelines 18-25, at p. 15.
corollary have been extensively discussed and dismissed by an ICC task force on e-discovery. It might be useful to recall pertinent findings by the ICC:

“There is no automatic duty to disclose documents, or right to request or obtain document production, in international arbitration, and the advent of electronic documents should not lead to any expansion of the traditional and prevailing approach to document production. Thus, requests for the production of electronic documents, like requests for the production of paper documents—to the extent they are deemed necessary and appropriate in any given arbitration—should remain limited, tailored to the specific circumstances of the case and subject to the general document production principles of specificity, relevance, materiality and proportionality. Without endorsing any particular practice or scope of document production, this Report and the accompanying Appendices identify several techniques that arbitrators and parties may wish to consider using in order to manage, in a fair and efficient manner, any issues that may arise when production of electronic documents is permitted or required and, importantly, to ensure that international arbitration does not fall prey to the inefficiencies of electronic document production that have plagued litigation in certain national court jurisdictions like the United States.”

And, under the heading “G. Preservation of and failure to produce electronic documents”:

“5.31 [...] international arbitration operates under a very different regime. Tribunals should avoid importing from other systems notions with regard to the preservation of evidence that may give rise to unnecessary inconvenience or expense. While a party’s intentional efforts to thwart disclosure of relevant and material evidence by destroying or altering an electronic document may warrant appropriate sanctions (such as an adverse inference contemplated by Article 9(5) of the IBA Rules of Evidence), inadvertent destruction or alteration of an electronic document as a result of routine operation of that party’s computer network does not ordinarily reflect any culpable conduct or warrant any such sanctions. Moreover, whilst a party may wish, for its own benefit, to take steps to preserve relevant evidence, it is under no automatic duty to do so. Nor should a tribunal consider imposing such a duty absent a specific reason to do so, such as credible allegations of fraud, forgery or deliberate tampering with evidence.”

Guideline 12 and Guidelines 12-15 as a whole breathe a quite different spirit. There is no explanation for this apparent deviation of the IBA Guidelines from a basically contemporaneous other IBA-sponsored document and a similar ICC report.

68 Ibid., Preamble, p. 2.
69 Ibid., p. 5.31.
In sum, the most contentious parts of the IBA Guidelines are largely informed by U.S. court practice, and hence do not reflect global standards. Trying to impose them on the whole world is bound to create a backlash that is unhelpful for the future of arbitration.

11. Too Vague

Some of the guidelines may also be too vague to be of much use in a cross-cultural context. This applies to the repeated reliance on the standard of reasonableness. If there is no commonality of standards (and thus a need for guidelines), what is reasonable remains largely in the eye of the beholder.

Cases in point are once more the guidelines on document preservation and production. **Guideline 12** only requires the preservation of documents "so far as reasonably possible". A U.S. litigator on one side and a Swiss or French litigator on the other side would widely disagree on what "reasonable" document preservation requires. There are many anecdotes on how preservation measures that appeared reasonable enough to a non-U.S. party were criticized by opposing U.S. counsel, leading to lengthy, and often unpredictable side litigation before a U.S. judge. Counsel will simply not dare to authorize the continued destruction of laptops or only cursory listing of potential email custodians whose mailboxes need to be preserved. No counsel wants to end up in a position having to explain to lawyers from another legal culture why he or she thought that securing 25 email boxes was more than enough if it turned out later that some 26th email box might actually have been quite relevant.

Proponents of Guideline 12 sometimes play down the relevance of this guideline by emphasizing that the need to preserve explicitly arises only "when the arbitral proceedings involve or are likely to involve" document production. However, the U.S. legal hold has to be implemented latest at the outset of proceedings, before any procedural order could be issued and when it is thus very rarely predictable that there will be no (or, according to the more flexible Comments, only "minimal") document production. There is no indication in Guideline 12 what other point in time than the initiation of proceedings (or even earlier, i.e., upon the imminent threat of proceedings) would trigger the need to preserve. For example, waiting until after a first organizational hearing, and continuing with the deleting of emails in the meantime, would arguably run afoul of Guideline 12.

**Guideline 15** even provides for a double reasonableness test: Counsel should advise the party to take "reasonable steps to ensure that [...] a reasonable search is made" for responsive documents. Nobody will argue against that, which is probably why this wording made it into the final text. But does anybody know what it actually means? Counsel had better find out what it entails because getting it wrong might expose him or her to being accused of, or even being sanctioned for, misconduct.

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70 See also HWANG and HON, op. cit. fn. 12, p. 659.
71 Comments to Guidelines 12-17, p. 12.
Guideline 13 prohibits production requests that are made "for an improper purpose, such as to harass or cause unnecessary delay". Here again the guideline begs the question: What is to be understood under "improper" and "unnecessary delay"? In some jurisdictions, reviewing another 20 email boxes that may potentially serve justice is worth a few months of additional delay. For many users, arbitration proceedings already take too long even without extensive discovery.

One might argue that reliance on vague tests such as reasonableness is common in international soft law. Indeed, the popular IBA Rules on the Taking of Evidence 2010 refer to reasonableness eight times, as often as the IBA Guidelines. There is a crucial difference, though: Under the IBA Rules on the Taking of Evidence, counsel is not threatened with sanctions if his or her standard of reasonableness does not happen to coincide with that of the arbitral tribunal.

12. Not Providing the Necessary Authority

Guidelines 5 and 6 address the problem that arose in the Hrvatska and Rompetrol cases. If new counsel is appointed whose involvement might create a conflict of interest for an arbitrator, the arbitral tribunal may exclude him or her from the proceedings. However, the official comments qualify this seemingly simple rule as follows:

"In such case, the Arbitral Tribunal may, if compelling circumstances so justify and where it has found that it has the requisite authority, consider excluding the new Representative."73

This is striking: The comments explicitly take back what Guideline 6 is purporting to provide: the arbitral tribunal's authority to exclude counsel. The arbitral tribunal is thrown back to the situation the Hrvatska and Rompetrol tribunals found themselves in: the need to find a legal basis for excluding counsel. Thus, Guideline 6 is not as helpful as it appears prima facie.

There is another example that is much more fundamental and shows a basic, and this time, completely hidden weakness of the IBA Guidelines as a whole. The actual authority of arbitrators to sanction counsel conduct remains beyond the scope of the Guidelines. This was explicitly conceded in the draft comments of January 2013:74

"These Guidelines do not state whether Arbitral Tribunals have the power to rule on the misconduct of a Party Representative. Such power is neither established nor excluded by the Guidelines. This is a matter that may depend, in particular, upon the arbitration agreement, the relevant procedural rules or the law applicable to the

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72 See op. cit. fn. 6 and 7.
73 Comments to Guidelines 4-6 (emphasis added). See also the additional comment that "it is important that the Arbitral Tribunal give the Parties an opportunity to express their views about […] the extent of the Tribunal's authority to act in relation to such conflict […]" (ibid.).
74 Draft IBA Guidelines sent to the members of the IBA Arbitration Committee by email of January 14, 2013.
arbitration, which the Arbitral Tribunal must decide in the circumstances of the arbitration at hand.

If the Arbitral Tribunal established that it has the power to sanction misconduct and decides to apply, or draw inspiration from, the Guidelines …"

I could not agree more. However, these one-and-a-half paragraphs are missing in the final version that was adopted four months later. The official version does not indicate in any way that the application of the Guidelines alone may not suffice to confer unto arbitrators the authority to sanction counsel (with the specific exception of the comments to Guidelines 5 and 6 just mentioned). It is not clear what caused this fundamental about-face of the drafters at the very last moment.

Indeed, on closer analysis, the basis for the authority to sanction counsel is far from obvious. Even if the parties agree on the application of the IBA Guidelines as provided for by Guideline 1, how can that party agreement confer on the arbitral tribunal jurisdiction over such parties' representatives? It is a basic tenet of law that a person acting on a power of attorney is not a party to the rights and duties of the party he or she represents. Further, arbitration is known to be a creature of contract: Arbitrators have no power over persons that have not submitted to such arbitration. It goes without saying that counsel submits to the procedural authority of the arbitral tribunal, but does not submit him- or herself to the arbitral tribunal's jurisdiction.75

In fact, the receptum arbitri, the contract between the parties and the arbitral tribunal, authorizes the arbitral tribunal to decide upon disputes between the parties. It does not authorize the arbitral tribunal to deal with other disputes, such as a dispute with counsel, unless the parties explicitly so provide. Thus, if an arbitral tribunal spends time and money to investigate and sanction counsel without specific authorization, the arbitrators risk being liable to the parties for breach of the receptum arbitri.

The drafters of the LCIA General Principles appear to have been aware of this fundamental problem. They addressed it in Article 18.5 of the LCIA Rules:

"18.5 Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance."

While this provision does not fully solve the lack of an arbitration agreement with counsel, it at least takes a first step in the right direction.

75 Sometimes it is argued that the IBA Guidelines do not impose duties and sanctions on counsel but rather on the parties (see CUMMINS, op. cit. fn. 50, p. 447). I find this view difficult to reconcile with the purpose and the plain wording of the IBA Guidelines.
13. Disqualifying Regional Traditions

One of the arguments sometimes advanced to justify guidelines on counsel conduct is the need to educate newcomers to arbitration. One can hardly argue against education. It seems odd, however, that a document allegedly meant to educate also provides for sanctions. Education by sanctions is very old school.

Even without the sanctions, the IBA Guidelines are difficult to justify as a means to educate. With their aspiration to globalize certain standards, they thereby disqualify differing local or regional practices as substandard or even improper. How is the IBA to judge whether, e.g., any and all African, Asian or other traditions in dispute resolution that do not happen to be in line with the IBA Guidelines are substandard and need to be eradicated or simply ignored? There is a risk that the IBA Guidelines could be perceived in some regions as being too condescending.

14. Ignoring the Users

There is also some navel-gazing involved. Maybe the arbitrators amongst us would like to have more powers. Before we grant ourselves such powers, though, we should involve the users. At the 2014 arbitration conference in New York mentioned above, the general counsel of a well-known global company said that he did not need any sanctioning of counsel. He makes sure that his counsel behave properly and is quite happy if the opposing counsel misbehaves; if that were the case, he added, the arbitral tribunal would notice and instinctively draw an adverse inference on the merits. For him, as for most users, the decision on the merits is all that counts.

This observation is somewhat at odds with a finding of the 2015 Queen Mary survey, according to which 68% of in-house counsel favor greater regulation of counsel conduct. However, the survey also showed that counsel conduct should primarily be regulated “through tribunals’ effective use of the sanctions that are currently available”, instead of through additional rules and guidelines, i.e., by using the inherent powers of the arbitral tribunal to conduct the proceedings. In addition, anecdotal evidence suggests that enthusiasm for sanctioning counsel is only skin-deep and wanes when in-house counsel are made aware of the potential costs and risks of formally investigating and finding misconduct.

Typically, users do not want proceedings to be interrupted by formal investigation of counsel conduct as envisaged by Guidelines 26 and 27. This is not what they pay the arbitrators for.

76 See above III.10.
77 2015 Queen Mary Survey, op. cit. fn. 22, p. 41.
78 Ibid.
79 Limited interest in rules and guidelines is also suggested by the low participation rate of in-house counsel in the survey undertaken by Christopher Lau; just 10 out of 82 user responded (LAU, op. cit. fn. 21, p. 1).
Neither do users want to have sweeping document production as envisaged by Guidelines 12-17: At the 2009 ASA yearly conference on "The Search for 'Truth' in Arbitration", a U.S. lawyer argued for full discovery to make truth and justice prevail. In stark contrast, at the same conference, a panel of in-house counsel of large European companies declared that they prefer efficient dispute resolution in order to achieve closure and be able to move on with business. According to these general counsel, internal investigations are important, but once the decision to litigate (or arbitrate) is taken, additional investigation through a formal discovery process of U.S. proportions is just a budgetary burden most users are happy to do without, especially in the current climate of increasingly limited litigation budgets.

Thus, before the arbitration process is burdened with additional issues on a global level, the users need to be involved.

15. Dangerous For the Unwary

The Task Force conducted an international survey, which "revealed a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration". This finding does identify an important issue, but quite a different one from what the IBA Guidelines actually address. Confusion about applicable (typically mandatory) rules is not alleviated by adding another layer of rules; additional rules rather create additional confusion and conflicts and thus additional jeopardy for practitioners. The IBA Guidelines do not address such conflicts at all, but, in Guideline 3, merely acknowledge their existence and leave it to the arbitral tribunal to sort out.

In other words, counsel trying to chart a course across the high seas of arbitral proceedings has to avoid clashes with rocks, i.e., mandatory bar rules of his or her home jurisdiction, some of which are shrouded in the fog of unclear applicability in international arbitration proceedings. The IBA Guidelines make this task more difficult by (i) adding additional rocks to be avoided and (ii) sometimes inviting counsel on a course that will inevitably lead to clashes with national bar rules, as is the case with regard to preparation of witnesses and experts. The IBA Guidelines should come with a warning sticker: "Reliance on these Guidelines might be dangerous to your professional career."

16. Mislabeled

The title of the IBA Guidelines is innocuous enough. The content speaks a different language, though: Guidelines do not usually come with sanctions attached, rules do.

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81 Preamble, p. 1 et seq.
82 See above at III.5 and III.10.
83 See above at III.10.
Interestingly, the informal survey undertaken by Christopher Lau SC for the 2016 ICCA Congress showed that most of the respondents, who wrote a comment, mislabeled the IBA Guidelines by referring to them as the "IBA Rules on Party Representation". This raises the question as to whether it is not the Guidelines themselves that are rather mislabeled.

17. **In Sum: Well-Meant But Too Hastily Drafted**

At least with hindsight, the IBA Guidelines should not have been adopted in 2013. The discussion about counsel conduct had not progressed enough within the Task Force, let alone within the wider arbitration community. Very few people were aware of what the draft really contained; even fewer were able to take the time to consider the wisdom of the various provisions. The content is too revolutionary to be adopted without careful and extensive consideration.

The IBA Guidelines do not represent the collected wisdom of the global arbitration community. They do not even fully represent the collected wisdom of the Task Force. In essence, they remain the work of very few practitioners and should at least be thoroughly reconsidered and partly revised in order for them to be beneficial to international arbitration.

Rusty Park recommended that time should tell whether such guidelines make arbitration better or worse and that the "arbitration community must, for now at least, put the matter into a box labeled ‘Awaiting Further Light’". The Swiss Arbitration Association ASA shone a spotlight on the IBA Guidelines and reached the conclusion that they are obviously too deficient to be subjected to the test of time. When a new medicine obviously risks doing more harm than good, any clinical trial must be aborted. ASA concluded that "It is therefore not advisable to adopt the Guidelines for application in specific arbitration proceedings".

IV. **How To Self-Regulate**

1. **What Is Required?**

Justice must be seen to be done. There is a perception that the arbitration community needs to clean up its act. One of the arguments put forth in favor of the IBA Guidelines is that it would be naïve to think that the arbitration community can simply say "No" to rules on counsel conduct. Granted. However, not saying "No" to rules on counsel conduct does not necessarily mean saying "Yes" to the IBA Guidelines. There is not just one way to address the issue of counsel conduct.

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84 LAU, op. cit. fn. 21, p. (emphasis added).
86 GEISINGER, SCHNEIDER and DASSER, op. cit. fn. 23, p. 4, Conclusion 5.
A simple and effective measure is to educate counsel about how to behave and arbitrators about how to deal with inappropriate counsel conduct. Conferences, workshops, continued education of all sorts as well as educative materials, like the UNCITRAL Notes on Organizing Arbitral Proceedings87 or arbitral toolboxes can go a long way in improving quality.

If, however, cleaning out pure misconduct is the issue, the measures which we as the arbitration community take must be sufficiently transparent in order for them to be widely viewed as being taken. Perception is generally known to be everything.

Under such a test, rules that are applied behind closed doors might eventually fall short: Unlike investment treaty arbitration, most commercial arbitration proceedings are confidential, either as a matter of law or of fact. It will be difficult, if not impossible, to gauge if and how counsel conduct is improved by the application of, for instance, the IBA Guidelines assuming that the IBA Guidelines will ever be widely applied.

Another question is how sanctions against counsel can actually be made to work in practice. An admonishment behind the closed doors of confidential arbitration proceedings might not impress a dishonest party representative, let alone make him or her behave appropriately the next time.

What might theoretically work is punishing the party – as is indeed provided for by Guideline 26(b) and (c) – and then let the party sort it out with its wayward counsel and his or her insurance company or bar council. However, in practice, dishonest counsel conduct is normally a reflection of dishonest party intent.

Still, perception is reality: "The times they are a-changing", as Bob Dylan sang in 1964, but this time they are changing in favor of more government interference with all aspects of business, also with the business of dispensing private justice. If there is thus a perceived need to regulate, and it is likely to be the case, something must be done, but it should not make the arbitration process more cumbersome than it already is, lest users vote with their feet.

2. **A Global Arbitration Ethics Council?**

If (i) a problem concerns core counsel ethics and cannot be solved by procedural means, (ii) the arbitral tribunal is not to be burdened with the task of investigating and sanctioning counsel and, finally, (iii) neither the arbitration institution nor the national bar councils want to or can take on this role, another body has to step in. This should ideally be a global body than can apply global minimum standards, thereby providing the kind of self-regulation of the international arbitration community that some governments and practitioners are calling for.

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a) The Idea

In 2014, ASA's President, Elliott Geisinger, proposed the establishment of a truly transnational regulatory body, which may be called a Global Arbitration Ethics Council (GAEC). Such a council would be set up by major arbitration institutions and organizations and would be authorized by them to deal with counsel misconduct.

In the meantime, this initiative has started to take hold. On November 26, 2015 an international workshop with representatives of various arbitration institutions took place at the premises of the World Intellectual Property Organization (WIPO) in Geneva to explore how counsel misconduct should best be dealt with. The workshop was held under the Chatham House Rule, making the discussions confidential. The participants agreed to meet again to continue discussions. A second workshop is planned for June 2016.

The GAEC is not just another layer on top of already burdened arbitration proceedings. Rather, the idea is to separate ethical issues from procedural issues and shift them to an independent body. Thus, the first step is a sorting of issues:

<table>
<thead>
<tr>
<th>Orderly proceedings</th>
<th>Weighing of evidence</th>
<th>Admissibility of evidence</th>
<th>&quot;Conflicted arbitrators&quot;</th>
<th>Ethical issues</th>
</tr>
</thead>
</table>

The white boxes concern typical responsibilities of an arbitral tribunal.

Under both the IBA Guidelines and the LCIA Rules, it is the arbitral tribunal that deals with all these issues:

<table>
<thead>
<tr>
<th>ARBITRAL TRIBUNAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Orderly proceedings</td>
</tr>
</tbody>
</table>

Under ASA's proposal, the various issues would, in a second step, be referred to different bodies:

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88 Elliot GEISINGER, “President's Message: Counsel Ethics in International Arbitration – Could One Take Things a Step Further?”, 32 ASA Bulletin (2014-3) p. 453, at p. 455; See also the discussion of this proposal at a Queen Mary conference in London on September 11, 2014, GAR, September 12, 2014, “ASA proposes global body to police counsel conduct”.
89 GAR, July 10, 2015, “ASA to hold global ethics summit in Geneva”; GAR, November 27, 2015, “No agreement yet on global ethics council”.
90 These terms cover a situation in which a party appoints counsel that creates a potential conflict of interest for one or several members of the arbitral tribunal and situations in which there are inappropriate ex parte communications between an arbitrator and a party or its counsel. It does not cover the other situations of arbitrator conflicts which are not the topic of the ethics debate.
Thus, the arbitral tribunal can focus on the typical role for which it was constituted.

b) A Possible Structure

ASA’s proposal is still very much open for discussion. Currently, the GAEC is a vision rather than a concept. ASA could imagine that:

- All adhering associations and institutions delegate a certain number of eminent members from which panels are drawn to deal with individual matters according to the specificities of the case (in particular the legal and cultural background of counsel and parties involved). The choice of eminent arbitration specialists would facilitate the acceptance of decisions.

- Disciplinary power over counsel could be conferred to the GAEC (i) via the by-laws of participating law associations binding their members or (ii) via arbitration institutions that would, under their rules, not accept communications from counsel that do not agree to be subjected to the GAEC’s authority. To the extent that the institutional arbitration rules acknowledge the GAEC, there would not be issues of confidentiality of the arbitration proceedings that could prevent recourse to a distinct body.

- The proceedings would be initiated by counsel or by a party, possibly also by the arbitral tribunal, and would be confidential (possibly except for any sanctions).

- The proceedings before the GAEC would only commence once the arbitration is completed (including challenges, if any, against the award), with the potential exception of emergency situations.

- There could be a second tier providing for appellate review.

- The substantive rules to be applied by the GAEC could consist of a set of truly international core ethical principles that apply in all cases independent of the background of counsel, supplemented by any other rule the individual panel finds applicable in the specific case.\(^91\) These principles would also define the substantive scope of jurisdiction of the GAEC.

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\(^91\) Whether it is possible to draw up a list of such guidelines remains to be seen (doubtful: Paula HODGES, [in this yearbook, Title and page to be added])
Possible sanctions could include (i) stating a breach, (ii) admonishment, (iii) monetary sanction (fine), (iv) recommendations to the pertinent association to suspend or expel the offending counsel, or (v) even "naming and shaming".

c) Benefits

A GAEC would provide for self-regulation that can be shown and explained to governments. It could be the additional regulatory step called for by the Singapore attorneys-general.

It leaves the arbitral tribunals to do their job – i.e., to decide the parties’ dispute – without being distracted by counsel skirmishes and issues that are alien to the arbitration process.

It allows an assessment of counsel behavior without the heat of the fight on the merits, because this is an issue totally separate from the arbitration proceedings between the parties and thus not an additional layer of bureaucracy on top of the arbitral proceedings (as sometimes misunderstood). In exceptional cases the outcome of the GAEC proceedings could expose an arbitral award as erroneous, e.g., by exposing a crucial document on which the arbitral tribunal relied as having been faked. In such a case, the aggrieved party might consider applying for a revision of the award or other remedies if so provided for by the applicable law (lex arbitri).

It is strictly limited to ethics in a narrow sense – i.e. dealing with dishonesty – not just clashes of legal cultures. This leaves the procedural aspects, including safeguarding the integrity of the proceedings and the leveling of the playing field, to the arbitral tribunals and the arbitration institutions.

It allows full review of counsel ethics, including behavior outside of the proceedings before the arbitral tribunal, such as tactical challenges, abusive resort to satellite litigation in state courts, or abusive obstruction of enforcement.

d) Any Chance of Realization?

The late former German Chancellor, Helmut Schmidt, once memorably said: "When you have visions, go see a doctor". ASA is not going to see a doctor any time soon, but whether its vision will ever be more than just that, is a valid question. Its implementation would be a major undertaking as is often pointed out by skeptics – and rightly so. However, if indeed there is a need to self-regulate, a body like GAEC would probably be the most appropriate way of achieving that goal, no matter what it takes. If

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92 In his paper in the present yearbook, Christopher Lau SC raises several issues that in his view argue against a GAEC (LAU, op. cit. fn. 21, p. ■). While I do not share most of his concerns, his thoughtful comments deserve more space than is available here.

93 See fn. 1 and 2.

94 See, e.g., Michael Hwang’s serious doubts, HWANG and HON, op. cit. fn. 12, p. 660.
it turns out that there is no real need, because the arbitrators’ and the arbitral institutions’ existing powers if properly deployed suffice it would be all the better.

V. How To Ensure Equality of Arms By Controlling Counsel Conduct?

1. The Broader Picture

The topic of today’s panel is equality of arms. We have seen that the IBA Guidelines purport to enhance equality of arms but are deficient in many aspects. Conversely, a Global Arbitration Ethics Council is currently not more than a brave vision and one that does not specifically focus on equality of arms, but on combating dishonesty.

It is time to take a step back. By staring at the IBA Guidelines we might lose sight of the broader picture. We could even take several steps back. Equality of arms does not depend only upon counsel conduct. There are many other factors that have an impact: Local laws, financial means, political stability, political and social networks, language, arbitration experience, dispute resolution culture, political considerations, venue, access to information, and so on. Addressing just one factor does not come even close to solving the problem.

For the sake of this panel, let us concentrate on counsel conduct, though. In this limited respect, equality of arms is a general principle that has to be implemented by specific measures in the individual case. This requires an analysis that has yet to be sufficiently carried out. Mere unease about a perceived increase in ill-defined guerrilla tactics or an unlevel playing field in the abstract should not justify across-the-board regulation.

2. What Exactly are the Problems?

Technically leveling the playing field is, as this paper argues, a procedural matter between the parties in specific proceedings. It should not be and cannot be addressed on a global level by the international arbitration community. What can and should, however, be addressed are issues of real misconduct.

Talking about dishonest counsel conduct, even guerrilla tactics, has become pervasive, but mostly remains on the level of swapping war stories. There is anecdotal evidence of many manifestations of misconduct. However, what is lacking is statistical data on the prevalence of the various manifestations. There would be no need to set up a GAEC, for instance, if only two or three cases arise each year.

A few years ago, a survey by Edna Sussman provided empirical data from selected practitioners from around the globe. Asked whether they had ever witnessed at least once what they subjectively considered to be "guerrilla tactics", 66% of the 55 responders affirmed. The sample is rather small and the responses might not be fully

95 See above II.
96 SUSSMAN and EBERE, op. cit. fn. 5, at p. 612.
representative. In discussions, the result is often referred to as proof of both the prevalence of guerrilla tactics (and thus the need to do something) as well as the relative rarity of guerrilla tactics (and thus the lack of a need to act). On the face of it, the result is not disturbing: One third of these experienced practitioners had never met what they considered to be guerrillas. One could see this as a glass that is half-empty or half-full, or in the words of the authors:

"It is significant that 32% of the survey responders, including many well known international arbitration practitioners, reported that they had not seen such tactics utilized. While this is undoubtedly a result of a different definition being applied to the term guerrilla tactics by different people, perceptions matter, and that 32% number is worthy of note. It was also my sense, from reading the many responses, that those who said they had encountered such tactics, had seen them only rarely, The international arbitration bar is perhaps, generally speaking, a quite civilized and ethical bar. Indeed several respondents volunteered that they saw guerrilla tactics employed to a much greater extent in litigation."

In any case, guerrilla tactics are obviously not pervasive, otherwise each of the practitioners surveyed – and not just 66% – would have had one or two war stories to tell.

There does not seem to be any available data on the proliferation of bad behavior over time. Some arbitrators report an increase of misconduct due to more parties and counsel coming from certain jurisdictions with limited tradition of the rule of law. Others report increasing obstructive tactics by lawyers who are professionally trained to play hardball in their home jurisdictions. Sussman and Ebere also reported indications of an increase, concluding that the issue of arbitration tactics "requires serious exploration" even if absolute numbers might still be low. Lacking hard data, it is unclear to what extent greater awareness of the issue is to blame for an increase in anecdotal reports or whether the increasing globalization with ensuing culture clashes fuels the perception of increased misconduct. One lawyer's legitimate hardball tactics is another lawyer's guerrilla warfare.

Another question is what tactics we should be concerned with. When talking about guerrilla tactics, people often mean quite different issues of which only few may warrant any regulatory action against counsel conduct. The survey by Sussman and Ebere also inquired about the tactic that respondents consider as guerrilla tactics. The list reads as follows:

97 While such surveys are helpful, they raise the questions (i) whether the original sample of persons addressed is representative of the whole community of relevant persons, (ii) whether the often quite small group of responders is representative of the original sample, and (iii) whether the questions are clear enough. I myself often give up during such a survey after the second or third question that is ambiguous or based on a non-universal premise.
98 Ibid., p. 612.
100 Op. cit. fn. 5, p. 613 et seq.
— Abusive document production (examples: excessive requests, late production, excessive production that buries the relevant documents)

— Delay tactics (examples: counsel advancing health concerns, not truthfully representing availability for hearings)

— Creating conflicts (example: changing counsel during the arbitration process to create a conflict with an arbitrator; conversely, motion to disqualify opposing counsel right before hearing for alleged conflict)

— Last-minute surprise (example: submissions at the eve of or during a hearing)

— Anti-arbitration injunction or other approaches to courts (including criminal proceedings against a party or counsel)

— *Ex-parte* communications with arbitrators

— Witness tampering (example: threats to witnesses)

— Lack of respect and courtesy towards tribunal and opposing counsel

— Frustrating an orderly and fair hearing

In an impressive book dedicated to arbitration guerrilla tactics, several authors classified all kinds of such tactics into three groups:\(^\text{101}\)

— "*Guerrilla tactics*" (bribery; intimidation and harassment; wiretapping and other surveillance methods; fraud; delay tactics; frivolous challenges; guerrilla tactics within the arbitral tribunal)

— "*Extreme guerrilla tactics*" (violence, threats of violence, and other severe criminal acts; blatant abuse of state authority)

— "*Rough riding*" (withholding evidence; introducing evidence through witnesses; further examples)

Most of these manifestations of misconduct can be addressed by the arbitral tribunal within its standard remit to direct the proceedings and decide the dispute between the parties, such as assessing the evidence and, in the process, taking into account indications of tampering with evidence.

Other issues, like vexatious challenges of an arbitrator or abusive resort to state courts in order to derail arbitration proceedings, are beyond the possible reach of an arbitral tribunal and require different measures.

\(^{101}\) Günther J. HORVATH, Stephan WILSKE, Harry NETTLAU and Niamh LEINWATHER, "Categories of Guerrilla Tactics", in HORVATH and WILSKE, *op. cit.* fn. 5, p. 3 *et seq.*
At the workshop in Geneva organized by ASA on November 26, 2015 on the Global Arbitration Ethics Council, the representatives of various arbitration institutions discussed the prevalence of misconduct.\textsuperscript{102} There was broad consensus that actual data are lacking and that more research needs to be done by the various institutions to identify the types and magnitudes of the real problems as opposed to merely perceived ones.

It is not clear to what extent the IBA Guidelines are based on a similar analysis. At least for the arbitration community at large, the process of the Task Force was not transparent. There is no published analysis of the issues and the options available. This work needs to be done now. The outcome might vindicate the IBA Guidelines in principle – apart from the drafting deficiencies, some of which are explained above –, it might also support the view that there never was a need for the IBA Guidelines in their present form, or that they do not solve the real problems.

In this context I note that few practitioners know of counsel being reported to their national bar councils for misconduct. There might be many reasons for this striking fact. Confidentiality of arbitration only explains it to some extent.\textsuperscript{103} In any case, this might also explain the lack of knowledge about what national bar rules apply in international arbitration that resulted from the IBA survey. If there is a real need for sanctioning counsel, several counsel would already have been reported to various bar councils, and a body of case law would have evolved over the years clarifying what counsel misconduct can be taken care of by which bar councils and national supervisory authorities. There does not seem to be any substantial case law and thus probably also not a problem of widespread serious counsel misconduct.

3. **What Exactly is Required to Fix the Specific Problems (If Any)?**

Do the current means suffice or are additional rules, instruments or even bodies required? Of course, the answers depend largely upon the pressing problems. The following comments are thus tentative.

Apart from simply raising arbitrators' awareness of their powers and how to use them, problems in international commercial arbitration can be addressed on different levels and by different instruments:

1. **National arbitration laws** are the first line of defense. To the extent that they can address such problems, the international market of arbitration venues should come into play. It is about choosing the right venue. Parties do not need to submit to jurisdictions that foster misconduct.

\textsuperscript{102} See above, fn. 89.

\textsuperscript{103} The confidentiality of arbitration proceedings largely depends upon the applicable law and rules. There is no uniformity; see, \textit{e.g.}, BORN, \textit{op. cit}. fn. 12, p. 2779 et seq.
2. Arbitration institutions are the next line.\textsuperscript{104} Again let the market sort it out. If the parties care about equality of arms and the fight against misconduct, they will, over time, gravitate towards the arbitration institutions with the best record.

3. Arbitration rules can address conduct. To the extent that there is a real need, let the formulating agency in charge of a specific set of rules adapt them. For instance, the ICSID Rules can be adapted to vest the arbitral tribunals with the authority to exclude counsel from a case under certain circumstances and thus prevent a reoccurrence of Hrvatska or Rompetrol discussions\textsuperscript{105}.

4. "Best practices" should take care of misconduct. However, best practices are difficult to define. Practitioners understandably tend to call best practices whatever they themselves happen to be used to.

5. Nonbinding guidelines are of little help as long as they are nonbinding; and, as shown with the IBA Guidelines, they can even easily become counterproductive if the parties declare them binding, either in the arbitration agreement or after being nudged into doing so by the arbitral tribunal, before the parties could carefully consider the potential consequences. They can be helpful, though, in raising awareness and developing best practices.

6. "Good faith" as an overarching principle could shield against dishonest behavior and also hardball tactics.\textsuperscript{106} As a general principle pervading law as a whole, it is well known in civil law jurisdictions, but little known in common law jurisdictions and might thus be of limited help in some cross-cultural contexts.\textsuperscript{107} Still, it seems to work in most arbitration proceedings, including proceedings with parties and counsel that are less used to good faith as a legal concept but recognize it as a common sense concept.

7. A "tool box" for the arbitral tribunal is clearly helpful as it makes arbitrators aware of the means at their disposal. Often, arbitrators fail to contain obstructive counsel behavior not because of a lack of authority to sanction counsel, but merely because they are not aware of the options within their inherent powers to direct the proceedings and to safeguard the integrity of the process. A tool box also makes the available options transparent for everybody. One example of such a product is the UNCITRAL Notes on Organizing Arbitral Proceedings (1996).\textsuperscript{108}

\textsuperscript{104} See also HWANG and HON, op. cit. fn. 12, p. 668 et seq. Hwang favors a solution that leaves the task of sanctioning counsel with the arbitration institutions.

\textsuperscript{105} On the Hrvatska and Rompetrol cases, see above I.2.


\textsuperscript{107} See, however, Articles 14.5 and 32.2 of the 2014 LCIA Rules on good faith.

\textsuperscript{108} See above fn. 87.
8. In the end, however, what is required are arbitrators that are (i) willing to implement the equality of arms by appropriate procedural directives and (ii) capable of enforcing them. The parties normally have a say in the constitution of the tribunal and should make use of this power wisely. There is a free market for arbitrators, and reputation matters. As a group we as arbitration practitioners can make an arbitrator’s reputation reflect whether he or she is capable of and willing to tackle counsel misconduct.

9. For gross misconduct, such as bribing arbitrators, forging documents or instigating witnesses to lie, national criminal laws might apply and public prosecutors might take care of miscreants.

10. Any remaining ethical issues concerning professional counsel could be outsourced to national bar councils or to a Global Arbitration Ethics Council.

4. The Dilemma Between Justice and Efficiency: Counting the Costs

There is an eternal dilemma between justice and efficiency. Justice delayed is justice denied. Just recently, in his yearly report 2015, U.S. Chief Justice Roberts called for a change in the U.S. legal culture to place a premium on “the public’s interest in speedy, fair, and efficient justice”. Speedy and efficient, but still fair. This is a tall order. Dilemmas, almost by definition, cannot be solved, but can be managed. Thus, there are no quick and easy solutions that apply across the board. Depending upon one’s legal and cultural background, one might shift the emphasis onto one side rather than the other.

Depending upon the circumstances, the optimization between justice and efficiency will turn out different. Large international companies may be able to finance more discovery and witness preparation than a small enterprise or an organization from a less developed state with a limited litigation budget. Leveling the playing field by making the game too costly or cumbersome for many does not advance fairness.

In this regard, commercial arbitration is at risk of pricing itself out of the market. By increasingly assimilating itself to certain litigation traditions with sweeping (e-)discovery, extensive motion and satellite litigation practice and week(s)-long hearings pitting large teams of counsel against each other, we risk generating costs and disruption that will result in many users simply not being able or willing to participate any longer.

The arbitration community has a responsibility to nurture the efficiency of arbitration and ensure that any measures to control counsel conduct do not unnecessarily harm it.

VI. Conclusions

The current heated discussion about counsel conduct is rather a distraction from the broader and more important discussion about equality of arms. Equality of arms is not advanced by pitting counsel against its own party (e.g., by investigating communications between counsel and party), by re-characterizing procedural issues (such as document production or witness preparation) as ethical ones, or by stipulating that an arbitral tribunal has jurisdiction over counsel as such (and not just the parties).

Indeed, the IBA Guidelines on Party Representation were well-meant but contain too many flaws. They need to be fundamentally revised. By trying to fix what is not necessarily broken and by breaking what was supposed to be fixed they provide grounds for unnecessary distraction, at best, and even more guerrilla tactics, at worst. There is a reason why many previous attempts at regulating conduct have been abandoned.\(^\text{110}\)

Equality of arms requires (i) leveling the "hearing room" (rather than the whole world through one-size-fits-all rules) with (ii) rules that carry the same meaning for all participants and (iii) an arbitral tribunal capable of and willing to implement these rules as well as the general principle of equality of arms as such.

Equality of arms and fairness do not require global standards. On the contrary, regional differences and competing concepts allow users to opt for proceedings that best suit their specific purposes and traditions and with which they feel most comfortable. What is required, however, is transparency at the outset (i) of the parties about their expectations and (ii) of the tribunal about its approach to the procedure.

If at the end there is still a perceived need to address core ethical standards of counsel, this issue should be left to a separate body, either the competent national bar council as is the case today or, to the extent that this is not possible or realistic, to a global body such as a Global Arbitration Ethics Council. The arbitral tribunal should not be burdened with such responsibility, even if its authority to address counsel ethics could indeed somehow be construed.

So, back to our initial questions: Do rules and guidelines level the playing field and properly regulate conduct: Can they, will they, should they? The simplistic answers are obviously "No", "No", and "No" again.

Having said that, we cannot just call it quits and all go home. Lawyers can find ways to tweak these answers and come up with somewhat optimized results even if they will have limited scope and effect. As perception is everything and the arbitration community seems to have a perception problem, we need to do this work. Invited by ASA, major arbitration institutions are taking up the challenge. The IBA Guidelines are a good starting point for the discussion. However, the real work is yet to be done.

\(^{110}\) For an abandoned European attempt to regulated counsel ethics in arbitration see BAIZEAU, op. cit. fn. 12, p. 347.
Maybe also ICCA should join in taking up the challenge presented by Doak Bishop in his Key Note Address at the 2010 ICCA Congress in Rio: 111

We suggest that an organization like ICCA, or perhaps the IBA, appoint a working group [...] to consider this proposal [i.e., the RIO Code], perhaps along with others, with a view toward building a consensus around a Code of Ethics that will have widespread support and can be adopted."

111 See BISHOP, op. cit. fn. 4, at p. 390.