

SOME CAUTIONARY NOTES FOR AN AGE OF OPPORTUNITY

*Keynote Address by the Honourable the Chief Justice Sundaresh Menon**

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Mr Vinayak Pradhan, the President of the CIArb

Honourable Judges

Mr Anthony Abrahams, Director General of the CIArb

Distinguished Guests

Ladies & Gentlemen

Let me begin by expressing my deepest appreciation to the Organising Committee for having invited me and for the hospitality they have extended to me. It is entirely my loss that I shall not be able to partake of it for more than a few hours because Tun Arifin and I will head directly to Singapore immediately after this opening session for some meetings there. I also wish to extend my heartfelt congratulations to my dear friend, Mr Vinayak Pradhan, on his election as President of the CIArb and notably, the first Malaysian to achieve this. As delighted as I am, I cannot say I am surprised because having had the pleasure of appearing before him and of sitting with him, I had long come to form the view that he is one of the truly world class arbitrators from our part of the world.

* I am deeply grateful to my colleague, Mr Shaun Leong, Assistant Registrar of the Supreme Court, for his considerable assistance in the research and preparation of this address and for his very valuable contributions to the ideas contained here.

I **INTRODUCTION**

1 It is of course my honour and privilege to have this opportunity to address such a distinguished audience. It has been a little over a year since I delivered the keynote address at the ICCA Congress last year. That address fuelled much debate and was reportedly received with almost equal measures of acclaim and derision. I was told that this was the hallmark of a good keynote speech. The fact that some people liked what they heard was a reliable indicator that I might have a serious point. And the fact that some people thought I might have lost my way, suggested that I had not been unduly safe. But amidst some discordant notes, I believe that progress has been made in the important discussions on issues that should concern us, affecting this industry that we all care deeply about. My own thoughts have evolved on a number of these issues through my participation in these discussions. This evening, I would like to share some perspectives with you and to sound “Some Cautionary Notes for an Age of Opportunity”. I chose this topic because I thought it provided a balance to the theme for this conference, which is “Tapping Asia’s Growth”. Indeed, the international arbitral community, perhaps especially in Asia, is well placed to continue to reap the fruits of this roaring business today. But it is important that we not lose sight of our bearings or of what lies ahead. Arbitration today plays an essential role in the global infrastructure of transnational trade and commerce and thus in the development of an international rule of law. How successfully this Titanic continues to sail ahead will depend on the diligence of its stewards in spotting and reacting to the approaching icebergs.

2 I begin by sketching out three distinct issues which I believe the community needs to take cognizance of. To some degree, although these are distinct issues, they are perhaps symptomatic of a wider need for a concerted response to the challenges posed by a changing environment. I then examine what some possible responses might be.

II CAUTIONARY NOTES

A *The dramatic growth of new entrants to arbitration*

3 The first, and in my view the most obvious and significant change affecting the arbitration industry, is the dramatic growth in the number of new entrants. These numbers can be expected to grow even more significantly in the coming years. The past two decades have seen the establishment of new arbitral institutions all over the world, including in locations with limited background in arbitration. In a trend which reflects the global trade flows, such institutions have been established in Asia, the Middle East, and Africa. In tandem with this, the number of international arbitrations worldwide has grown, with a marked increase seen in Asia.¹ Along with the exponential increase in the number of arbitration cases has come the establishment of transnational practices to deal with disputes of increasing cross-jurisdictional complexity. At the same time, most jurisdictions have liberalised the admissions criteria for foreign counsel appearing in international arbitration within their borders. The cumulative effect of all this has been an explosive growth in the number of new entrants to the global arbitration community, many from diverse legal traditions.

¹ Where the Singapore International Arbitration Centre had only 2 international cases in 1991, this has grown to 235 international cases in 2012.

- 4 In the early days of arbitration, practitioners saw themselves as belonging to a small, select group governed by implied norms and shared albeit unwritten values.² These practitioners held themselves to such self-prescribed standards without the need for express rules, much less the intervention of courts or tribunals. In keeping with this culture, challenges against arbitrators were almost unheard of. The trust accorded to arbitrators was evident in the respectful silence maintained in the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 in relation to the effect of arbitrator misconduct, and this remained so three decades later when the New York Convention³ was adopted.
- 5 The new entrants bring with them their own conceptions of what constitutes ethically acceptable conduct, much of which is shaped by the broad range of legal, cultural and social backgrounds from which they come. Implied understandings or shared values no longer provide any meaningful means of shaping or influencing conduct in this context.⁴ Arbitrators can no longer consider themselves bound by peer standards, because there are no peers in the true sense, amidst all this diversity. Without meaning to discourage an entire generation of practitioners, I suggest that as the practice of arbitration has become a global industry, it has resulted in the complexion of arbitration changing, from something that was thought of as a cherished system with an essential though perhaps modest role to play in promoting the international rule

² Doak Bishop & Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, at p 5.

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10th June 1958.

⁴ Gary Born and Thomas R. Snider, *A Code of Conduct for Counsel in International Arbitration*, Kluwer Arbitration Blog.

of law, to something that might be seen as the new *el dorado* for the modern commercial disputes lawyer. These changing attitudes can incentivise departures from old but treasured ethical norms. This may be reflected in the results of a recent survey which reported that 68% of respondents had experienced ethical misconduct, and even the deployment of guerrilla tactics in international arbitration, such as the strategic change of counsel to create a conflict with an arbitrator, and the deliberate issuance of abusive correspondence to the arbitrator so as to create a situation from which to launch a challenge founded on alleged bias.⁵

- 6 The absence of common or defined ethical standards to guide such a great diversity of practitioners obviously poses serious difficulties and has the potential to create an uneven battleground that can ultimately affect fairness and integrity in international arbitrations. I can illustrate the point with some examples that we will all be familiar with. *Ex parte* communications with arbitrators are prohibited in many places, but it is not necessarily seen as objectionable in China where an arbitrator may take on the role of a mediator in the same dispute.⁶ Pre-testimonial communication with witnesses might be seen as a standard part of the pre-hearing preparatory process from the perspective of US and even some other common law practitioners, but a civil law jurist could be scandalised by this and might regard it as flagrant misbehaviour deserving criminal sanctions.⁷ On the other hand, the often

⁵ Edna Sussman & Solomon Ebere, *All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration*, 22 Am. Rev. INT'l. Arb. 611, 612 (2011).

⁶ Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, Michigan J. Int'l. Law (Winter 2002) Vol. 23, No. 2, at p 363.

⁷ *Ibid* at p 359. Hans Van Houtte, *Counsel-Witness Relations and Professional Misconduct in Civil Law Systems*, 19 Arb. Int'l 457, 461 (2003).

extensive discovery requests made by a US practitioner might be viewed as an oppressive fishing expedition or abuse of process by a Continental lawyer.⁸

- 7 These illustrations are especially apposite for us in Asia - home to around 3 billion people featuring some of the hottest investment prospects in countries that cover the full spread of development, and a mix of both codified and common law systems. Yet they barely scratch the surface because they are confined to genuine cross-cultural differences in perspectives and do not yet touch on conduct that might reasonably and widely be regarded as inappropriate. But this must be seen in the context of a largely unregulated industry with little, if any, barriers to entry. What is the yardstick to be applied in such a setting? At what point does hard ball become abusive? If football were played without rules but with massive stakes and rewards, how would we condemn those playing the man instead of playing the ball?

B The increasing use of third-party funding in international commercial arbitration

- 8 I move to the second cautionary note which is the growing incidence of third-party funding and the participation of funds in international arbitration. The lucrative business of funding arbitrations is growing rapidly. In 2012, a European gas company announced that a Luxembourg fund would finance its €1 billion ICSID claim.⁹ And this year, a Canadian mining company made an agreement with a third-party funder to cover the costs of a multi-billion

⁸ Stefan M. Tiessen, Smith, Gambrell and Russell LLP, *Effects of Differing Cultural Backgrounds on Dispute Resolution*.

⁹ Wolfgang Rauball, *EuroGas AG: European Investment-Fund Financed Billion-Lawsuit of EuroGas Group against the Slovak Republic*, BusinessWire (6 November 2012).

arbitration claim brought by its subsidiary against Bolivia.¹⁰ This is evidently a good business model if one looks at the rate at which the profits have reportedly grown. Burford Capital is one of the largest litigation funders in the US. It specialises in funding investment arbitration and commits an average of US\$8 million to each case. Since it was listed in late 2009, its profits have grown from US\$1.5 million in 2010, to US\$ 15.9 million and US\$34.1 million in 2011 and 2012 respectively.¹¹

9 Should we be concerned by this trend? To be sure these issues will reach Asia. Concerns have at times been voiced in relation to this development in the domestic litigation setting; but in the arbitration context, there is a virtual absence of *any* form of regulation. To contrast this with the position in the domestic setting, the Australian Federal Government for example, has imposed legislative safeguards such as the requirement for litigation funders to put in place arrangements to manage conflicts of interests.¹²

10 Is the character of arbitration such that there is no need for this issue to be regulated? I suggest the contrary is true for several reasons. For one thing, international arbitration features the unique situation of counsel and arbitrators often being drawn from essentially the same pool. A potential problem can arise when a funder finances multiple arbitral claims, and where an arbitrator in one of those claims is also the legal representative of the claimant in a separate

¹⁰ Leo Szolnoki, *Miner secures funding for Bolivia claim*, Global Arbitration Review (28 May 2013).

¹¹ Burford Annual Reports 2010-12. One of the largest UK-based funders, Juridica Investments Limited, saw its comprehensive income grow from a negative of US\$9 million in 2010 to positive income of US\$194 million and US\$35.6 million in 2011 and 2012 respectively; see Juridica Investments Limited's Annual Reports 2010-12. See also *Profiting from Injustice*, Corporate Europe Observatory and the Transnational Institute, Chapter 5, p 58.

¹² Corporations Amendment Regulations 2012 (no. 6).

claim that is being financed by the same funder.¹³ In such a case, the funder is essentially the practitioner's direct paymaster in the case where he is counsel. There needs to be meaningful guidance in such a situation as to the appropriate obligation on the prospective arbitrator to conduct conflict checks with due diligence and then to make disclosure.

11 Second, the funder may have so much influence over the arbitration proceedings that *it*, in fact, is the *de facto* party that selects and appoints the claimant's arbitrator. This is simply a reflection of the adage that he who pays the piper often calls the tune. If a funder is in it for the commercial return on its investment, one should not be surprised if its choice of arbitrator were based on prior commercial relationships and contacts. Is this disclosable to the other party to the arbitration? Should the funder be free to direct the selection of counsel, the arbitral procedures to adopt, and the strategies to deploy?

12 Third, in investment arbitration, investors will stand to lose nothing by firing the first shot against States. Instead, taxpayers will end up financing the payout for successful claims, a part of which will accrue to the third-party funder as its return for funding the claim. On the other hand, if the investor is not successful in its claim, the costs and risks will have been outsourced to the funder in any event, even though the taxpayers of the "successful" State will end up footing the costs of having successfully defended the arbitral proceedings. Is there really no public interest then in regulating the use of litigation funding in international arbitration?

¹³ Maxi Scherer, *Out in the Open? Third-Party funding in arbitration*, 26 July 2012.

13 Fourth, the prevalent use of third-party funding in international arbitration has seen the emergence of a market for the sale of the payment obligation that will be owed by the claimant in the event of success, as a chose in action to third-party speculators. Such practices are reminiscent of and have the potential to replicate the vulture funds that were prevalent in the 1990s. Would funders create a portfolio of high risk claims, consisting of frivolous or unmeritorious claims, hedged by low risk claims, consisting of claims with a good chance of success, and sell them as a diversified basket of claims to third-party speculators?¹⁴ This would make it possible to profit from frivolous and unmeritorious claims that would not otherwise have a market with speculators if they were sold individually. An article written by Burford Capital's Chief Executive Officer and posted on its website describes arbitration finance as specialty corporate finance that is focused on arbitration claims as assets, which can be employed to fund *portfolios* of cases in addition to individual disputes.¹⁵ This, it states, distributes risks across multiple actions to allow the financier to offer better pricing.¹⁶ And some industry insiders believe that arbitral claims can and will in time be structured as derivatives, not unlike the structured debt obligations which underlay the sub-prime mortgage crisis a few years ago.¹⁷

¹⁴ *Profiting from Injustice*, Corporate Europe Observatory and the Transnational Institute, Chapter 5, p 58, referencing Selwyn Seidel from Fulbrook Management in Ross, Alison (2012) *The dynamics of third-party funding*, Global Arbitration Review 7:1, p 14.

¹⁵ Christopher Bogart, Third party funding in international arbitration, 22 January 2013, Burford Capital, at <<http://www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/>>.

¹⁶ *Ibid.*

¹⁷ Rebecca Lowe, *Speculate and arbitrate to accumulate*, International Bar Association, referencing Selwyn Seidel from Fulbrook Management, at <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=804e46e3-dfc0-4966-b16e-31627803970c>>.

14 Third-party funding is not only an important issue in its own right, it is also a vivid example of the new types of issues that will confront the arbitration industry. The coincidence of a flood of new players and a range of serious new issues must not be allowed to give way to a perfect storm.

C *The rising costs of international commercial arbitration*

15 Let me turn to the third development. The myth that international arbitration is to be preferred over litigation because it is a simpler and more cost-effective method of dispute resolution has long been shattered. There is growing recognition amongst users that the level of costs in international arbitration is rising at an unsustainable rate. A 2006 survey reported that almost 40% of in-house counsel found that international arbitration was more expensive than cross-border litigation.¹⁸ This number grew to 65% just a year later.¹⁹ Subsequent surveys appear to have omitted this question; but there can be no serious doubt that the past few years have seen costs evolve from being a key attraction to becoming the *primary bane* of international commercial arbitration. Professor Lukas Mistelis conducted a study in 2008 which found that 50% of corporations ranked costs as the most important *disadvantage* of international arbitration.²⁰ That, I emphasise, was 5 years ago!

16 While the reasons for the rising costs are manifold, it is unsatisfactory that the international arbitral community has not acted with dispatch to address this

¹⁸ Joseph R. Profaizer, *International Arbitration: Now Getting Longer and More Costly*, *The National Law Journal*, July 29, 2008; which referred to survey conducted by PricewaterhouseCoopers and Loukas Mistelis from Queen Mary School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices 2006*.

¹⁹ Kate Durcan, *International Arbitration: Getting pricier, but still growing*, *The Law Society Gazette*, Thursday 16 October 2008.

²⁰ Loukas Mistelis & Crina Mihaela Baltag, *Trends and Challenges in International Arbitration: Two Surveys of in-house counsel of major corporations*, *World Arbitration and Mediation Review* (2008) Vol 2, No. 5, at 93.

issue. On the contrary, the trend might even point somewhat the other way. A costs study conducted by the ICC revealed that 82% of the costs incurred in arbitration constituted legal costs which were counsel's fees and expenses and experts' fees, while 16% of costs were arbitrators' fees and expenses.²¹ Law firm partners acting as counsel expand their portfolios and their profits by leveraging off teams of associates. In recent years, arbitrators have started to emulate this with the growing practice of engaging Tribunal secretaries whose remit might vary from drafting correspondence to undertaking research and even to award drafting. Should we be concerned by this trend?

III WHAT ARE THE POSSIBLE RESPONSES TO THESE CHALLENGES?

17 When issues concerning the domestic legal profession are identified, the regulated scheme for admission to the profession coupled with the significant and direct effect that such issues might have on the domestic polity come together to ensure that these will be addressed. But the arbitration industry is vast and increasingly amorphous. Left alone there is no impetus to develop a concerted response. This heightens the need for stakeholders to take the lead in developing such responses. Today, I wish to reiterate and to add my support to two suggestions. The first is the development and implementation of codes of ethics to set uniform standards for arbitrator and counsel conduct; and the second is for arbitral institutions to play a larger role in developing and implementing a regulatory framework to apply and enforce such standards, perhaps by working in tandem with some of the leading arbitral think tanks.

²¹ Winston & Strawn LLP, *What can be done about arbitration costs?*; made reference to the ICC Commission on Arbitration's 2007 report on *Techniques for controlling time and costs in arbitration*.

A *Developing Codes of Conduct*

1. Codes of Conduct for Arbitrators

- 18 The need for a uniform or at least broad-based code of conduct for arbitrators is rooted in various considerations. First, arbitration practitioners who come from diverse legal traditions and cultural backgrounds need to be able to find guidance as to what the *international consensus* is on ethically acceptable conduct. Absent this, they can only fall back on what they know from the ethical norms found in the domestic realm of the jurisdictions from which they come. This can have serious consequences when such norms fail to meet standards expected by and of the international arbitral community. Worse it can encourage the view that anything not expressly prohibited should be taken to be permitted.
- 19 Second, there is a lack of consistency which needs to be reconciled in arbitrator standards in areas such as the scope of an arbitrator's disclosure obligations or due diligence obligations in relation to conflicts of interests.²² At present, many arbitral institutions incorporate ethical rules into the sections of their arbitral rules relating to arbitrators' qualifications and conduct of hearings. However, very few arbitral institutions have a dedicated code of conduct for arbitrators, and even amongst those, fewer still are as comprehensive as they could be. The end result is inconsistency in standards required by different institutions. For example, while the ICC rules require a prospective arbitrator to disclose circumstances which might call into question the arbitrator's independence "in

²² Emilio Cardenas & David W. Rivkin, *A Growing Challenge for Ethics in International Arbitration*.

the eyes of the parties”,²³ the LCIA rules require one to disclose circumstances which are “known to him likely to give rise to any justified doubts as to his impartiality or independence”.²⁴ By contrast, the AAA code of ethics prescribes a comprehensive list of matters which a prospective arbitrator must disclose.

20 Third, the lack of clear rules to guide arbitrators’ conduct can encourage “unwilling” arbitrants to scrutinize every perceived lapse in standards, and to “try their luck” by making opportunistic challenges in the hope that the alleged misconduct could have the effect of achieving the ultimate aim of setting aside an arbitral award. This phenomenon, if left unchecked, could turn international arbitrations into even more long-drawn and costly affairs, and also impact upon the finality of arbitral awards. Already, the number of challenges has been growing at a disquieting rate.²⁵

21 Two well-known decisions highlight the importance of setting clear guidelines on the arbitrator’s due diligence obligations to conduct conflicts checks. In *ConocoPhillips v Bolivarian Republic of Venezuela*²⁶, the respondent brought a challenge against a renowned arbitrator as the law firm of which he was a partner had merged with another law firm which was acting for the claimant in several other disputes. The arbitrator decided to leave his firm upon being informed of this conflict. The tribunal found that the arbitrator had a disclosure

²³ ICC arbitration rules, Art 11(2).

²⁴ LCIA arbitration Rules, Art 5.3. Also see the 2013 HKIAC administered arbitration rules.

²⁵ David Hacking, *Challenges: Theirs is to Reason Why*, 1(6) Global Arb. Rev. (2006).

²⁶ ICSID Case No ARB/07/30, (27 February 2012).

obligation if he knew or should have known about the merger, and any non-disclosure could give rise to a reasonable suspicion of bias.²⁷

- 22 In the second case, *Compañía Aguas and Vivendi Universal v. Argentine Republic*²⁸, the ICSID annulment committee found that the arbitrator should have done her conflicts checks before she accepted a directorship of a major international bank with significant shareholding in the claimant, and suggested that the failure to do so may have amounted to negligence.²⁹
- 23 Two other cases illustrate that arbitrants will often scrutinize every relational aspect of the arbitrator's past and these efforts might at times result in a finding of perceived partiality. The London Commercial Court in *ASM Shipping v. TTMI*³⁰ found that the arbitrator in the case should have recused himself from the arbitration, as he had made serious allegations against the principal witness in his capacity as counsel in an earlier separate dispute. And in *B v A, C (and others)*³¹, the Commercial Court removed the arbitrator on grounds of bias, as he had given legal advice in a prior dispute to an agent of the respondent in the ongoing arbitration in relation to issues which would arise in the arbitration.
- 24 Finally, to further illustrate the point, I mention two other cases which highlight the need for clear guidance on the implications of an arbitrator's prior appointments by a party. In *OPIC Karimum v Bolivarian Republic of*

²⁷ *Ibid* at [60].

²⁸ ICSID Case No. ARB/97/3, Annulment Proceeding (20 August 2007).

²⁹ *Ibid*, at para 230.

³⁰ [2005] All ER (D) 271 (Nov).

³¹ Unreported, London Commercial Court; see Gawaine Batchelor, *Challenging arbitrators: confidential information and bias*, New Law Journal, 1 December 2004.

Venezuela,³² the appointment of an arbitrator was challenged as he had been appointed five times by the same respondent in the past three years. The tribunal observed that multiple appointments might affect an arbitrator's ability to exercise independent judgment;³³ and in *Tidewater v Bolivarian Republic of Venezuela*,³⁴ the tribunal observed that regular appointments with the attendant financial benefits could create a relationship of dependence which would influence the arbitrator's judgment.

25 A preliminary observation to be made in relation to each of these examples is that the arbitrators concerned all did not think there was substance in the challenge. Perhaps, it is the inherent difficulty of scrutinising one's own position dispassionately when faced with a challenge; or it might be the committed determination of those appointed to discharge their mandates; or perhaps it is a consequence of the lack of guidance which is the *status quo*. Certainly, we can expect that if this is left unresolved, it will raise increasingly difficult questions that will ultimately be decided by the courts. This, however, raises a further issue. Should these issues be left to be settled by the emergence of a jurisprudence developed by those courts before which the challenges are brought? Put another way, should the courts be the ones setting out the boundaries of acceptable arbitrator conduct? How can this be preferable to the arbitration community taking the initiative to develop its own code which sets out clearly the conduct, disclosure standards, and due diligence obligations expected of arbitrators?

³² ICSID Case No. ARB/10/14, (May 5, 2011).

³³ *Ibid* at [50].

³⁴ ICSID Case No. ARB/10/5, (Dec. 23, 2010).

2. *Codes of Conduct for Counsel*

26 The need for a uniform code of ethics for counsel is equally, if not more compelling. I have mentioned that differences in ethical standards can create an uneven playing field with the potential to undermine the integrity and fairness of the arbitral proceedings. The 2010 survey conducted by the IBA Taskforce on Counsel Conduct in International Arbitration revealed the great extent of uncertainty and confusion amongst arbitrants as to which ethical rules govern legal representatives in arbitration proceedings.³⁵ Is it the rules of the jurisdiction in which the representative is licensed to practice? Or those of the arbitral seat? Or those agreed by the arbitrants? Each of these might prescribe different or even contradictory standards. The recently published IBA Guidelines³⁶ is a very welcome step in the right direction as it aims to set a uniform standard of conduct expected of counsel.

27 The Guidelines prescribe that they shall apply if the parties so agree, or if the arbitral tribunal decides to rely upon them after consultation with the parties and having determined that it has the authority to rule on matters of party representation to ensure the integrity and fairness of the arbitral proceedings.³⁷ The commentary on the Guidelines state that they “neither recognize nor exclude the existence of ... authority” for the tribunal to apply them in the absence of the parties’ express agreement. In recent times, arbitral tribunals have occasionally held that they do have the *inherent* power

³⁵ IBA guidelines on party representation in international arbitration (25 May 2013), preamble.

³⁶ *Ibid.*

³⁷ *Ibid*, guideline 1.

to regulate counsel's conduct, resting this on their duty to preserve the integrity of the arbitration proceedings.³⁸ However, any inherent power to regulate counsel's conduct is of limited use if it does not extend to the ability to impose effective sanctions. Given that a tribunal's authority is ultimately determined by the mandate conferred upon it by the parties' agreement, it may be doubted whether an arbitrator has the power to order effective sanctions, such as the prohibition of counsel from continuing in the arbitral proceedings, without the arbitrants' express agreement.

28 This problem would be mitigated if ethical codes of conduct were appended to the arbitral rules of institutions.³⁹ In such circumstances, by incorporating these rules in their arbitration agreement, the parties would be according the arbitral tribunal the necessary authority to regulate counsel's conduct without having to resort to any perceived inherent powers. The arbitral tribunal would also have clear guidance on the types of sanctions it could impose. A promising example of this is the 2013 revised version of the LCIA rules which provide guidelines on counsel's ethical conduct, and adds some bite by providing that serious or persistent violation of these guidelines may result in the exclusion of counsel from the arbitration.

29 Moreover, if ethical codes of conduct become contractually binding upon the arbitrants by being indirectly incorporated into the arbitration agreement, an arbitrant whose representative is found to be in breach of the ethical codes

³⁸ *Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia*, ICSID Case No. Arb/05/24; *Pisciotta v. Shearson Lehman Bros., Inc.*, 629 A.2d 520, 525 – 26 (D.C. 1993); and *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 530, 354 (R.I. 2000).

³⁹ Catherine Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, *Stanford Journal of International Law*, 2005, Volume 41, No. 1, p 111.

might find itself contractually liable in damages to the affected party. This could be significant because mere costs sanctions might not be sufficient to deter arbitrants if they have authorised their counsel's conduct in the hope of gaining a strategic advantage. Arbitrants could be given the flexibility to customize the rules to suit the needs of their arbitration.⁴⁰ Naturally, such rules would need to be periodically reviewed to align ethical standards with the evolving demands of international commercial arbitration.

3. *Viability of a uniform code of ethics*

30 Is the development and implementation of a uniform code of ethics for arbitrators and counsel a viable suggestion then? Some have cautioned against this, warning that it will prove to be a quixotic endeavour to achieve the impossible. Five main objections have been made, and I turn to these.

a. The argument from generality

31 The first objection is the argument from generality, which asserts that ethical codes by their very nature will set open-textured rules which are too general to be of any use.⁴¹ It is contended that vague and undefined concepts such as "impartiality" are liable to be manipulated depending on the objective sought to be achieved.⁴² This argument, however, is in itself a *general one* which fails to pay sufficient regard to the existing rules, many of which do provide specific guidance on exactly how arbitrators and counsel should conduct themselves.

⁴⁰ A practitioner has derived a checklist of obligations which arbitrants may select to bind the legal representatives before arbitral proceedings commence, see Cyrus Benson, Partner, Gibson, Dunn & Crutcher LLP (London), *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*.

⁴¹ Toby Landau QC, *Seminar on Contemporary Challenges in international arbitration*, Queen Mary, University of London, 27 September 2012.

⁴² Jan Paulsson, 4th London School of Economics Arbitration Debate on 9 May 2013, *Is Self-Regulation of International Arbitration an Illusion?*

32 The SIAC has developed a code of ethics that defines the situations which could give rise to partiality and dependence,⁴³ while the AAA's code of ethics for arbitrators is a good example of a code which provides specific guidance on how arbitrators and counsel should conduct themselves.⁴⁴ It sets out specifically what an arbitrator should avoid doing while serving as an arbitrator so as to maintain the integrity and fairness of the arbitral process,⁴⁵ and sets out the limited situations in which *ex parte* communications with an arbitrator are permissible.⁴⁶ In the same vein, the LCIA rules provide clear guidance on the acceptable modes of communication allowed between arbitrant and arbitrator.⁴⁷ The recently published IBA guidelines provide specific guidance on the ethical boundaries for counsel on issues such as disclosure of documents and preparation of witnesses.⁴⁸

33 Of course, it is impossible to legislate specifically for the myriad of situations in which challenges to arbitrators and allegations of counsel misconduct might be made. No code can claim to have the answer to every issue; but this does not mean all legislation is pointless. Given that these fact-sensitive disputes will ultimately have to be resolved within the precise circumstances in which they arise, there needs to be a process by which a "gap-filler" can interpret the rules and apply the principles drawn from them. In this regard, arbitral institutions would do well to follow the practice of the LCIA in publishing its decisions on

⁴³ Section 3.1 of *SIAC's Code of Ethics for an Arbitrator* provides.

⁴⁴ The Code of Ethics for Arbitrators in Commercial Disputes, effective 1 March 2004, American Arbitration Association, International Centre for Dispute Resolution.

⁴⁵ *Ibid*, Canon I.

⁴⁶ *Ibid*, Canon III.

⁴⁷ LCIA Arbitration Rules, 1 January 1998, Art 13.

⁴⁸ IBA guidelines, *Supra* n 35.

challenges made against arbitrators, as the development of jurisprudence in this area would provide clearer guidance to practitioners on the applicable standards.

34 Finally, I must observe the irony that those who complain that the rules are too general also complain when the rules are drafted more precisely. This leads me to the next argument which is that from diversity.

b. The argument from diversity

35 This argument highlights the perceived impossibility of prescribing precise standards due to the range of ethical obligations that practitioners may be bound by, given their diverse legal backgrounds and traditions. Ethical rules are derived from cultural and policy norms, and so, it is argued that each set of competing ethical rules is equally valid and any contradictions cannot be reconciled. A prominent illustration is the practice of an arbitrator taking on the role of a mediator in arbitrations conducted in East Asia. It is said that any attempt to mark such a practice as “unethical” would be to disregard its acceptance by a significant portion of the international arbitral community.

36 In my view, this argument is misplaced. International arbitration is inherently transnational in nature. It cannot be suggested in this setting, that each player is entitled to act solely in accordance with his or her personal code and disregard widely accepted standards. The values which inform the ethical norms of any given forum must hold little, if any, weight in the *international* arena, where primacy is instead accorded to the values of transparency, fairness and consistency in the practice of international commercial arbitration.

These values act as a filter to draw out the principles which the international arbitral community finds most favourable and exclude those which do not serve their needs. The end result is the convergence of the best aspects of the civil and common law systems. This is reflected in the recently published IBA Guidelines, which, for instance, recognise the practice of counsel assisting witnesses in the preparation of their testimony.⁴⁹ Similarly, witness statements are now frequently served before the hearing;⁵⁰ written submissions from counsel are expected in most cases;⁵¹ it is now accepted that counsel may orally examine witnesses during the hearings; and it is no longer controversial for the arbitrators to pose questions where necessary to clarify points raised by counsel's examination.⁵²

37 Even the argument based on mediator-arbitrator practices in East Asia is no longer compelling. A recent survey indicates that 73% of Western arbitration practitioners found it appropriate for an arbitrator to suggest settlement negotiations to the parties.⁵³ This was only 1% less than the proportion of East Asian practitioners who agreed with the same. Similarly, the same proportion of practitioners from both Western and East Asian countries perceive it to be appropriate for an arbitrator to actively engage in settlement negotiations at the request of the arbitants. This is not to suggest that arbitrators can therefore act as mediators with impunity; just that it is possible for stakeholders to have meaningful discussions about these issues and find a sensible common ground.

⁴⁹ *Supra* n 8. See also IBA Guidelines, *Supra* n 35, guidelines 20 and 24.

⁵⁰ *Supra* n 8.

⁵¹ *Ibid.*

⁵² *Supra* n 6, at 412 – 413.

⁵³ Shahla F. Alia, *The Morality of Conciliation: an Empirical Examination of Arbitrator "Role Moralities" in East Asia and the West*, 16 Harv. Negot. L. Rev. 1 (2011) at 8.

38 The fact is, however, that there remain significant areas of ethical diversity. I suggest that it is precisely because of this that we need to think carefully and constructively about how best to deal with these differences. What is called for is a methodological framework to resolve ethical issues arising from diverse legal traditions. We must *recognise legitimate differences* in legal cultures, while developing a structure that can guide parties on resolving such differences. We cannot sit back and say this is an impossible dream. How else did the Model Law and the New York Convention emerge as universal codes to balance the attendant tensions and competing interests?

c. The argument from consequences

39 I turn to the third argument, which claims that codes of conduct are likely to invite opportunistic challenges to disrupt arbitral proceedings, or even serve as strategic tools used by arbitrants to set aside arbitral awards.⁵⁴ In my view, this argument in fact calls for greater clarity of what constitutes ethical conduct, for it is the lack of clear and specific rules that encourages spurious challenges. In order to preserve the finality of arbitration awards and discourage guerilla tactics, any code of ethics should also provide for the consequences which could flow from breaches. Not every breach must result in a proper ground to challenge the award itself, and most times, the consequences might lie in the realm of sanctions to be made against the arbitrator or counsel in default.

⁵⁴ Judith Gill, *The IBA conflicts guidelines – who’s using them and how?*, citing Khawar Qureshi, *Conflict of Interest*, New Law Journal (154 NLJ 1400). Jeffrey Waincymer, *Procedure and Evidence in International Arbitration*, (2012) Wolters Kluwer at 291, citing Markham Ball, *Probity Deconstructed: how helpful, really, are the IBA guidelines on conflicts of interest in international arbitration*, *World Arbitration and Mediation Review* (2004) Vol 15, No. 11.

d. The argument from lack of sanctions

40 This brings me to the fourth argument which asserts that the lack of sanctions reduces ethical codes to nothing more than “valuable suggestions”.⁵⁵ As seen in the measures already adopted by some arbitral institutions, there is no conceptual or practical barrier against the imposition of sanctions. The revised LCIA rules prepared by the LCIA Court’s sub-committee,⁵⁶ expressly provides the arbitral tribunal with the power to exclude the legal representative from the arbitration, if, after having been given an opportunity to be heard, he is found to be in serious or persistent violation of the conduct guidelines annexed to the LCIA rules.

41 Such sanctions will deter counsel misconduct, but it may take time for the arbitral community to accept this as routine because it ultimately impacts upon the arbitrator’s right to choose its legal representative. If the exclusion from arbitration is reserved to the extreme cases, there might be room for a more graduated range of options such as that reflected in the recently published IBA guidelines on party representation, which gives the tribunal the power to admonish the legal representative, consider counsel’s misconduct in apportioning costs of the arbitration, and to “take any other appropriate measures in order to preserve the fairness and integrity of the proceedings”.⁵⁷ I suggest this might be broad enough to include the following range of sanctions which ought to be considered by arbitral institutions for incorporation into their own arbitral rules: (i) communication with the arbitrator to raise concerns over

⁵⁵ *Ibid*, citing Markham Ball, *Probity Deconstructed: how helpful, really, are the IBA guidelines on conflicts of interest in international arbitration*, *World Arbitration and Mediation Review* (2004) Vol 15, No. 11.

⁵⁶ Comprising Boris Karabelnikov, James Castello, and V V Veeder QC.

⁵⁷ IBA Guidelines, *Supra* n 35, guideline 26.

the misconduct in question, (ii) making personal costs orders against recalcitrant counsel, (iii) reporting breaches to the relevant Bar Associations from the jurisdictions in which the legal representative is admitted to practice, and (iv) ordering the arbitrator to pay damages for any losses suffered or caused by the legal representative's ethical breaches, to the extent the legal representative was acting on the instructions of the arbitrator.⁵⁸

e. The Argument from over-regulation

42 The final objection warns against what has been referred to as "*Legislatis*"⁵⁹ which is the irresistible urge to legislate more and more rules in the endeavour to solve problems. Advocates of this school call for a "collective pause for thought", and warn against prescribing what would be another set of rules in an already bewildering web of rules, practice directions and guidance notes. In what is by now a famous warning, we are urged not to "cure the disease but kill the patient".⁶⁰

43 I agree that we must think very carefully about what the problems are, and what the proper solutions ought to be. The famous warning focuses on the medicine prescribed in order to assess whether the diagnosis is correct. This is ultimately unhelpful. A difference must be drawn between determining whether there is a *need* for treatment, and determining *what* that treatment should be. It is counter-productive to conflate the two.

⁵⁸ IBA Guidelines, *Supra* n 35, p 3.

⁵⁹ Toby Landau QC, *The relationship between international arbitration and the regulator(s): the need for ethical codes, guidelines and best practices for arbitration counsel, arbitrators, arbitral secretaries and arbitral institutions*, International Council for Commercial Arbitration Conference, Singapore, 12 June 2012.

⁶⁰ *Ibid*. See also *Supra* n 42.

44 The question of *how much* regulation is required is an important question, but it is a secondary question. We have to first identify the problem and reach a common understanding of its precise nature and the ill-consequences that it can give rise to before we turn to the secondary question of what treatment is required. To put it another way, while stretching the medical analogy to breaking point, saying that I am prescribing too much medicine even if that were true, does not displace the fact that the patient might well be unwell and in need of attention.

B Arbitral Institutions to play a bigger role in regulation

45 I have spoken at some length about the need for and viability of an endeavour to develop a uniform or broad based set of ethical standards for arbitrators and counsel. But, this if at all, addresses only the first of the three issues I highlighted at the beginning. Are the other issues beyond us? Far from it. I think one of the most encouraging developments in the arbitration landscape has been the emergence of arbitral think tanks made up of some of the most experienced and knowledgeable experts in the field working on key issues. By way of example and especially relevant in the present context, ICCA has identified the need to address the issues that could arise from the growing use of third-party funding in international arbitration.⁶¹ To this end, it recently launched a taskforce to study and make recommendations regarding the procedures, ethics and policy issues relating to third-party funding in international arbitrations.⁶² I warmly welcome this initiative because we can

⁶¹ ICCA Review, August 2013.

⁶² The taskforce, co-chaired by William Park and Catherine Rogers, will work jointly with a new Centre on Regulation, Ethics, and the Rule of Law at Queen Mary, University of London.

look forward to a pointed and careful analysis of the issues and some thoughtful recommendations emanating from such an effort.

46 There are other examples of such sophisticated think tanks working to tackle these issues. ICCA and the American Society of International Law have demonstrated great initiative with their launch of a joint taskforce to analyse the question of issue conflicts in international arbitration and to make recommendations. This would of course add to the valuable work done by the IBA in its guidelines on conflicts of interests and party representation in international arbitration. As to the challenges posed by escalating costs, the ICC Commission on Arbitration has demonstrated leadership with its publication on controlling time and costs to set clear guidance on cost-effective measures that arbitrants can adopt for each step of the proceedings. In a related area, Young ICCA has undertaken some work on the proper role of Tribunal Secretaries. And many who are present today can take pride in the contributions of the CIArb, for instance, in the introduction of its E-Disclosure Protocol to manage the extent of document production; as well as its work directed at maintaining transparency and controlling costs, with the Code of Professional and Ethical Conduct which mandates its members to charge reasonable fees and to explain to parties the basis upon which their fees are calculated and charged.⁶³

47 In view of these initiatives, I make two points:

⁶³ CIArb's Code of Professional and Ethical Conduct for Members, Rule 9, 11 January 2010.

- a. First, some questions such as those arising from the increasing incidence of third-party funding, the proper use of Tribunal Secretaries or the control of costs, demand a concerted effort to study the issue, to have a dialogue and to table recommendations that strike at the core concerns so that these can be considered and then responded to;
- b. Second, far from being criticised as a pointless or confusing addition to the tangled web of guidance notes and practice directions, work of this nature is not only valuable but will play a vital role in the future if the industry is to respond with due care to the new challenges it can expect to face.

48 Indeed, one hopes that as the arbitral think tanks undertake these and other significant initiatives, arbitral institutions might join these efforts and enter the debate on these issues with a view to developing, evaluating and hopefully adopting the resulting work product to a greater or lesser extent. In this light, I turn to my second suggestion which is for the arbitral institutions to play a larger, if not the primary role in the regulation of the industry as a whole.

49 The 2010 White & Case/Queen Mary survey revealed that 76% of respondents would like the opportunity to assess arbitrators at the end of a dispute and submit a report to the arbitral institution.⁶⁴ This suggests that users generally have confidence in the ability of arbitral institutions to implement measures to regulate arbitrator conduct and standards, as well as a reasonable degree of trust in the institutions' internal governance.

⁶⁴ White & Case LLP in collaboration with Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, at 28.

50 There are many ways in which arbitral institutions can step up to the plate. First, their existing competencies in drafting and modifying arbitral rules can be utilized to draft and implement ethical codes of conduct for arbitrators and counsel. The acceptance of such codes could be mandated as a condition for appointment to an arbitral institution's panel or participation in the institution's arbitrations.

51 Second, arbitral institutions can build on their existing structures and resources that handle challenges against arbitrators, by establishing formal processes to handle complaints of misconduct, with the attendant inquiry committees and disciplinary tribunals to deal with serious complaints. Arbitration practitioners who wish to practice at the institution could be required to submit themselves to the professional or disciplinary jurisdiction of the institution. The codes of conduct would set out clearly the powers of the disciplinary tribunal, the procedural guarantees of a fair hearing, and the criteria under which specific sanctions may be ordered. Decisions made by the disciplinary tribunals could be published with sufficient confidentiality protection to promote the development of a coherent jurisprudence that can provide clear guidance to the community.

52 Third, arbitral institutions might consider implementing an accreditation system with the prospect of such accreditation being suspended or revoked if an arbitrator is found to have committed sufficiently serious breaches.

- 53 Fourth, in many respects, the arbitral institutions are best placed to implement measures to curb rising costs, such as by the provision of services akin to the assessment of costs, or the introduction of cost-effective procedures. Arbitral institutions should be encouraged to develop the most efficient practices in an increasingly competitive environment. Significantly, it seems that a significant proportion of arbitrants in fact trust institutions to fulfill a supervisory role in this regard, as evidenced by the results of the 2012 White & Case/Queen Mary survey which indicated that 53% of users want arbitral rules to provide guidelines on the factors that an arbitrator should take into consideration when determining costs.⁶⁵
- 54 Fifth, arbitral institutions could reduce information asymmetries by making available to users a database containing relevant information on empanelled arbitrators.⁶⁶ In line with its mission to promote greater access to international arbitration, the CI Arb could take a particular interest in this and even consider working with institutions to develop this idea for its members.
- 55 Sixth, to overcome the disconnect between the users of arbitration and those who provide arbitration services, institutions should consider establishing users' committees so that they are listening directly to the sentiments of those they aim to serve. Again, the CI Arb could take a lead in organising a conference targeted at hearing the views of the users of arbitration on the state of the industry.

⁶⁵ 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, conducted by White & Case LLP in collaboration with Queen Mary University, p 41.

⁶⁶ Catherine Rogers has a clear vision on how this can be made workable, in *The International Arbitrator Information Project: From an Ideation to Operation*, Kluwer Arbitration Blog, 10 December 2012.

IV CONCLUSION

56 I close by respectfully suggesting that the question is no longer whether anything needs to be done. I believe that the *real* choice before us is *how* we should respond to the new issues the industry faces. In the exciting region that is Asia, it is vital to have these matters in our sights even as we think about how to tap Asia's growth. We have the opportunity to steer the practice of international arbitration in the right direction. We should choose to act decisively instead of allowing the winds of change to determine our course and ultimate destiny. The fact that we do face a number of new and challenging issues should not be cause for gloom as long as we are committed to meeting them squarely.

57 Some have suggested that because there is no viable alternative to arbitration for the resolution of international disputes, there is no need to be concerned. The three biggest mistakes that we as a community can make would be to:

- a. underestimate the disenchantment of our consumers;
- b. overestimate our own value to them; and
- c. ignore the power of human ingenuity.

58 Arbitration emerged as a response to the shortcomings of the traditional domestic litigation system. For many decades, it was seen as litigation's poor cousin. But today, it has come to be seen as a critical foundation of transnational trade and commerce by providing the primary framework for the resolution of cross-border commercial disputes. I suggested last year that this

is the golden age of arbitration. It would be a shame if we missed the opportunity to consolidate this position.