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НОВЫЕ ГОРИЗОНТЫ МЕЖДУНАРОДНОГО АРБИТРАЖА

Выпуск 4

НОВЫЕ ГОРИЗОНТЫ МЕЖДУНАРОДНОГО АРБИТРАЖА

Под редакцией
А.В. Асоскова, А.И. Муранова, Р.М. Ходыкина

НАУКА ПРАВА

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A.V. Asoskov, A.I. Muranov, R.M. Khodykin

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This edition of «New Horizons of International Arbitration» collects the articles of the speakers at the «Russian Arbitration Day – 2018» conference held in Moscow on 30 March 2018, one of the most successful arbitration events in Russia (www.arbitrationday.ru).

This is the fourth collection of articles for that conference. The first three RADs were held in 2013, 2014 and 2015. The first three collections of articles, «New Horizons of International Arbitration», were issued in the same years.

Articles in this book were selected through the strict competitive selection process by the moderators of «Russian Arbitration Day – 2018» with application of several criteria (in decreasing order of importance): novelty; depth of analysis; practical significance; and author. These diverse articles represent new approaches to development of practice of and academic studies in international commercial and investment arbitration in Russia and abroad.

This collection is intended for arbitrators and practicing lawyers, judges of the state courts, academics and other researchers, lecturers, postgraduates and students of legal universities and faculties, as well for all those who are interested in international commercial and investment arbitration.

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ВЫПУСК 4

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Под научной редакцией
А.В. Асоскова, А.И. Муранова, Р.М. Ходыкина

НАУКА ПРАВА

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Это четвертый сборник статей выступающих на указанной конференции. Первые три РАД / RADs состоялись, как известно, в 2013 г., 2014 г. и в 2015 г. В эти же годы были выпущены первые три сборника «Новые горизонты международного арбитража».

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Книга предназначена для практикующих юристов, ученых, преподавателей, аспирантов и студентов юридических вузов, а также для всех интересующихся международным коммерческим и инвестиционным арбитражем.

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COUNSELS' ETHICS IN INTERNATIONAL ARBITRATION

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This article provides an introductory guide to the ethics of legal counsel in international arbitration. It aims to present both theoretical and practical approaches to current issues and possible developments in the field. Within, we propose methods of addressing the issue of unethical counsel behavior in international arbitration and explain problems with the traditional approach to codification in the sphere of ethics.

Keywords: counsel ethics; ethics in arbitration; arbitral intelligence; ethics code; counsel conduct.

В статье с теоретической и практической точек зрения рассматривается проблема этики представителей в международном арбитраже, анализируются связанные с ней арбитражная практика и доктринальный подход. Предлагаются три способа решения проблемы неэтичного поведения в международном арбитраже, и объясняется, почему традиционный подход к кодификации этических норм не представляется реалистичным на современном этапе развития международного арбитража.

Ключевые слова: этика представителя; этика в международном арбитраже; кодекс этики; поведение представителя.

...One can generally prescribe ethical conduct only if
there is a sanction for noncompliance.
R.M. Mosk[1]

1. Introduction

The legal world is very small. It is like a state within a state, regulated not only by certain national bodies, but also internally, by lawyers themselves[2]. This pattern of self-regulation is unusual in comparison to most other professions, especially regarding the so far unshaken legitimacy and unchallenged independence of lawyers' organizations.

The world of arbitration has always been one of the least regulated. From the start, arbitration proposed an alternative to traditional court proceedings. This alternative, importantly, meant the adoption of much lighter external regulations and the pursuit of a private rule-making path. However, arbitration became increasingly popular and so the need for more regulation arose, especially in the area of professional conduct. In the past few years, the debate over whether to take the opportunity to create an arbitration practitioners' uniform regulation of ethics intensified[3].

But what exactly is to be regulated? In this article, we will refer to «counsels' ethics» (or «legal ethics») not only as the rules governing the conduct of lawyers in all professional functions, but also as the minimum standards of appropriate conduct generally understood to apply within the legal profession.

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1 *R.M. Mosk*, Attorney Ethics in International Arbitration, Berkeley Journal of International Law Publicist, Vol. 5 (2010), p. 32 <http://bjil.typepad.com/mosk_final.pdf> (last accessed – 20 February 2018) (citing: *O.W. Holmes*, The Path of the Law, Harvard Law Review, Vol. 10 (1897), No. 8, p. 457–478).

2 In the United States, but translatable to most other legal systems:
«The legal profession is largely self-governing.
<...>
The legal profession's relative autonomy carries with it special responsibilities of self-government» (ABA Model Rules of Professional Conduct, Preamble and Scope, [10], [12] <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html> (last accessed – 20 February 2018)).

3 To mention just a few scholar and institutional events where the topic was recently discussed: *«Twilight Issues in International Arbitration: In Search of an Applicable Law»* (Paris Sciences Po Law School, 19 October 2017); *«Regulating Arbitration Ethics? A Conversation»* (Center for American and International Law, 14–16 June 2017); *«Ethics in International Arbitration»* (ICC, 23–25 June 2016); *«Future of Ethics in International Arbitration Conference – What to Expect»* (Queen Mary Institute for Regulation and Ethics, 11 September 2014).

The scope of the present article only covers counsel's ethical conduct and will not touch upon another big topic currently under debate: arbitrator's ethics.

Unethical conduct may be defined as either a breach of an express ethical rule, or a breach of the overall principle underpinning the rule, *i.e.* safeguarding the interest of the client entrusted to the lawyer as a fiduciary. This is the only workable definition we find in the context of international arbitration.

There are a few recurrent problems arising in the sphere of counsel's unethical conduct. After analyzing doctrinal approaches and a number of international cases, we came to the conclusion that the majority of ethical issues in international arbitration can be categorized as follows[1]:

- improper counsel / arbitrator relationships (*e.g.*, *ex parte* communicating or having a common financial interest);
- procedural unethicalities (*e.g.*, tampering with evidence);
- unethical relations with the client (*e.g.*, not updating the client on the case status); and
- conflicts of interest (*e.g.*, representing a client against a former client in the same or a connected case).

The importance of ethics in arbitration is in contrast to its status in Russian or foreign legal doctrine, *i.e.* there has been very little interest. Despite the fact that the problem of unethical conduct by counsel in international arbitration has been a recurring issue over the last few years, not much has been done about it in the international arena. International arbitration brings together parties from various countries and legal systems. As such, one of its core challenges is to provide a level playing field for all parties. This recognizes the fact that parties may be subject to different domestic rules which will impact their ability to compete in the legal process.

The topic of ethics in arbitration can be developed from two angles: arbitrators' ethics and counsels' ethics. On one hand, international arbitration institutions have already addressed for decades the question of *arbitrators' ethics*. Recently, for example, two important codified guidelines for arbitrators' ethics were modified[2]. On the other hand, the question of *counsels' ethics* remains largely unaddressed and has been durably relegated to a secondary issue. In many jurisdictions, it is not covered at all. Arbitration rules also do not provide sufficient guidelines or regulations.

[1] Please note that since there are many arbitration awards, which are not public, we cannot label this classification as exhaustive.

[2] The ABA Code of Ethics for Arbitrators in Commercial Disputes and the IBA Guidelines on Conflicts of Interest in International Arbitration reformed their old Code and Rules, respectively.

It is important to recall here that parties in international arbitration are free in their choice of representative. Accordingly, in a dispute there are often representatives subject to different ethical norms. This is closely related to the nature of international arbitration and the character of disputes that are to be resolved through arbitration mechanisms. Jurisdictions look differently at the applicability of national and international codes of professional ethics to international arbitration. Different ethical regulations in different jurisdictions are potential grounds for procedural battles. Mostly, representatives of the parties are lawyers obliged to follow the rules governing their professional activities adopted in the jurisdiction in which they are admitted to practice. Since the professional conduct regulations governing counsel to parties in a dispute differ, a conflict might arise, which could negatively affect the process and outcome of arbitration.

In addition to content, the rules may also differ in scope. Some jurisdictions have provisions regulating the extraterritorial reach, imposing an obligation to comply with the rules even when counsel is representing a party in a different jurisdiction. Beyond that, the party whose counsel is subject to lower ethical standards may gain an unfair advantage in the proceedings over the party whose counsel is subject to higher ethical standards. Moreover, some national rules are limited in that they do not cover the specificity of professional conduct before international arbitral tribunals[1]. Academic research has shown that, when each state (or even bar) applies its own disciplinary rules, counsels may be subject to different standards in the same proceeding[2]. This is not fair.

However, superseding a licensed lawyer's domestic ethical obligations by a supranational body of rules may not solve the problem. In that vein, it is also not satisfactory to rely on the rules of the seat of arbitration, as counsels are generally not familiar enough with such local rules to use them as an absolute reference. One solution could be to give local counsels the monopoly to act at each particular arbitration seat as was recently the case in the United Arab Emirates. However, as was discussed during the GAR Live Dubai, this may be a setback to the effectiveness of arbitration and the access to dispute resolution mechanisms by permitting only Emirati lawyers to act in cases seated in the UAE under this new law[3].

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1 *Ch.B. Rosenberg & M.I. Khan*, Who Should Regulate Counsel Conduct in International Arbitration? (18 April 2016) <http://arbitrationblog.kluwerarbitration.com/2016/04/18/who-should-regulate-counsel-conduct-in-international-arbitration/> (last accessed – 20 February 2018).

2 *G.B. Born*, International Commercial Arbitration, Alphen aan den Rijn: Kluwer Law International, 2009, p. 2318–2319.

3 More information available at: <http://gar.live/dubai2017> (last accessed – 20 February 2018).

Parties to arbitration and arbitrators usually come from different jurisdictions and legal systems. As such, it is far more useful to allow participation of counsels with different legal background than it is to restrict participation to counsel of the arbitration jurisdiction. This maintains arbitration as a truly international process, and embraces the fact that the parties to the dispute will also come with different perspectives, some of which may not be compatible with the legal perspectives of counsel at the seat of arbitration.

A potential solution to resolve differences in counsel ethics is to find a universal mechanism to regulate conduct of counsels in international arbitration worldwide. It is not a secret that there is a relationship between the legal system of a country and the attitude of counsel towards ethical standards. Nonetheless, the international arbitral community is now in need of international regulation over the ethical aspects of arbitration. This mainly concerns parties' counsels since arbitrators' ethics and conduct are now mostly regulated by institutional rules of arbitration, international guidelines, and the national arbitration legislations of the most popular arbitration seats.

Thus, our primary focus here is to analyze the current doctrine and case law and to propose new ways of developing counsel ethics. We will focus on specific precedents in order to determine whether problems of counsel ethics are not only doctrinal but also known to international arbitration practice. Moreover, we will also elaborate on the majority view regarding a uniform international regulation of ethics in arbitration and describe the previous initiatives undertaken to resolve the question of counsels' ethics.

2. International Regulation of Counsels' Ethics

The international arbitration community has been discussing the topic of counsel ethics for several years now. The main debate is on the method of regulating[1] the conduct of a counsel in an international context. The majority agrees that the arbitration process should be grounded in international ethical principles and the ethical standards should be high. This is underpinned by the idea that unethical acts undermine the effectiveness and popularity of arbitration as a high-level dispute resolution mechanism. In Russia, criticisms of ethical principles in Russian seated arbitration have been voiced in the past, which is one of the reasons why Russian parties trust foreign arbitral

[1] Here we refer to some sort of «regulating» as a mechanism of solving the problem, not necessarily a list of rules or guidelines (as we will see below, different possible tools are under discussion at the moment).

institutions and counsels more than Russian ones. Effective ethical regulation would make international arbitration more attractive and would help to develop better practices of dispute resolution[1]. Of course, this is not only a Russian or CIS problem; ethical issues of international proceedings should be resolved at an international level. With that in mind, proposals for the implementation of an international regulation have emerged. Interestingly, some believe that such regulation should be based on different legal cultures and take the form of a universal document in order to be effective in different jurisdictions[2]. Conversely, some believe that despite all efforts to renew counsel's ethical standards, even new codified norms will not clarify the ethical scope of arbitration in itself[3].

2.1. Arbitrators' Inherent Powers

Since it is quite challenging and not always efficient to rely on national norms in the sphere of international arbitration, some international arbitral tribunals resolve such issues based on their inherent powers. We decided to retain a sample of proceedings in which a question of counsel's ethics arose in one or another way. Notably, these cases are mainly investment arbitration cases, given that their level of publicity is higher due to the participation of a state.

In *Hrvatska Elektroprivreda, d.d. v. Slovenia*[4], the International Center for Settlement of Investment Disputes (hereinafter – ICSID) tribunal had to rule on whether or not it had the power to prevent a potential conflict

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1 *A.S. Komarov*, Obshchie nachala i printsipy mezhdunarodnogo kommercheskogo arbitrazha i sovremennaya rossiyskaya praktika [Fundamentals of International Commercial Arbitration and Modern Russian Practice], in: A.I. Muranov & V.V. Plekhanov (eds.), Transgranichnyy torgovyy oborot i pravo: *Liber amicorum* v chest' 50-letiya A.N. Zhiltsova [Transnational Trade and Law: *Liber amicorum* in Honour of the 50th Anniversary of A.N. Zhiltsov], Moscow: Infotropic Media, 2013, p. 119–138.

2 *T.V. Slipachuk*, Voprosy etiki v mezhdunarodnom arbitrazhe [Ethical Issues in International Arbitration], in: A.A. Kostin (ed.), Mezhdunarodnyy kommercheskiy arbitrazh: sovremennye problemy i resheniya [International Commercial Arbitration: Contemporary Challenges and Solutions]: Collection of Articles in Commemoration of the 80th Anniversary of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Moscow: Statut, 2012, p. 355–368.

3 *A.C. Ortiz*, The Importance of Ethics in the Role of Arbitrators, Revista Análisis Internacional (RAI), Vol. 4 (2013), No. 7, p. 39–53 <https://revistas.utadeo.edu.co/index.php/RAI/article/view/872/884> (last accessed – 20 February 2018).

4 ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel (6 May 2008) <https://www.italaw.com/sites/default/files/case-documents/italaw6289.pdf> (last accessed – 20 February 2018).

of interest arising out of Slovenia's choice of counsel. The tribunal had to decide whether counsel David Mildon QC (Essex Court Chambers) could represent Slovenia in further proceedings, as Slovenia's opponent, *Hrvatska Elektroprivreda*, presented a challenge on conflict of interest grounds. Mr. David Mildon QC was added on the later stage of the proceedings when *Allen & Overy* (the firm representing Slovenia) submitted its list of Paris hearing attendees to the secretary of the tribunal. Claimant alleged that a conflict of interest could arise because the president of the arbitral tribunal was a door tenant at the Essex Court Chambers. The tribunal ruled that, although there was no express provision in the ICSID Rules on how to deal with such a situation, the tribunal had the inherent power to resolve the issue[1]. The arbitrators further noted that it was within the tribunal's power to preserve the integrity of the proceedings and refuse the intervention of Mr. David Mildon on behalf of Slovenia.

The same approach regarding the tribunal's inherent powers was later restated in the ruling by another ICSID tribunal in *The Rompetrol Group N.V. v. Romania*[2]. In that case the tribunal once again underlined that, although the ICSID Rules do not contain any explicit provisions allowing a tribunal to rule on counsel conduct, this was one of the tribunal's inherent powers. Importantly, the tribunal in that case explicitly stated that power is limited and should be used rarely. However, the tribunal refused to order the removal of the counsel upon the respondent's application which was made on the grounds of there being potential bias on the part of the arbitrator. Surprisingly, the respondent did not ask the tribunal to remove the arbitrator and elected to challenge the claimant's counsel instead. In the end, the tribunal expressly refrained from deciding the limits of its inherent power and highlighted that it was to be exercised only if there is a compelling need to safeguard the essential integrity of the entire arbitral process.

These cases are examples of situations where arbitral tribunals did not refrain from ruling on counsel conduct, even in the absence of express provisions and powers. With regard to the legal basis for doing so, one can wonder whether national and regional law on professional conduct can play a significant role in such rulings. The answer can again be found in investment arbitration cases.

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1 *Hrvatska Elektroprivreda, d.d. v. Slovenia*, Order Concerning the Participation of Counsel, ¶ 33.

2 ICSID Case № ARB/06/3, Decision of the Tribunal on the Participation of a Counsel (14 January 2010) <https://www.italaw.com/sites/default/files/case-documents/ita0718.pdf> (last accessed – 20 February 2018).

For example, in the *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* decision[1] the claims arose out of the annulment of a concession contract for the construction and operation of an international passenger terminal in Manila airport. During the subsequent investment arbitration proceeding the *ad hoc* Committee was faced with the issue of disqualifying Fraport's counsel, Mr. Schwartz (Paris and California Bar member), who firstly appeared in the annulment proceeding on behalf of Fraport's opponent, the Philippines. The Philippines as a respondent objected to Mr. Schwartz's representation based on the fact that he had already represented the Philippines in related proceeding. More precisely, he *«received the case file and discussed case strategy with representatives of Respondent»*[2]. Mr. Schwarz, however, objected to the respondent's allegation and denied prior representation of the Philippines. Furthermore, Mr. Schwartz invited the representative of the respondent to *«submit the matter to the appropriate bar authorities»*[3]. *The ad hoc* Committee noted that it was not bound by any specific provision of the laws or professional codes of any other jurisdiction, including Californian law on legal ethics or the European Union Code of Conduct for Lawyers. Thus, the Committee came to the conclusion that it could not prevent a party from having access to the counsel of its choice in the absence of clear evidence of a prejudice. Mr. Schwartz's representation of *Fraport* was allowed.

These cases underline the existence of important practical implications of counsel's ethics in international arbitration. Another set of cases helps to address intertwined question of the extent and form of sanctions on parties or counsels for counsel's unethical conduct. Important information may again be derived from the review of arbitral awards.

In *Generation Ukraine, Inc. v. Ukraine*[4], the ICSID tribunal found the claimant liable for the costs of the proceedings and ordered it to contribute all costs the respondent had paid to ICSID (USD 265,000) and another USD 100,000 to cover the respondent's legal fees. The tribunal shifted the respondent's legal representation costs to the claimant as a sanction for *«convoluted, repetitive, and legally incoherent»* submissions and unsatisfactory

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1 ICSID Case No. ARB/03/25, Decision on Application for Disqualification of Counsel (18 September 2008), <https://www.italaw.com/sites/default/files/case-documents/italaw1325.pdf> (last accessed – 20 February 2018).

2 Ibid., ¶ 7 (quoting letter of 19 May 2008 to the Committee).

3 Ibid., ¶ 8.

4 ICSID Case No. ARB/00/9, Award (16 September 2003) <https://www.italaw.com/sites/default/files/case-documents/ita0358.pdf> (last accessed – 20 February 2018).

representation of the facts[1]. Initially, the Respondent had claimed costs of USD 739,309.80. However, the tribunal found the cost submissions to be *«uncorroborated»* and *«vastly overstated»*[2].

In a relatively recent case, *Croatia v. Slovenia*, maritime border dispute before the Permanent Court of Arbitration tribunal, Croatia produced the transcripts of *ex parte* telephone conversations between the arbitrator appointed by Solvenia and the Slovenian counsel[3]. Those *ex parte* conversations were on the issues discussed by the arbitrators in the ongoing arbitration. Croatia contended that the conversations between the arbitrator appointed by Slovenia and the Slovenian representative revealed that *«the most fundamental principles of procedural fairness, due process, impartiality and integrity of the arbitral process have been systematically and gravely violated...»*, despite *«the Terms of Appointment provide[d] in Section 9.1 that „(t)he Parties shall not engage in any oral or written communications with any member of Arbitral Tribunal ex parte in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings"»*[4].

The tribunal noted that it had the duty to safeguard the integrity of the arbitral process[5]. In determining whether the process was affected by the unethical behavior of the arbitrator and the counsel, the tribunal noted that both resigned from their positions once their conduct was exposed. However, in its final award the tribunal allocated arbitral costs in equal shares, since neither of the parties requested the tribunal to make any other ruling[6].

Thus, in the absence of a global counsels' ethics regulation, some tribunals have found themselves to be in a position to rule on counsels' unethical conduct based on their inherent power. However, tribunals are quite reluctant to sanction counsels and question their unethical behavior unless it serves the compelling need of safeguarding the integrity of the arbitral process.

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1 *Generation Ukraine, Inc. v. Ukraine*, Award, ¶ 24.2.

2 Ibid., ¶ 24.8.

3 Arbitration between the Republic of Croatia and the Republic of Slovenia, PCA Case No. 2012-04, Partial Award (30 June 2016), <https://pcacases.com/web/sendAttach/1787> (last accessed – 20 February 2018).

4 Ibid., ¶ 80 (quoting letter of 24 July 2015).

5 Ibid., ¶ 183.

6 Arbitration between the Republic of Croatia and the Republic of Slovenia, PCA Case No. 2012-04, Final Award (29 June 2017), ¶ 1143 <https://pcacases.com/web/sendAttach/2172> (last accessed – 20 February 2018).

2.2. IBA Guidelines and Other Proposals on Uniform Set of Rules of Counsel's Ethics in Arbitration

There may be a risk to fairness and integrity of the international arbitral process in situations where counsels are bound only by the standards of the bar they are admitted to. Particularly, this could encourage clients to choose counsels from a jurisdiction with «lower» ethical standards to benefit from some sort of unfair ethical advantage. To solve this disparity, one of the most popular ideas to restore ethical integrity in international arbitration is to create a uniform code of ethics for counsel in international arbitration.

There has already been some work in this direction. The International Bar Association (hereinafter – IBA) initiated the movement by appointing a task force in 2008[1]. Its main goal was to investigate different aspects of the potential implementation of a new standardized Code for Counsel Ethics and, as such, a survey was produced to help determine the form, substance and whether at all to formulate a new standardized code. This gave birth to the IBA Guidelines on Party Representation in International Arbitration of 2013[2] (hereinafter – IBA Guidelines).

Most arbitration practitioners have praised the relatively recent IBA Guidelines as a unified ethics document and support its endeavor to provide a clear and transparent framework for arbitrators[3]. The production of the IBA Guidelines was of unusual significance given that national legislations are often not primarily aimed at codifying international legal practice standards. However, a system in which a limited number of nationalities determine the international standard risks unfairness. Consequently, the consolidation of an international ethical standard for counsels, similar in that spirit to the IBA institutional standard for arbitrators, might be part of the solution to improve arbitration[4].

To focus more on the IBA Guidelines, we note that they address the main possible issues of party representation in international arbitration, *e.g.* com-

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1 IBA Task Force on Counsel Ethics in International Arbitration Survey (26 February 2013) <http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=610bbf6e-cf02-45ae-8c3a-70dfdb2274a5> (last accessed – 20 February 2018).

2 Available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F> (last accessed – 20 February 2018).

3 *S.D. Orsi*, Ethics in International Arbitration: New Considerations for Arbitrators and Counsel, Arbitration Brief, Vol. 3 (2013), No. 1, p. 92–114 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1036&context=ab> (last accessed – 20 February 2018).

4 *Ph. Peters*, Can I Do This? – Arbitrator's Ethics (9 November 2010) <http://arbitrationblog.kluwerarbitration.com/2010/11/09/can-i-do-this-arbitrators-ethics/> (last accessed – 20 February 2018).

munications with arbitrators, submissions, information exchange / disclosure, witnesses and experts. As stated in the preamble of the IBA Guidelines, they are not in any way displacing any mandatory rules, but are of a contractual nature. Although tribunals, parties and counsels may use them, none are obliged to do so. The use of the guidelines remains at their sole discretion. The idea of the IBA Guidelines is to assist the parties by giving them a tool to use in case an issue concerning counsel's professional conduct arises.

Another example of an attempt at standardization worth mentioning is the Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals (hereinafter – Hague Principles)[1]. A Study Group established by the International Law Association (hereinafter – Study Group) created them in 2010. The Study Group, led by prominent academics, worked for a period of two years with the aim of identifying and formulating the minimal ethical standard for counsel appearing before international arbitral tribunals and courts[2]. Since the Hague Principles were among the first initiatives in the field, they *«represented a first step»* towards unifying ethical standards and principles for representatives before international courts and tribunals. They were intended to stimulate debate on the counsels' ethics in the international community and to *«contribute to future developments»*[3].

The Hague Principles are non-binding but have the potential to apply to any person before an international court or tribunal upon parties' agreement. They contain four concepts to be followed by international practitioners: (1) fair administration of justice; (2) independence; (3) professionalism; and (4) confidentiality. Specifically, the Hague Principles cover the following problems: (1) relations with the client; (2) conflicts of interest; (3) relations with the international court or tribunal; (4) presentation of evidence; and (5) relations with the other participants of an international arbitration / litigation.

The other documents resembling the Hague Principles (*e.g.*, the IBA Guidelines) aim at assisting arbitrators in deciding on the counsel's conduct. The main difference between the Hague Principles and other comparable

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1 Law & Practice of International Courts and Tribunals, Vol. 10 (2011), Issue 1, p. 6–15 <http://booksandjournals.brillonline.com/content/journals/10.1163/157180311x565151> (last accessed – 20 February 2018).

2 *Ph. Sands*, The ILA Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals, Law & Practice of International Courts and Tribunals, Vol. 10 (2011), Issue 1, p. 1–5 <http://booksandjournals.brillonline.com/content/journals/10.1163/157180311x565151> (last accessed – 20 February 2018).

3 Ibid., p. 1.

documents is that the Hague Principles were intended to assist counsels in case they are faced with a particular challenge and are not sure whether their future action may be regarded as unethical.

Reference should be made to the Chartered Institute of Arbitrators (hereinafter – CIArb), produced by a global professional membership organization of alternative dispute practitioners. It surely represents another source of a high interest in the sphere of counsel's ethics in international arbitration. In October 2009, CIArb issued a Code of Professional and Ethical Conduct[1] (hereinafter – CIArb Code), which is only applicable to members. CIArb Code was published pursuant to the CIArb Bye-Laws as a reminder of the moral and professional principles which should govern the member's conduct at all times.

CIArb Code is a great example of a document making a difference in the sphere of international arbitration counsels' ethics: it provides an effective set of disciplinary tools to be used in case of professional misconduct. However, it is circumscribed to CIArb members and cannot serve as a unified regulation for all counsels involved in international arbitration. Nonetheless, the CIArb Code has been in effective use for almost eight years now and served in the resolution of many ethics controversies. For example, in the famous *CIArb and Andriy Astapov* case[2] the CIArb's Professional Conduct Committee expelled Andriy Astapov, a Ukrainian (Kyiv) lawyer, who claimed that he paid a substantial sum of money to an expert in the course of ICSID arbitration involving Kazakhstan, whereas he, in fact, transferred the claimed sum to the offshore bank account of his law firm. Moreover, CIArb also ordered Mr. Astapov to pay the costs incurred in course of this disciplinary proceeding in the amount of GBP 25,000.

The idea of implementing a universal code of ethical conduct is supported by well-known scholars such as Mr. Gary Born. Specifically, it is believed that *«the best eventual resolution… would be through the development of uniform international rules of professional conduct, applicable to counsel in international arbitral proceedings»*[3]. Although this sounds like a sensible

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1 Available at: <http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/code-of-professional-and-ethical-conduct-october-2009.pdf?sfvrsn=6> (last accessed – 20 February 2018).

2 Chartered Institute of Arbitrators and Andriy Astapov, Decision of the Disciplinary Tribunal (20 July 2015) <http://www.ciarb.org/docs/default-source/ciarbdocuments/about-us/governance/Professional-Conduct/tribunal-final-decision-andriy-astapov-july-2015.pdf?sfvrsn=0> (last accessed – 20 February 2018).

3 *G.B. Born*, International Commercial Arbitration, 2nd ed., Alphen aan den Rijn: Kluwer Law International, 2014, p. 2877.

solution, we believe that there are very little chances for it to succeed in practice. First, and most importantly, it would be hard to implement such a uniform code effectively, unless it took the form of a binding instrument approved and signed by a majority of jurisdictions like the New York Convention. In a modern, highly divided world, this seems an impossible feat to achieve. As such, the proposal must rest on the basis of non-binding discretional enforcement by the different institutions, which would eventually undermine the instrument itself if tribunals are to implement it differently or not implement it at all.

Second, even if such a code were to be successful, it would still have significant downsides. For example, it would have little if any impact on proceedings where the party representatives are not members of the legal profession and the parties are representing themselves through in-house counsels, which happens quite often in small proceedings and proceedings involving states. Finally, such a code could bring even more confusion and opportunities to obstruct the arbitration process with multiple grievances and submissions and their additional time and costs.

2.3. Rules of Arbitral Institutions

In response to the ethics challenges, arbitral institutions have begun developing some guiding principles for arbitrations under their rules. This seems to be a positive phenomenon, especially since arbitral institutions may give tribunals real powers to regulate counsel conduct through their rules[1].

Based on these considerations, it seems that arbitral institutions themselves may bring about a real change by introducing rules governing the conduct of counsel appearing before arbitral tribunals.

For example, the London International Court of Arbitration (hereinafter – LCIA) updated its Arbitration Rules (hereinafter – LCIA Rules) in 2014 and included an Annex for legal representatives participating in LCIA arbitration[2] (hereinafter – Annex). The Annex includes a mandatory set of rules governing the conduct of counsel participating in arbitrations governed by LCIA Rules.

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[1] This is also supported by the Queen Mary / White & Case International Arbitration Survey (see: 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> (last accessed – 20 February 2018)), which indicated 35 % of respondents supported the regulating of counsel conduct through institutional rules.

[2] Annex to the LCIA Rules: General Guidelines for the Parties' Legal Representatives (Articles 18.5 and 18.6 of the LCIA Rules) <http://www.lcia.org/media/download.aspx?MediaId=379> (last accessed – 20 February 2018).

The Annex prohibits performance of the following activities: (1) obstructing the arbitration or jeopardizing the finality of any award; (2) making a false statement to the Arbitral Tribunal or the LCIA; (3) knowing procurement, reliance or assistance in the preparation of false evidence; (4) knowing concealment or assistance in the concealment of any document / part of the document ordered to be produced by the Arbitral Tribunal; (5) deliberate initiation or attempt to initiate any unilateral contact relating to the arbitration or the parties' dispute with any member of the Arbitral Tribunal or with any member of the LCIA Court (excluding the Registrar) making any determination or decision in regard to the arbitration without a written disclosure prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal (if comprised of more than one arbitrator) and the LCIA. Under Art. 18.5 of LCIA Rules the parties are to ensure that their legal representatives are familiar and agree to comply with the Annex. In case the Arbitral Tribunal finds an ethics violation, it can impose the following sanctions provided in Art. 18.6: (1) written reprimand; (2) written caution as to future conduct; and (3) any other measures deemed necessary by the tribunal to maintain its general duties. The LCIA Rules provide a good set of ethical norms. However, there are some flaws in their language[1], in particular that they are of a suggestive rather than mandatory nature.

The Rules of Arbitration of International Commercial Disputes of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (hereinafter – ICAC) in § 26(2) provide that the ICAC bodies, authorized officials and the arbitral tribunal may take relevant measures when a party's representative fails to comply with the ICAC Rules. For instance, the arbitral tribunal might take into consideration the improper conduct of the counsel when deciding on distribution of arbitration expenses, make a warning or offer the party opportunity to appoint another representative.

As we have seen, no tribunal has been granted an explicit power to impose sanctions, such as disqualification, under any of the current arbitral rules in force.

2.4. Creation of an International Disciplinary Body

In contrast with the view that international rule making could be the optimal solution, some believe that soft law will regulate ethics issues: it is

[1] *Chr. Bustos*, Empty Rhetoric: The Failings of the LCIA's Ethical Rules for Legal Counsel and Alternatives, Yearbook on Arbitration and Mediation, Vol. 7 (2015), P. 315 ff. <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?referer=https://www.google.ru/&httpsredir=1&article=1046&context=arbitrationlawreview> (last accessed – 20 February 2018).

a matter of practitioners' morals and reputation and should not be subject to stricter rules[1].

In this regard, some have proposed a model for effective *«ethical self-regulation»*, meaning regulation of professional conduct at an international level within both new or existing arbitral procedures and structures[2].

The creation of International Arbitration Ethics Council or another international body capable of supervising and assessing ethical issues in international arbitration seems to be an effective tool for the regulation of counsels' ethics. Although such a council would not be sanctioning counsels or issuing orders, it would be comprised of the world-renowned specialists with extensive knowledge and experience in international arbitration. Those specialists would be in a position to prepare opinions and recommendations on the best way to implement ethical norms into national legislation and arbitration rules. They could also prepare an annual review of arbitration cases involving unethicality and the way it influenced the outcome of the case and the proceeding in general. This would provide invaluable guidance for both parties and counsels making strategical case decisions.

Moreover, since such a council would be composed of well-known international arbitration practitioners from all around the world, it would be in a position to make counsels from different legal cultures familiar with ethical norms of other cultures. This would help with the overall development of arbitration and cultural tolerance among the arbitration society.

Finally, it could also maintain a list of identified unethical behavior and / or a corresponding list of representatives involved to help guide parties in their choice of arbitrators and counsels.

There has already been a similar initiative in 2014 by the Swiss Arbitration Association (Association Suisse de l'Arbitrage (hereinafter – ASA)), whose President proposed a Global Arbitration Ethics Council. Reactions to that proposal varied greatly from hostile to enthusiastic and lead to the creation of an informal working group in November 2015, chaired by the ASA[3]. In Oc-

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1 *E.* Sussman, Part III. Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives, in: L.W. Newman, M.J. Radine (eds.), Soft Law in International Arbitration, NY: Juris Pub., 2014, p. 239–320.

2 *C. Rogers*, Ethics in International Arbitration, Oxford: Oxford University Press, 2014.

3 More about this initiative read in the article prepared by Sebastiano Nessi (Schellenberg Wittmer) (see: *S. Nessi*, Creation of a Global Arbitration Ethics Council: The Swiss Arbitration Association Declares That Time Has Not Yet Come (10 November 2016) <http://arbitrationblog.practicallaw.com/creation-of-a-global-arbitration-ethics-council-the-swiss-arbitration-association-declares-that-time-has-not-yet-come/> (last accessed – 20 February 2018)).

tober 2016, the ASA working group released its findings on whether to create Global Arbitration Ethics Council[1]. The main conclusion of the ASA working group was that it was not the right time for such a global council initiative, even though arbitration associations may still implement internal disciplinary procedures to avoid concerns related to counsels' misconduct.

3. Conclusion

To the great disadvantage of international arbitration as a dispute resolution method, as of today, a counsel may act unethically without being punished by the tribunal. In this case, the punishment may fall on the party represented by such a counsel, for example in the form of a payment of all the arbitral costs. Moreover, if the party approves the unethical conduct of its representative, such counsel would most likely not be disqualified, unless the party fires him or he decides to resign himself.

At the moment, the field of counsel's ethics is in need of further development. Such a development should bring an effective system of sanctions for counsels' misconduct. Without an effective mechanism of sanctions, even the most brilliantly drafted codes or guidelines will be of little use. The most useful sanctions would be those imposed by the tribunal or the administering institution, who know better the case facts and particular counsel's behavior.

It is also true that to regulate conduct of counsels the tribunal should incorporate standards of behavior into procedural documents from the very beginning of the arbitration. Especially, the ideal would be to give the tribunal the power to issue regulations and sanctions regarding counsels' ethics, which would not be in conflict with requirements of national legislatures or bar opinions. The most effective way to achieve this is through institutional arbitration rules, which is already the case in one or another form for LCIA and ICAC rules.

The other problem is that currently an unethical counsel's behavior results in sanctions falling back on represented parties, not counsels. For example, the imposing of costs, disregarding of evidence and drawing of adverse inferences will all have an adverse effect on the party's case, not on the future conduct or financial situation of the misbehaving counsel.

Consequently, there is a need for a new universal system of ethics regulation with sanctions targeting counsels. However, we do not believe that a uni-

[1] More on that topic see: Too Early for Global Arbitration Ethics Council (ASA Working Group) (5 October 2016) <https://uk.practicallaw.thomsonreuters.com/w-003-7751?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> (last accessed – 20 February 2018).

fied code of counsels' ethics will be a quick or effective solution. It may be better to regulate through institutional rules and reputational consequences for unethical behavior. Although the idea of a unified codification of counsels' ethical rules is now dominating the arbitration community, we believe that this is not the best possible solution to the problem. Instead, we propose a change to the approach through the practical solutions below.

We believe that it would be more efficient to create an international guideline for arbitral institutions, which would suggest incorporating uniform provisions into each set of arbitral rules. Either IBA's task force or another arbitration association or organization can come up with such provisions. As a consequence, ethics norms would become a part of the procedural rules applicable to arbitral proceedings. This would give arbitral institutions grounds to uniformly control counsels' ethics and subject all counsels in a particular arbitration proceeding to the same set of rules. More specifically, such provisions should not only include standards of conduct, but also provisions on strict sanctions of unethical behavior.

Since there is a chance that arbitral institutions would not want to amend their rules we recommend the creation of a special database of counsels where parties, arbitral institutions, and state arbitration regulators could report unethical conduct of identified arbitration practitioners. This, for example, can be made in collaboration with the *Arbitration Intelligence* platform (http://www.arbitratorintelligence.org/), the aim of which is to promote transparency, accountability, and diversity in arbitrator appointments[1]. This database would serve as a moral and reputational regulator. Since reputation is of high importance in international arbitration, such a database could be a great internal regulator on a «name and shame» basis, without the need for institutional support or other contributions.

[1] Once fully developed *Arbitrator Intelligence* aims to become a *«non-profit, interactive informational network that increases and equalizes access to critical information in the arbitrator selection process»*, which enriches its database through a questionnaire. At the moment *Arbitrator Intelligence* comprises information on approximately 3,000 arbitral awards and orders. For more information, see: *C.A. Rogers*, The International Arbitrator Information Project: From an Ideation to Operation (10 December 2012) <http://arbitrationblog.kluwerarbitration.com/2012/12/10/the-international-arbitrator-information-project-from-an-ideation-to-operation/> (last accessed – 20 February 2018).

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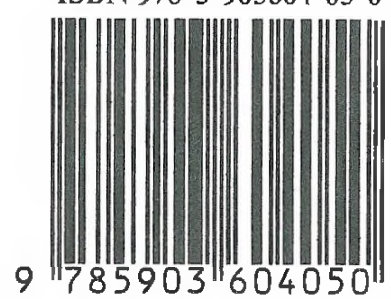

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This edition of «New Horizons of International Arbitration» collects the articles of the speakers at the «Russian Arbitration Day — 2018» conference held in Moscow on 30 March 2018, one of the most successful arbitration events in Russia (www.arbitrationday.ru).

This is the fourth collection of articles for that conference. The first three RADs were held in 2013, 2014 and 2015. The first three collections of articles, «New Horizons of International Arbitration», were issued in the same years.

Articles in this book were selected through the strict competitive selection process by the moderators of «Russian Arbitration Day — 2018» with application of several criteria (in decreasing order of importance): novelty; depth of analysis; practical significance; and author. These diverse articles represent new approaches to development of practice of and academic studies in international commercial and investment arbitration in Russia and abroad.

This collection is intended for arbitrators and practicing lawyers, judges of the state courts, academics and other researchers, lecturers, postgraduates and students of legal universities and faculties, as well for all those who are interested in international commercial and investment arbitration.

Настоящее издание — сборник статей лиц, выступающих на конференции «Российский арбитражный день / Russian Arbitration Day — 2018» (Москва, 30 марта 2018 г.), одном из самых успешных арбитражных мероприятий в России (www.arbitrationday.ru).

Это четвертый сборник статей выступающих на указанной конференции. Первые три РАД / RADs состоялись, как известно, в 2013 г., 2014 г. и в 2015 г. В эти же годы были выпущены первые три сборника «Новые горизонты международного арбитража».

Статьи в настоящий сборник были отобраны на строгой конкурсной основе модераторами «Российского арбитражного дня — 2018» при помощи следующих критериев (по степени убывания их значимости): новизна; глубина проработки заявки; практическая значимость; автор. Эти разноплановые статьи представляют новые подходы к развитию практики и науки международного коммерческого и инвестиционного арбитража в России и за рубежом.

Книга предназначена для практикующих юристов, ученых, преподавателей, аспирантов и студентов юридических вузов, а также для всех интересующихся международным коммерческим и инвестиционным арбитражем.

www.arbitrationday.ru
http://rad.lfacademy.ru