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***Ethics in International Arbitration***  
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**I. INTRODUCTION**

*[Ladies and gentlemen should behave with respect to one another]*

I first want to thank the Seoul IDRC, Professor Shin, Kevin Kim and BC Yoon for inviting me to give this prestigious lecture. The SIDRC is an important part of the rapidly growing arbitration culture in Asia, and I am honored to be here to give the 2<sup>nd</sup> Annual Seoul Arbitration Lecture.

As we all know, as international arbitration cases have grown ever more complex, involve much larger sums in dispute and have expanded geographically, the system of international arbitration faces many challenges. I have spoken many times about the need to reign in its growing time and cost and methods to make arbitration more efficient. I will speak today about another challenge: the need for counsel from different legal systems to act in a consistent ethical manner and, more importantly, what many perceive to be a decline in ethical conduct by counsel in advocating their clients' cases.

The arbitration community has debated this topic extensively. We have gone from an "ethical no man's land," in the words of Catherine Rogers,<sup>1</sup> to a crowded teenager's bedroom "filled with too many people," in the words of Gary Born.<sup>2</sup> Still, as Lord Goldsmith recently affirmed, "ethics in international arbitration has generated much debate but relatively few answers."<sup>3</sup>

We certainly have not reached any consensus, either on the standards or on how to enforce them. Perhaps the debate has been too abstract, or it has focused too narrowly on whether what we really need is a code, guidelines, core principles, or nothing at all.

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<sup>1</sup> Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. Int'l L.J. 341, 2002.

<sup>2</sup> Barry Fletcher, *Populating the Ethical No Man's Land—a Conference Report*, Conference hosted by Queen Mary Institute for Regulation and Ethics, entitled: "The Arguments For and Against Further Regulation of Arbitration Counsel". LexisNexis, September 2014.

<sup>3</sup> Peter Goldsmith QC, Keynote Speech, ICC UK Annual Arbitrators Forum: *Ethics in International Arbitration*, Conference Materials, 2013.

T.S. Eliot said in his poem “Little Gidding,” that “the end of all our exploring will be to arrive where we started.” Perhaps we ought to pause for a moment and take a step back.

When I was growing up, we had a summer home in Connecticut in a neighborhood that shared two beautiful, red clay tennis courts. Every year, the neighborhood association issued several pages of rules on how the courts could be used – and always did so only after a contentious meeting lasting several hours in which every rule was debated. My father, who also was a lawyer with an extensive international practice, went to those meetings and always returned angry and perplexed. He said the association only needed one simple rule: “Everyone shall behave like ladies and gentlemen.”

Unfortunately, too often lately I have seen conduct that does not meet that standard, that pushes the borders of right and wrong or exceeds it. I have heard that complaint from others – that lawyers’ conduct in international arbitration is worse than it had been. This conduct harms the system of international arbitration, and we need to remedy the situation. Oddly, it does not even serve the lawyers’ clients’ interests – which presumably is what motivates such conduct – so it is often frankly hard to understand.

I am not sure what has caused this unfortunate development. In the past, when there were fewer and less complex cases, the international arbitration community was smaller. Perhaps there was more need to self-regulate then, as it was more likely that a misbehaving lawyer would find himself or herself in front of the same arbitrator soon again or that an adversary witnessing that conduct would be an arbitrator in a future case argued by that counsel. In his recent Freshfields Lecture, Emmanuel Gaillard noted that too many actors in the international arbitration system have fallen into fixed roles – as professional arbitrators or as counsel always representing the same side of a type of dispute – and that this has broken down some of the norms that governed international arbitration. (To be clear, the significant expansion of the number of lawyers and arbitrators acting in international arbitration is an enormously beneficial development; this may simply be one unfortunate byproduct.)

The field has grown so diverse, complex, and global that it is often said that, as Chief Justice Sundaresh Menon put it, “implied understandings or shared values no longer provide any meaningful means of shaping or influencing conduct in this context.”<sup>4</sup> Or, to put it another way, there is no shared concept of what it means to act like ladies and gentlemen—we are too diverse and it means something different to each of us.

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<sup>4</sup> Cecil Abraham, *Do Counsel Owe a Duty of Honesty in Relation to Their Submissions and If So, When and To Who? – An Asia-Pacific Region Perspective*, 17<sup>th</sup> Annual IBA International Arbitration Day, 14 March 2014, Paris, referring to Chief Justice Sundaresh Menon’s Keynote Address to the CI Arb International Arbitration Conference, August 2013. See also Gary Born and Thomas R. Snider, *A Code of Conduct for Counsel in International Arbitration*, Kluwer Blog, November 2010.

Moreover, lawyers are well trained in drawing hairline distinctions and interpreting statutes or other rules in a manner that suits them and their clients.

However, the duty to act ethically is consistent across national codes of professional responsibility, and at their core are standards that lawyers know separate right from wrong. Lawyers should not hide behind hairline distinctions or creative interpretations of rules to engage in conduct that misleads the tribunal in any way.

Too often, we have seen lawyers misstate evidence in the record or describe legal authority incompletely or inaccurately. Or affirmatively state to the tribunal that a full search for requested documents has been conducted when the lawyer knows that the client has not diligently searched or has purposely withheld a responsive, but harmful, document. Or engage in tactics whose sole purpose is to delay or derail the arbitration. Fortunately, such behavior is usually discovered; the other side simply corrects the record, so that in the end this conduct does not help the lawyer's client. But it adds to time and cost, and it leads to questions about the integrity of the system that could lead to its downfall.

My message today is that the international arbitration community needs to return to a higher standard of conduct. Doing so will save parties time and cost, and it will enhance and therefore preserve the system of international arbitration.

*[Broad concept of ethics: what we know is right, not to the line of what is written]*

Arbitration has played a significant role in upholding the rule of law from its use in ancient Greece, through the Middle Ages, and into the 20<sup>th</sup> and 21<sup>st</sup> Centuries.<sup>5</sup> As with any mechanism that upholds the rule of law, arbitration also includes an ethical component,<sup>6</sup> and it is incumbent upon those who practice in the field of international arbitration to act ethically so as to enable the enforcement of the rule of law.

A formulation based only on “ethical behavior” may be too vague to be of practical use. However, in the midst of the ongoing debate, it is surely prudent to refer to ethics in a broader sense, as “what we know is right, not to the line of what is written.”

*[Source of duties: not just national codes, but to the parties, each other and the system of international arbitration]*

The duty to act ethically should be given broad application, in that it is not limited to the letter of national codes of professional responsibility. We owe the duty to act

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<sup>5</sup> David W. Rivkin, Clayton Utz/University of Sydney International Arbitration Lecture, *The Impact of International Arbitration on the Rule of Law*, November 13, 2012.

<sup>6</sup> Goldsmith, *supra* no. 3.

ethically to the parties, to each other, and to the system of international arbitration itself. This idea is not new. For example, Bernard Hanotiau has written that it is “a basic principle of international commercial arbitration that the parties have the duty to cooperate in good faith in the performance of their agreement as well as in the arbitral proceedings.”<sup>7</sup> In his 2001 Goff Lecture, Johnny Veeder espoused the lawyer’s duty to arbitrate in good faith.<sup>8</sup> In it, he cited the “symbiotic relationship” that exists between arbitrators and counsel: “In the Anglo-Saxon adversarial system, fairness is dependent on the standards of conduct deployed by the parties and especially the parties’ legal representatives, towards each other and towards the court or arbitration tribunal. . . . Judges just cannot [do their work] as well or at all without the help of the parties’ lawyers, and an international arbitration of any size would be equally incomplete without the parties’ legal representatives.” Thus, it falls to us to ensure that the integrity of the arbitration system is preserved and remains sustainable.

With this framework in mind, I will now refer, *first*, to examples of counsel misbehavior; *second*, to issues arising in arbitration procedures, and particularly whether different national ethics standards cause these problems; *third*, to the question of whether there should be more regulation or less; and *fourth*, to the role of the arbitral tribunal in remedying the situation.

## II. COUNSEL MISBEHAVIOR

I would venture to guess that everyone in this audience, and eventually reading this speech, will have recently experienced some form of counsel misbehavior in an arbitration. (I would never suggest that anyone in the audience has himself or herself engaged in such behavior!)

Indeed, commentators have not only reported on the use guerrilla tactics in international arbitration, but also that “these tactics appear to be on the rise.”<sup>9</sup> In an often-cited survey published in the *American Review of International Arbitration*, sixty-

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<sup>7</sup> Bernard Hanotiau, *Complex Multicontract-Multiparty Arbitration*, *Arbitration International* 369, 1988.

<sup>8</sup> V.V. Veeder, *The 2001 Goff Lecture: The Lawyer’s Duty to Arbitrate in Good Faith*, *Arbitration International* 431, 2002.

<sup>9</sup> Edna Sussman, Solomon Ebere. *All’s Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration*, *American Review of International Arbitration*, 2011. See also Günther J. Horvath, Stephan Wilske, *Guerrilla Tactics in International Arbitration*, Wolters Kluwer, October 2013.

eight percent of respondents reported that they had experienced what they believed were guerrilla tactics.

That study and others have cited these tactics, among others: producing requested documents at the last minute; excessive requests for document disclosure; a failure truthfully to represent the client's availability for hearing appearances in order to delay the proceedings; frivolous anti-arbitration injunctions; frivolous challenges to arbitrators; introducing important arguments, witness statements and exhibits for the first time only in a rejoinder or, worse, on the eve of or during the hearing; initiation of criminal proceedings against party officers or counsel; witness tampering; incorrect translation of pivotal documents or refusal to accept a corrected translation offered by an interpreter; wiretapping and other surveillance methods; willfully misstating the record or the holding of a legal authority; willfully making false statements or denying facts the parties known to be true; and making allegations of fraud or other serious misconduct without citing to any record evidence – and when asked to provide such evidence, withdrawing the allegations rather than supporting them.<sup>10</sup>

As I mentioned at the beginning, I have seen far more episodes of such conduct in the last few years than previously, including examples of a number of the tactics mentioned above. I do not want to go into details because many of the cases are still live, but suffice it to say that, for example, we have sometimes had to attach appendices at the back of memorials in order to correct misstatements of the record so numerous that we did not want to distract from the main points of the memorial by referring to them there. Frankly, as I said, much of this conduct simply backfires, as the tribunal eventually learns of the misstatements or sees the purpose of the tactics – which can only diminish the credibility of that counsel and eventually harm the counsel's client.

### **III. ISSUES ARISING IN ARBITRATION PROCEDURES AND DIFFERING NATIONAL ETHICS STANDARDS**

So let's turn to some of the issues that most commonly appear in debates about ethics in international arbitration.

Commentators often emphasize that arbitration has become more complex and increasingly international, and, in consequence, that discrepancies between counsel practices from different jurisdictions have become more apparent.<sup>11</sup> Indeed, much of the ongoing debate has been driven by the premise that different legal traditions espouse “different and equally legitimate” ethical standards.<sup>12</sup> It is also said that because lawyers

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<sup>10</sup> Sussman, *supra* no. 9. See also Wilske, *supra* no. 9.

<sup>11</sup> Goldsmith, *supra* no. 3.

<sup>12</sup> *Ibid.*

subject to different national ethics rules often appear before the same tribunal, the arbitration may be conducted on an uneven playing field.

This might be true. Yet, it is also true that basic principles of lawyer ethics are found across jurisdictions— in the common law and the civil law. Cyrus Benson has reported that a comparison of various national codes reveals that “virtually all . . . codes recognize . . . the need for lawyers’ conduct to be guided by honesty, integrity and good faith.”<sup>13</sup> And again, virtually all require “that lawyers not make false and misleading statements or engage in the creation, use or preservation of false or fraudulent evidence.”<sup>14</sup>

The diverse players who interact within the arbitration system all share these basic principles, which should reach far beyond the idiosyncrasies of domestic laws and regulations.

In this context, I will briefly refer to two of the most common issues that arise with regard to counsel conduct in international arbitration: (a) submissions to the arbitral tribunal; and (b) document disclosure and production.

**a) Submissions to the Arbitral Tribunal**

False or Misleading Submissions

I will first focus on false or misleading submissions, and particularly on the norms regulating counsel faced with client or witness wrongdoing.

Perhaps one of the most interesting issues here is the tension between maintaining client confidentiality and disclosing wrongdoing to the relevant court or tribunal. While some commentators have argued that legal systems differ in how they treat the obligations of counsel in the face of client wrongdoing, I believe that the ethics codes generally show a consensus that lawyers must refrain from making false or misleading submissions.<sup>15</sup>

I will seek to illustrate that conclusion by turning now to a brief comparison among various common law and civil law systems rules and regulations.

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<sup>13</sup> Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, International Bar Association’s Dispute Resolution International, March 2009. *See also* Wilske, *supra* no. 9.

<sup>14</sup> *Ibid.*

<sup>15</sup> *See* Bishop and Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, Rule 4.

## ***Korea***

I will start here in Korea and elsewhere in Asia. Article 24 of the Korean Legal Profession Act provides that attorneys shall not conceal the facts or make false statements.

KBA Attorney-at-Law Ethics Bill

Article 2

*(2) Each attorney-at-law should not distort the facts or make false statements.*

Article 36

*(1) Each attorney-at-law should not make false arguments or submit false evidences in trial proceedings.*

*(2) Each attorney-at-law should not instigate or induce witnesses to false statements.*

## ***India***

Chapter II of the Advocates Act 1961 sounds like something my father would have written:

*“An advocate shall at all times comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity, may still be improper for an advocate.”* Note that the language needs be updated to include the increasing number of female lawyers in India! But the sentiment should nevertheless remain.

This chapter then goes on to prescribe certain conduct, including that *“an advocate shall use his best efforts to restrain and prevent his client from resorting to sharp or unfair practices or from doing anything in relation to the court, opposing counsel or parties which the advocate himself ought not to do.”*

## ***Japan***

The professional rules include:

Article 5: *“An attorney shall respect the truth and be faithful and perform his or her duties fairly and in good faith.”*

Article 75: *“An attorney shall not entice a witness into committing perjury or making a false statement, nor shall he or she submit false evidence.”*

## ***England & Wales***

The Solicitors' Regulatory Authority (SRA) Code of Conduct sets forth a series of "Outcomes" that a solicitor must achieve, and "Indicative Behaviors" that may tend to show when a solicitor has achieved those outcomes.

The Code notes that "[i]f you are a litigator or an advocate there may be occasions when your obligation to act in the best interests of your client may conflict with your duty to the court. In such situation you may need to consider whether the public interest is best served by the proper administration of justice and should take precedence over the interests of your client." **Chapter 5, Note (i)**.

In relation to the hypothetical of perjured testimony, and in addition to the general duty not to mislead the court, and not to be complicit in another person misleading the court (**O(5.1) and O(5.2)**), the Code requires that "where relevant, clients are informed of the circumstances in which your duties to the court outweigh your obligations to your client." **Outcome 5.5**.

Positive indicative behaviors that demonstrate compliance with these outcomes include:

**IB(5.4)**: "immediately informing the court, with your client's consent, if during the course of proceedings you become aware that you have inadvertently misled the court, or ceasing to act if the client does not consent to you informing the court."

**IB(5.5)**: "refusing to continue acting for a client if you become aware they have committed perjury or misled the court, or attempted to mislead the court, in any material matter unless the client agrees to disclose the truth to the court."

Negative indicative behaviors on the other hand, include "calling a witness whose evidence you know is untrue." (**IB(5.9)**).

The Bar Code of Conduct is similarly structured with outcomes, rules and guidance. And like solicitors, barristers are required not to "knowingly or recklessly mislead or attempt to mislead the court." (**rC3**). A barrister's duties to act in the best interest of his or her client are subordinated to their duties to the court (**rC4**), however the duty to the court "does not require you to act in breach of your duty to keep the affairs of each client confidential." (**rC5**).



Further to these general rules are more specific rules to false witness testimony, as follows:

**rC6:** *“Your duty not to mislead the court or to permit the court to be misled will include the following obligations:*

*(1) you must not*

*(a) make submissions, representations or any other statement; or*

*(b) ask questions which suggest facts to witnesses which you know, or are instructed, are untrue or misleading.*

*(2) you must not call witnesses to give evidence or put affidavits or witness statements to the court which you know, or are instructed, are untrue or misleading, unless you make clear to the court the true position as known by or instructed to you.”*

As to the situation in which a barrister later learns that he or she has misled the court by submitting false witness testimony, the guidance to the rules states that: *“Knowingly misleading the court includes inadvertently misleading the court if you later realise that you have misled the court, and fail to correct the position.”* (gC4).

*“If there is a risk that the court will be misled unless you disclose confidential information which you have learned in the course of your instructions, you should ask the client for permission to disclose it to the court. If your client refuses to allow you to make the disclosure you must cease to act, and return your instructions. In these circumstances you must not reveal the information to the court.”* (gC11).

### ***New York***

**Rule 3.1** of the NY Rules of Professional Responsibility, entitled “Conduct before a Tribunal,” provides that *“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous.”* “Frivolous” conduct includes knowingly asserting *“material factual statements that are false.”*

**Rule 3.3(a)(3):** *“A lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its*

*falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”*

**Rule 3.3(b):** *“A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”*

**Rule 3.3(c):** *“The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”*

As can be seen, in NY, the lawyer’s duty to the court in these circumstances overrides his or her duty of confidentiality to the client. The Commentary to Rule 3.3 makes it clear by stating that *“although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.”*

**Commentary to Rule 3.3.**

**Rule 3.4**, which is entitled “Fairness to Opposing Party and Counsel,” also prohibits the presentation of false evidence by a lawyer:

*“A lawyer shall not . . . .*

- (4) knowingly use perjured testimony or false evidence;*
- (5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false[.]”*

I note by the way that both the English and New York rules specifically apply to lawyers conducting arbitrations as well as litigation in the courts.

***Paris***

In Paris, the “*essential principles*” of the profession—found in Article 1.3 of the *Règlement intérieur du Barreau de Paris*—require honesty before the tribunal:

*“The essential principles of the profession guide the behavior of the lawyer in all circumstances.*

*The lawyer exercises his functions with dignity, conscience, independence, integrity, and **humanity**, in respect of the terms of his oath.*

*He respects, in addition, in this practice, the principles of honor, loyalty, absence of personal interest in the case, **fraternity**, discretion, **moderation**, and **courtesy**.*

*He displays, towards his clients, competence, devotion, diligence, and prudence.”*

Again, this sounds like my father wrote it.

The same tension between client confidentiality and honesty can be found here. Lawyers are subject to the rule of “professional secret” under Article 2 of the *Règlement Intérieur National*, which protects information communicated by the client to his or her attorney.

One leading treatise, by Damien and Ader, emphasizes the strong protection provided for the attorney-client privilege under French law: “*The lawyer cannot reveal his professional secrets except for when it is strictly necessary for his own defense in very limited cases that are defined by the law. Even the client cannot give the lawyer permission to reveal these secrets . . . Even in defense of his client against slander, the lawyer does not have the right to testify regarding what he has learned in the course of his professional activities.*”<sup>16</sup>

The same treatise emphasizes the tension that can sometimes arise between a lawyer’s obligation of professional secrecy to his client and his obligation not to knowingly make a false pleading before the Court. Damien and Ader note that:

*“A lawyer cannot lie at a hearing, even to save his client . . . [T]he lawyer is a guardian of the law and cannot make a false pleading when he knows the truth; and his professional secrecy obligations prohibit him from revealing his clients’ confidences, the lawyer morally should, in the interest of the client, persuade the client to choose a lawyer who can plead for him with the confidence necessary for a true defense.”*<sup>17</sup>

So where does this leave us in international arbitration? One can see an overall consistency among these standards. A lawyer may not knowingly present false evidence, and has an obligation to correct it if he or she learns the tribunal has received false evidence. The latter obligation may or may not be subject to competing obligations of confidentiality or secrecy, depending on the circumstances, but the former obligation is not, because nothing has yet been revealed. And these core principles, which we see in common law and civil law codes, in North America, Europe and Asia, rest on the

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<sup>16</sup> Henri Ader & André Damien, *Règles de la Profession D’Avocat* (11th ed. Dalloz Action 2006), p. 264.

<sup>17</sup> *Ibid.* at 323-24.

fundamental truth that I mentioned earlier: The system depends on procedural fairness and a level playing field for the parties, and that in turn can only exist if counsel have an affirmative obligation not to purposely mislead the decision-maker, whether a court or an arbitral tribunal.

Recent efforts by the IBA and others, such as the 2014 LCIA Rules, help to level this playing field.

**IBA Guideline 9:** *“A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.”*

**IBA Guideline 10:** *“In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.”*

**IBA Guideline 11:** *“A Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representatives knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Depending upon the circumstances, and subject to countervailing considerations of confidentiality and privilege, the Party Representative should promptly take remedial measures, which may include one or more of the following:*

- (a) advise the Witness or Expert to testify truthfully;*
- (b) take reasonable steps to deter the Witness or Expert from submitting false evidence;*
- (c) urge the Witness or Expert to correct or withdraw the false evidence;*
- (d) correct or withdraw the false evidence;*
- (e) withdraw as Party Representative if the circumstances so warrant.”*

**IBA Guideline 23:** *“A Party Representative should not invite or encourage a Witness to give false evidence.”*

#### Disclosure of Legal Authorities that Could Harm One’s Own Case

On the other hand, a classic example of a conflict between domestic professional rules relates to disclosure of legal authorities that are adverse to one’s own case. To put it simply, and no doubt incorrectly as so broadly generalized, common law systems regulate this matter while civil law systems do not.

### ***England & Wales***

The SRA Code of Conduct provides that “*drawing the court’s attention to relevant cases and statutory provisions, any material procedural irregularity*” is an indicative behavior related to the duty not to mislead the court. (**IB(5.2)**).

Barristers are also required to “*take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions.*” (**rC3**). The “guidance” provided in relation to this rule makes clear that the duty “*includes drawing to the attention of the court any decision or provision which may be adverse to the interests of your client.*” (**gC5**).

### ***New York***

The NY rules provide that a lawyer shall not knowingly “*fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.*” (**Rule 3.3(2)**).

The commentary to the NY Rule articulates the rationale of this rule: “*Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.*”

### ***Civil Law Systems***

Civil law systems tend not to contain rules on this matter. That is most likely because prior court decisions in civil law systems are not binding precedent, so no prior decision is “controlling” in the same manner as in a New York or English court.

Thus, counsel from different jurisdictions may take different approaches in commercial arbitrations. One could perhaps apply a rule that counsel have an obligation to cite a controlling legal authority from a jurisdiction whose law governs the arbitration – no matter where counsel are from. This could essentially mean that common law authorities would need to be cited while civil law authorities need not be. And in investment treaty arbitrations, where prior tribunal awards are certainly not controlling, but may be persuasive, counsel would not be bound to cite an unhelpful decision.

In practice, however, often (though I admit not always) the adversarial system regulates this conduct and avoids any issues. If counsel do not bring a leading (not even

necessarily controlling) precedent to the attention of the arbitral tribunal, it is most likely that opposing counsel will do so. (And in the investment treaty context, it is likely that the tribunal members will know of the award in any event.) Failure to discuss or even raise a critical leading decision, as I saw recently in a case, will not assist the lawyer's client, and may harm the client if the tribunal begins to doubt the credibility of the lawyer and their ability to rely on his representations and arguments.

## **b. Document Disclosure and Production**

As noted by the IBA in its commentary to the Guidelines on information exchange and disclosure (Guidelines 12–17), it is unfortunately common for counsel in the same arbitration proceeding to apply different standards with regard to the process of preserving, collecting and producing documents in international arbitration. These differences may lead to disparity in access to information or evidence, undermining “the integrity and fairness of the arbitral proceeding.”<sup>18</sup>

The IBA provides an example of such differing standards by stating that, for example, “one Party Representative may consider him- or her-self obligated to ensure that the Party whom he or she represents undertakes a reasonable search for, and produces, all responsive, non-privileged Documents, while another Party Representative may view Document production as the sole responsibility of the Party whom he or she represents.”<sup>19</sup>

The disparity in approaches is often due to differences between legal systems that expressly address counsel's document production duties, and systems that do not contain much regulation for document exchange procedures and thus do not contain express ethical rules in this regard.<sup>20</sup>

To illustrate this point, I turn again briefly to a comparison between rules and regulations in England and Wales, New York and Paris.

### ***(i) England & Wales***

In England & Wales, under “standard disclosure,” a party is required to produce:

“(a) *the documents on which he relies; and*

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<sup>18</sup> IBA Guidelines, Commentary to Guidelines 12-17.

<sup>19</sup> *Ibid.*

<sup>20</sup> Wilske, *supra* no. 9.

- (b) the documents which —
- (i) adversely affect his own case;
  - (ii) adversely affect another party's case; or
  - (iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.” **Civil Procedure Rule 31.6.**

The Party is under a duty to make a “reasonable search” for these documents. Reasonableness is assessed by looking at the following factors:

- “(a) the number of documents involved;
- (b) the nature and complexity of the proceedings;
- (c) the ease and expense of retrieval of any particular document; and
- (d) the significance of any document which is likely to be located during the search [.]” **Civil Procedure Rule 31.7.**

Also, the guidance contained in the Bar Code of Conduct makes clear that as part of a barrister's duty not to mislead the court, “if you become aware that your client has a document which should be disclosed but has not been disclosed, you cannot continue to act unless your client agrees to the disclosure of the document. In these circumstances you must not reveal the existence of contents of the document to the court.” (cG13).

## **(ii) New York**

As in England & Wales, in New York, parties are also bound by detailed rules on document production.

Under Federal Rules, a Party is entitled (with some exceptions) to “discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter . . .” **US Fed. R. Civ. Pro. 26(b)(1).**

Notably under US Federal Rules, counsel itself must search for relevant documents and certify that the search was reasonable. On making a disclosure, counsel must certify that “to the best of the [its] knowledge, information, and belief formed after a reasonable inquiry with respect to a disclosure, it is complete and correct as of the time it is made.” **US Fed. R. Civ. Pro. 26(g)(1).**

Moreover, under NY Rules of Professional Conduct, if a client wishes to prevent, or has prevented, the disclosure of relevant evidence, counsel is bound to “*take reasonable remedial measures, including, if necessary, disclosure to the tribunal.*” **NY Rule 3.3(b)**. As the commentary to the rule makes clear, “[l]awyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process.” **Commentary to Rule.**

The NY Rules also specify that a lawyer shall not “*suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce*” and that it shall not “*conceal or knowingly fail to disclose that which the lawyer is required by law to reveal [.]*” **NY Rule 3.4(a)**.

### **(iii) Paris**

In contrast, and as is often the case in civil law jurisdictions, the Parisian Code of Conduct does not explicitly address counsel’s document production duties.

The French Code of Civil Procedure contains some provisions on document production such as that of Article 11, which provides that if one party holds an element of proof and does not produce it, the Judge can, at the request of the other party, enjoin that party to produce it, if necessary subject to a penalty. Articles 138 and 139 provide for the procedure under which a party can request that the judge order the production of a document by an individual or entity that is not party to the litigation.

French courts have, however, relied on the “duty to act loyally in the conduct of arbitration proceedings” to require production of documents even not required under the Code of Civil Procedure, including when one party retains a document “because it is deemed to be contrary to its interests.”<sup>21</sup> This duty to act loyally is expressly contained in Article 1464 of the Code of Civil Procedure and is applicable to international arbitrations unless the parties agree otherwise.

IBA Guidelines 12–17 seek to address the difficulties posed by disparities in access to information by suggesting standards of conduct in international arbitration and fostering the “taking of objectively reasonable steps to preserve, search for and produce” documents that a party has an obligation to disclose.

Likewise, the 2014 LCIA Rules, which contain as an annex “guidelines for the parties’ legal representatives,” provide that “[a] legal representative should not

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<sup>21</sup> Kleiman & Saleh, *Célérité et loyauté en droit français de l’arbitrage international: quels pouvoirs et quelles responsabilités pour les arbitres et les parties?*, Cahiers de l’arbitrage, January 1, 2012 n°1, p.99, ¶ 29



knowingly conceal or assist in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal.”<sup>22</sup>

The IBA Guidelines and the LCIA Rules reflect the fact that, despite the differences between the common and civil law traditions, some degree of document disclosure is common practice in international arbitration. As shown by their widespread use, the IBA Rules of Evidence have struck a reasonable balance regarding the scope of such disclosure that has generally been acceptable to lawyers and parties from both traditions and from all geographic regions. Importantly, therefore, tribunals usually set down the rules for requests and production in procedural orders, often by reference to the IBA Rules.

The IBA Guidelines and LCIA Rules annex are thus of great importance because, as Constantine Partasides stated at the IBA Arbitration Day this year, the “document production process depends on confidence that opposing counsel will implement and police the process with equal rigour.”<sup>23</sup> The system relies on trust and on counsel subjecting themselves and their clients to a high standard to make sure that evidence that may be false is not presented and that all documents ordered to be produced are, in fact, produced.

Some practitioners from civil law countries have opposed these provisions of the Guidelines on the basis that, if their client instructs them not to produce a certain document, their professional responsibility requires them to follow that instruction and not produce the document. This argument, however, misses the point entirely, and it seems to me the answer is quite simple. If a conflict arises, it is not caused by the Guidelines but arises as a natural result of the client’s agreement to arbitrate. Compliance with the document request has been ordered by the Tribunal. In the circumstances described, the counsel has a choice: he or she can either make a full document production and include that document, despite the client’s instruction, or he or she must inform the tribunal that the document production is not complete and that a responsive document has been located but not produced. To do otherwise – to produce documents and affirm that the party has complied with the document request when a document has been specifically withheld – is to lie to the tribunal. As we have seen, virtually every professional ethics code mandates that a lawyer shall not make untrue statements to a tribunal. There is no conflict among legal systems in this regard. And considering my essential point that lawyers know the difference between right and wrong, they know that to affirmatively mislead a tribunal is wrong.

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<sup>22</sup> LCIA Rules, Annex, para 5.

<sup>23</sup> Constantine Partasides, *Duties of Arbitration Counsel in the Document Production Process*, 17<sup>th</sup> Annual IBA International Arbitration Day, 14 March 2014, Paris.

Moreover, while both the IBA Guidelines and the LCIA Annex make clear that they are not intended to conflict with mandatory professional rules, that exception does not apply here. As I noted, given the duty to tell the truth to the tribunal, there is no such conflict.

The so-called conflict can also be resolved in another manner: The party has agreed to arbitrate under rules that permit a tribunal to order document production. It is therefore contractually bound to comply with the tribunal's document production order. To instruct its lawyer to disobey that order is a breach of that obligation, as well as morally wrong of course.

Thus, the IBA Guidelines and the LCIA Annex are not to be criticized for creating a conflict for lawyers from civil law jurisdictions or anyone else who may raise this problem. Rather, they are to be praised for bringing to light that some lawyers may have knowingly withheld responsive documents while silently or affirmatively confirming that the document request has been satisfied.

To close on this point, failing to comply fully with document disclosure orders is not only unfair to the system; it can also be prejudicial to one's own case. Indeed, in a number of cases, such as *Fraport v. Philippines* and *Waste Management vs. Mexico*, the tribunals have indicated that they would draw adverse inferences from a party's failure to disclose documents.<sup>24</sup>

#### **IV. SHOULD THERE BE MORE OR LESS REGULATION?**

Much of the recent ethical debate has centered on whether there should be more or less regulation. Three streams of thought can be identified.

One body of literature evinces a strong aversion to regulation of ethics in international arbitration. Toby Landau is often cited for his concern that “we risk regulating ourselves out of existence”—that too much regulation could undermine the flexibility of arbitration, “which enables it to accommodate an international clientele.”<sup>25</sup>

Advocates of this position question the utility of additional rules and soft law.<sup>26</sup> Michael Schneider, for instance, at the 2014 IBA International Arbitration Day in Paris,

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<sup>24</sup> See *Fraport v. Philippines*, Award, 16 August 2007, paras 18, 25, 31, 38, 42 and 47 and *Waste Management v. Mexico II*, Award, 30 April 2004, para 30. See also Christoph H. Schreuer, *The ICISD Convention, A Commentary*, Cambridge University Press at 657.

<sup>25</sup> See Goldsmith, *supra* no. 3.

<sup>26</sup> See Global Insight, *Arbitration: What does the future hold?*, IBA's 17<sup>th</sup> Annual International Arbitration Day.

expressed his doubt as to a “general consensus of agreement on the need for guidelines,” and suggested that “we should pay more attention to the differences in arbitration, listen to each other and respect our differences,” rather than seek to force everyone to conform to uniform standards.<sup>27</sup>

Second: a middle ground, which promotes guidance and “soft regulation” of ethical conduct. The IBA Guidelines on Party Representation are the best example of this approach. The Guidelines expressly state that they are “not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation,” and that “the use of the term guidelines rather than rules is intended to highlight their contractual nature.”<sup>28</sup> Parties are free to adopt these Guidelines, or a portion thereof, by agreement.<sup>29</sup> The IBA task force emphasized that the Guidelines are not meant to limit the flexibility of international arbitration, which it cites as one of its main advantages.<sup>30</sup>

The 2014 LCIA Arbitration Rules and their Annex, which contains “General Guidelines for the Parties’ Legal Representatives,” represent a stronger, though more general, approach. Like the IBA Guidelines, they stipulate that they do not derogate from otherwise applicable professional rules. However, unlike the Guidelines, by agreeing to arbitrate under the LCIA Rules, the parties are agreeing that they and their legal representatives shall comply with the ethical conduct provisions in the Rules and the Annex (subject to the exception I have just noted). Perhaps for that reason, the LCIA Annex is more general than the IBA Guidelines.

Although in principle compliance with the Annex lies with the parties, rather than their counsel, the Rules specify that the tribunal has express powers to determine whether any of the guidelines have been violated by a party representative (*Article 18.6*) and that by permitting any legal representative to appear on their behalf, “a party thereby represents that the legal representative has agreed to comply with the guidelines.” (*Article 18.5*).

Several arguments support this “middle ground” approach. Guidelines can be necessary and important to help focus counsel on appropriate standards of conduct, regardless of their home jurisdiction. In addition, guidelines can help to create a level

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<sup>27</sup> *Ibid.*

<sup>28</sup> IBA Guidelines, preamble.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

playing field by educating newcomers to the system, including lawyers more familiar with litigation in their home country than with international arbitration.<sup>31</sup>

The third stream includes initiatives that entail more and binding regulation. Interestingly, despite the vocal opposition of some leading Swiss lawyers like Michael Schneider to the soft approach of the IBA Guidelines, the Swiss Arbitration Association (“ASA”) has just made a proposal going to the opposite end of the spectrum, which calls for the creation of a “Global Arbitration Ethics Council.” ASA proposes to create a transnational body with jurisdiction to enforce ethical principles and to sanction violations.<sup>32</sup>

More specifically, the proposal is to create a “Global Arbitration Ethics Council”, formed of appointees of the major arbitration associations and arbitration institutions, to whom matters of alleged unethical conduct would be referred. This entity—not the arbitral tribunal or the arbitral institution—would have the main power to apply rules of professional ethics and, where appropriate, to sanction violations of these rules. The initiative also proposes that in parallel, the participating associations and arbitration institutions should work together to create an international and joint set of truly core principles that apply in all cases, irrespective of the legal or geographic background of counsel or parties.<sup>33</sup> (Perhaps if that were done, the Council could adopt my father’s approach and simply say that counsel should behave like ladies and gentlemen, in the manner that they would expect to be treated by the other side, and that they shall not act to mislead tribunals.)

I frankly think that this would be a step too far. It would create an additional regulatory layer to arbitration that could have the effect of increased bureaucracy and rigidity. It could also lead to more and frivolous threats to bring charges to the Council – another form of guerilla tactics.

## V. REMEDIES AND THE ROLE OF THE ARBITRAL TRIBUNAL

I particularly think that this approach is unnecessary because I believe that arbitral tribunals possess the power to police conduct in their proceedings and to levy appropriate sanctions if necessary. The tribunal itself has the most information and ability to judge the conduct in the circumstances of the case.

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<sup>31</sup> Global Insight, *supra* no. 26.

<sup>32</sup> ASA President’s Message, *Counsel Ethics in International Arbitration—Could one Take Things a Step Further*, September 2014.

<sup>33</sup> *Ibid.*

A tribunal's inherent power to preserve the integrity of its proceedings is a proposition that few, if anyone, would question.<sup>34</sup> Most frequently used arbitration rules expressly or implicitly grant arbitrators the power to ensure fundamental fairness and integrity.<sup>35</sup> The LCIA Rules provide that the tribunal's general duties include "a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute."<sup>36</sup> Likewise, the UNCITRAL Rules of 2010 provide that the arbitral tribunal shall conduct the proceedings "so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."<sup>37</sup> The ICDR Rules are perhaps the most explicit, as they provide that "[t]he arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration."<sup>38</sup>

Because arbitrators are empowered to protect arbitral proceedings by ensuring their fairness and integrity, and to provide an efficient process, then they surely possess sufficient authority to take appropriate measures against disruptive counsel or counsel who misrepresent the record or legal authorities to them.<sup>39</sup> If a tribunal stands still in the face of misconduct and "guerilla tactics," the proceeding as a whole may be compromised. Indeed, the recent amendments to ICC, UNCITRAL and LCIA Rules, among others, make even clearer than before that the tribunal has the final say on procedure and the right to issue orders, so that parties have expressly given this authority to the tribunal by agreeing to those rules.

A tribunal has various remedies available to sanction counsel or party misconduct. To name just a few: admonishment, adverse inferences, and financial sanctions via cost allocations.<sup>40</sup> The LCIA Annex also refers to "any other measure necessary to fulfill within the arbitration the general duties" of the tribunal. Likewise, the IBA Guidelines

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<sup>34</sup> William Park, *A Fair Fight: Professional Guidelines in International Arbitration*, Boston University School of Law Working Paper, October 2014.

<sup>35</sup> 2014 ASA Board Report. *See also* Park, *supra* no. 34.

<sup>36</sup> LCIA Rules, Rule 14.4(ii).

<sup>37</sup> 2010 UNCITRAL Arbitration Rules, Article 17(1).

<sup>38</sup> ICDR Rules for International Arbitration, Article 20.7. Rules Amended and Effective June 1, 2014.

<sup>39</sup> *See* Christine Guerrier, *Counsel's Misconduct in Arbitration Proceedings*, 17<sup>th</sup> Annual IBA International Arbitration Day, 14 March 2014, Paris. *See also* Park, *supra* no. 34.

<sup>40</sup> *See* Wilske, *supra* no. 9.

emphasize that the tribunal may “take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.”<sup>41</sup>

Tribunals could reduce the level of attorney misconduct through very simple interventions. Too often, when presented with clear evidence that a party has misstated the record or a legal authority, or has failed to undertake a reasonably diligent document review, tribunals remain silent. If instead a tribunal simply turned to the counsel involved, raised an eyebrow, and stated that they expect in the future there shall be no more misrepresentations, it would deter a substantial amount of such activity. Counsel and their client would not want to risk further criticism from the tribunal and even further loss of their credibility. No tribunal need fear that expressing this view in such circumstances would be seen as non-neutral or prejudicial or that it would risk vacatur of the award, because it based on conduct in the proceeding.

Tribunals also should more often allocate costs—or even issue interim cost orders during an arbitration – when counsel or party misconduct leads to wasted time or greater costs for the other party. The IBA Guidelines specifically provide that as a remedy for misconduct, the tribunal may “consider the Party Representative’s Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative’s Misconduct leads the Tribunal to a different apportionment of costs.”<sup>42</sup> Some institutional rules specifically link the party’s behavior to cost allocations. For example, the ICC Rules provide that “[i]n making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.”<sup>43</sup> The ICDR Rules provide that “[t]he parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.”<sup>44</sup>

Every time a lawyer misstates the record or authorities, it costs the other party time and money. Its counsel must provide a response to the misrepresentations, and the tribunal must more carefully check every reference by the offending party to see if it is in fact true. Tribunals should therefore be more aggressive in compensating the innocent

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<sup>41</sup> LCIA Rules, Rule 18.6 and Annex.

<sup>42</sup> IBA Guideline 26.

<sup>43</sup> ICC Rules of Arbitration, Article 37.

<sup>44</sup> ICDR Rules for International Arbitration, Article 20.7.

party for such additional costs. Some have in fact done so. Perhaps the most public and clear such pronouncement was in *Generation Ukraine v. Ukraine*:<sup>45</sup>

#### 24. Costs

24.1 *Since the claim fails in its entirety, it remains to be considered whether there are any reasons to attenuate the general rule that an unsuccessful litigant in international arbitration should bear the reasonable costs of its opponent.*

24.2 [ . . . ] *But the Claimant's written presentation of its case has also been convoluted, repetitive, and legally incoherent. It has obliged the Respondent and the Tribunal to examine a myriad of factual issues which have ultimately been revealed as irrelevant to any conceivable legal theory of jurisdiction, liability or recovery. Its characterisation of evidence has been unacceptably slanted, and has required the Respondent and the Tribunal to verify every allegation with suspicion [ . . . ]*

24.3 *The Claimant's position has also been notably inconsistent [ . . . ]*

24.4 *Moreover, the Claimant's presentation of its damages claim has reposed on the flimsiest foundation [ . . . ]*

24.6 *The Claimant's presentation has lacked the intellectual rigour and discipline one would expect of a party seeking to establish a cause of action before a international tribunal. This lack of discipline has needlessly complicated the examination of the claim [ . . . ]*

24.8 *The Respondent has claimed costs of USD 739,309.80, representing "contract payments of lawyers [sic] and experts services and expenses for business trips". The Tribunal is unsatisfied with these uncorroborated costs submissions, and considers them vastly overstated. It awards all costs the Respondent has paid into ICSID, or USD 265,000 as well as a contribution of USD 100,000 to the Respondent's legal fees.*

In an extreme event of counsel misconduct, it is possible that a tribunal could even consider exclusion of that counsel as an appropriate remedy. I will not enter here into the debate whether tribunals have that power – as evidenced by the conflicting

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<sup>45</sup> *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003, ¶¶ 24.1 – 24.8.

decisions in the *Hrvatska Elektroprivreda, d.d. [HEP] v. the Republic of Slovenia* and *Rompetrol v. Romania* cases – but I note that it is potentially available.<sup>46</sup>

Those of you who have heard my speeches or read my writings encouraging more proactive tribunals will not be surprised that I strongly encourage this approach. Tribunals have control over arbitral proceedings, not the parties, and they have an obligation to conduct the case in as cost-effective manner as possible. This should mean not only adopting only procedures appropriate for each case but also avoiding misconduct that lengthens the proceedings and adds to its costs. As I mentioned, often no more than a raised eyebrow would be necessary. Moreover, this approach is essential because of the finality of arbitral awards. If the tribunal does not take proper action to control and to remedy misconduct within the proceeding, at the time it occurs, the fairness and integrity of the proceeding are compromised. Given the limited ability to vacate arbitral awards or to seek annulment of ICSID awards, the innocent party may have no effective recourse after the award is rendered.

I should also note that tribunals exercising this power in no way conflict with the authority of local bar associations to regulate the conduct of their members.<sup>47</sup> As Rusty Park has correctly suggested, tribunals and local authorities apply different sets of standards, which emanate from different sources of authority and carry different sanctions.<sup>48</sup> Tribunals must control their proceedings, while local bars need to police the conduct of their members. Particular misconduct could warrant independent sanction by either or both of them.

This speech has focused on the ethics of counsel in arbitration and not on ethical standards applicable to the arbitrators, but before leaving the subject of tribunals and then concluding, let me mention two ethical issues for arbitrators. One of course is disclosures and conflicts of interest, which continue to pose challenges to the international arbitration system. The other is the arbitrators' conduct of the proceedings. Is it ethical to make parties wait a year or more for an award after they have thoroughly presented the case? Is it ethical to require parties to undergo the costs of full post-hearing briefing after tribunal members may have already come to a decision? These are subjects that could use an address of equal length as today – and perhaps will be covered on another day. But with respect to both, I think the approach I have suggested throughout this lecture applies equally. Tribunal members know the boundaries between right and wrong.

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<sup>46</sup> *Hrvatska Elektroprivreda, d.d. [HEP] v. the Republic of Slovenia*, ICSID Case No. ARB/05/24, Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings of 6 May 2008, paras. 22-26; *Rompetrol v. Romania*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel of 14 January 2010, paras. 14-19.

<sup>47</sup> See ASA Comments on IBA Guidelines, April 2014. See also Park, *supra* no. 34.

<sup>48</sup> *Ibid.*



Written guidance is helpful, but most often arbitrators should be able to make such decisions simply by considering their own moral compass.

## **VI. CONCLUSION: A CALL FOR MORE ETHICAL BEHAVIOR TO PRESERVE THE SYSTEM**

In the US at the moment, there is a popular show on HBO called *The Newsroom*. It depicts a fictional newsroom like CNN; it is written by Aaron Sorkin, who wrote *The West Wing* and *The Social Network*, among other TV and movie scripts. In a recent episode, which I saw after drafting much of this lecture, I was struck by his dialogue. A young news producer turns down a story from an inside Administration source because she concludes she obtained that story deceptively. A law school ethics professor witnesses this and asks her why. She answers in the following way:

*“I’m not going to blackmail him into giving it to me. You can save your students a lot of time. On the first day of class, tell them they know the difference between right and wrong. Do what is right. They don’t need a lawyer to tell them their moral absolutes. Whenever you hear someone giving a monologue defending their ethics position, you can be pretty sure they know they were wrong.”*

That has been, I hope, the theme that you have understood from this lecture. It falls to us to ensure that the integrity of the arbitration system is preserved and remains sustainable. Legal counsel play an essential role in this mission, along with arbitrators, arbitral institutions, bar associations, and other key players. Together, it is our responsibility to chart a course that sets and maintains high standards for legal professional conduct.

The problems and issues I have discussed, and the challenge of responding to them, have been ongoing for decades. We must stay vigilant to protect the integrity and legitimacy of the arbitration system, lending our force and attention to our common goal of practicing our profession among *ladies and gentlemen* and in the best interests of our clients.