*Bahrain Chamber for Dispute Resolution*

# INTERNATIONAL ARBITRATION REVIEW

Published by *Kluwer Law International B.V.*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South
Wolters Kluwer Legal & Regulatory U.S. 7201
McKinney Circle Frederick MD 21704 United
States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by
Air Business Subscriptions Rockwood House
Haywards Heath West Sussex RH16 3DH
United Kingdom
Email:
international-customerservice@wolterskluwer.com

ISSN 2352-7374


This Journal should be cited as (2017) 4 BCDR Int. Arb. Rev. 2

The *BCDR International Arbitration Review* is published twice per year.
Subscription prices for 2017 [Volume 4, Numbers 1 through 2] including postage and handling:
Subscription rate (print): EUR 331.00 / USD 446.00 / GBP 265.00

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at lrus.wolterskluwer.com
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*BCDR International Arbitration Review* is indexed/abstracted in the European Legal Journals Index.

*Printed on acid-free paper*

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Volume 4 | December 2017 | Number 2

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**BCDR-AAA 2017 ARBITRATION RULES, PART I**

**Rules**

# Party Representation: Does Article 21 Mark a Trend?

James E. Castello*

***Article 21: Party representation***

*21.1 Any party may be represented in the arbitration by any legal representative whose full name, postal address, e-mail address and telephone number have been notified in writing to the Chamber, to all other parties, and (once appointed) to the arbitral tribunal, provided that there shall be no addition to any party's legal representatives following the appointment of the arbitral tribunal without the prior written approval of the arbitral tribunal.*

*21.2 The arbitral tribunal may decline to approve an addition to any party's legal representatives if, on proper disclosure, a relationship exists between the proposed additional legal representative and any member of the arbitral tribunal that would create a conflict of interest jeopardizing the composition of the arbitral tribunal or the integrity of the proceedings.*

*21.3 The Chamber and, once appointed, the arbitral tribunal may at any time require written proof of the authority of any named legal representative.*

*21.4 Every party shall require its legal representatives to agree that they shall not:*

*(a) engage in any ex parte communication with any member of the arbitral tribunal;*
*(b) knowingly make any false statement to the arbitral tribunal;*
*(c) knowingly submit any false witness evidence to the arbitral tribunal, nor encourage or assist any witness to give false evidence;*
*(d) suppress or conceal any document that the party instructing that legal representative has undertaken, or has been ordered by the arbitral tribunal, to produce; or*
*(e) otherwise conduct themselves in a manner likely or calculated to obstruct, or jeopardize the integrity of the arbitral proceedings, or to create unnecessary delay or expense.*

*21.5 If the arbitral tribunal, having given the parties a reasonable opportunity to express their views, determines that any legal representative has breached any of the rules set out at Article 21.4, the arbitral tribunal may:*

*(a) issue a written admonition to the legal representative, including a warning as to his or her future conduct in the arbitration;*

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Castello, James E., 'Party Representation: Does Article 21 Mark a Trend?'. *BCDR International Arbitration Review* 4, no. 2 (2017): 357–376.

*(b) draw such inferences as the arbitral tribunal may consider appropriate in considering the evidence or statements relied upon by the legal representative;*
*(c) consider any effect that the actions of the legal representative should have on the apportionment of the costs of the arbitration, including the parties' legal costs; and*
*(d) take any other measures that the arbitral tribunal considers appropriate to preserve the fairness and integrity of the arbitration.*

*21.6 In determining whether to exercise any of the measures available under Article 21.5, the arbitral tribunal shall take into account the nature and seriousness of the breach; the potential impact of the exercise of the sanction on the rights of the parties, and on the enforceability of any award; and such other matters as it considers appropriate in the circumstances of the case.*

*21.7 The provisions of this Article do not displace any applicable mandatory laws or professional or disciplinary rules.*

The word 'trend' – whose origins date back more than a thousand years to the Old English *trinde*, meaning 'ball', and *trendan*, meaning 'to roll about, turn' – has two modern meanings. One – especially well known in Paris, where I base my practice – is 'fashion, mode'; the other – which is the sense in which I have written my title – is more serious: 'general tendency or direction'.[1] My title is framed as a question: Has the Bahrain Chamber for Dispute Resolution ('BCDR-AAA' or the 'Chamber') now fostered a general trend by adopting Article 21 of its 2017 arbitration rules (the '2017 BCDR Rules')? It is a query because, to my knowledge, Article 21 of the 2017 BCDR Rules marks only the second time that an arbitral institution has regulated attorney conduct through its rules of arbitration, and some practitioners may doubt whether two similar events suffice to create a 'trend'. But when those two occurrences build on a prior decade of scholarly commentary advocating the very development we are now witnessing, then perhaps we may speak of a 'trend' – especially when the new development is a good one. So, I hope to persuade readers by the end of this commentary that Article 21 does mark a trend and that it is one that those of us who use international arbitration should encourage other arbitral institutions to follow.

Article 21 certainly marks a new development for BCDR-AAA, since the previous version of its arbitration rules (2010) contained only one paragraph about party representatives (former Article 12), which was a very brief and general provision simply authorizing parties to be represented in arbitration and requiring that representatives' contact details be provided to the tribunal and to other parties. By contrast, the seven paragraphs in Article 21 of the 2017 BCDR Rules go much further: they (i) constrain parties' choice of representatives once an arbitration is ongoing, (ii) impose standards for the conduct of representatives during the arbitration, and (iii) set forth possible sanctions for the tribunal to apply if those

[1] *See* Collins English Dictionary (Complete and Unabridged Digital Edition 2012), https://www.dictionary.com/browse/trend?s=t (last consulted 14 August 2013).

standards are violated. BCDR-AAA has stated that these provisions 'draw on the IBA Guidelines on Party Representation in International Arbitration',[2] which were adopted in 2013. In fact, what Article 21 chiefly strives to do is to redress a problem that frequently arises when parties' counsel in an arbitration come from different legal systems with disparate ethical norms. More than fifteen years ago, Professor Catherine Rogers – one of the leading scholars on ethics in international arbitration – published a major article on this problem, noting that: 'As yet, no empirical research has been done to measure the full extent to which ethics conflict in international arbitration, but there are anecdotal reports that national ethics are colliding in arbitral proceedings with greater frequency and that these clashes are producing greater concern among participants.'[3] For example, under one legal system, counsel may feel obliged to comply fully with tribunal orders directing the production of documents even if harmful to the client's position while, under another legal system, counsel may believe it has an ethical obligation not to take affirmative actions that injure the client's legal interests, such as producing documents that may undermine a client's case. As Professor William Park has remarked: 'Cross-border arbitration may appear rigged against advocates that respect procedures not observed by the other side.'[4] Professor Rogers concluded in her 2002 article that, 'in the absence of a code of ethics that applies in international arbitration, attorneys have no justification for disregarding the ethical strictures of their home jurisdictions, even if they conflict with those of their opponents'.[5]

Before discussing Article 21's substance and how it regulates party representation in the three ways enumerated above, it is useful to canvass the scholarly and other developments that led up to Article 21's adoption, in order to see how those events foreshadowed this new element in BCDR-AAA's rules. Those prior events also make it possible to assess Article 21 in its full context.

I start by recalling the more general developments regarding the increase in 'soft law' instruments in the field of arbitration. A growing chorus of critics in recent years has complained about the proliferation of 'soft law' instruments directing how arbitrations should be conducted, which are said to be meddlesome and unnecessary. A common refrain from these sceptics is that overregulation is destroying arbitration's greatest advantage – its flexibility and adaptability to the

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2 Press Release, *BCDR-AAA Launches New Arbitration Rules* (5 October 2017), http://www.bcdr-aaa.org/bcdr-aaa-launches-new-arbitration-rules/ (last consulted 17 September 2018).

3 C.A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Int'l L. 341, 374 (2002).

4 W.W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30(3) Arb. Int'l 409, 410 (2014).

5 Rogers, *supra* note 3, at 374.

needs of each particular case, to the will of the parties, and to the experience of the arbitrators.

One memorable example of this 'protest literature' is an article of a few years ago by Mr Michael Schneider, then president of the Swiss Arbitration Association, which appeared under the humorous but acerbic title: 'The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and Other Methods Intended to Help International Arbitration Practitioners to Avoid the Need for Independent Thinking and to Promote the Transformation of Errors into "Best Practices"'.[6] As that article portended, Mr Schneider subsequently joined those who criticized the IBA's Guidelines on Party Representation in International Arbitration (2013), from which Article 21 of the 2017 BCDR Rules is said to derive. In Mr Schneider's view, those guidelines, 'while presented as the solution to what in reality appears only as a marginal problem, risk becoming a major source of procedural motions and disruption'.[7] One can expect that at least a few of the doubters who share Mr Schneider's concerns may react similarly to Article 21 of the 2017 BCDR Rules.

But far more numerous, I predict, will be those arbitration practitioners and scholars who recognize the problems that parties' selection of counsel – and counsel's conduct during arbitrations – can pose, and who welcome Article 21 not only as the logical outgrowth of a decade of serious thought in this area but also as the most workable method of forestalling the problems identified. We may count among these practitioners/scholars Professor William Park, who addressed the topic of regulating counsel conduct in a recent article entitled 'Equality of Arms in Arbitration: Cost and Benefits'.[8] As Professor Park admonishes, the question 'Do we need even more lawyer regulation?' inevitably invites 'an easy negative response' but is the wrong question to pose in assessing new regimes addressing counsel conduct in arbitration. The issue is one of *different* rather than more regulation. Is it appropriate to rely largely (as we do now) on national bars and courts for ethics rules governing a global practice like international arbitration? As Professor Park observes (in assessing both the IBA Guidelines on Party Representation in International Arbitration and the new standards for counsel conduct adopted in the 2014 LCIA Arbitration Rules), the relevant inquiries

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6 M.E. Schneider, *The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and Other Methods Intended to Help International Arbitration Practitioners to Avoid the Need for Independent Thinking and to Promote the Transformation of Errors into 'Best Practices'*, in L. Levy and Y. Derains (eds.), *Liber Amicorum en l'honneur de Serge Lazareff* 563 (Pedone 2011).

7 *President's Message: Yet another opportunity to waste time and money on procedural skirmishes: The IBA Guidelines on Party Representation*, 31 ASA Bull. 497, 500 (2013).

8 W.W. Park, *Equality of Arms in Arbitration: Costs and Benefits*, in V. Heuzé et al. (eds.), *Mélanges en l'honneur de Pierre Mayer* 663 (LGDJ 2015), http://www.bu.edu/law/faculty/scholarship/workingpapers/2015.html (last consulted 10 August 2018).

should be: 'First, will codes of conduct promote equality of arms among counsel? Second, will the costs of those codes outweigh their benefits?'[9] Article 21 of the 2017 BCDR Rules certainly meets the first test and, as further explained below, it should easily produce more benefits than costs, as well.

Since only the last five of Article 21's seven paragraphs actually pertain to counsel conduct, we need to consider first the specific background developments that led to inclusion of the article's first two paragraphs, which deal with a distinct but related problem: a party's ability to add new counsel during an ongoing arbitration. The circumstances prompting inclusion of these two paragraphs are well known by now and are illustrated by what occurred a decade ago in the ICSID arbitration *Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia*, when a respondent attempted to add new counsel just before the merits hearing, which threatened to require the reconstitution of the tribunal in the middle of an ongoing arbitration to avoid an arguable conflict.[10] The claimant in *Hrvatska* objected that the proposed new member of the respondent's legal team was a barrister in the London chambers where the tribunal president was a door tenant, which the claimant said would at least create an 'appearance of impropriety' as to the president's ability to remain impartial. The respondent countered that barristers in the same chambers did not share income and should therefore not be treated in the same way as law firm partners and that any refusal to allow the respondent's chosen new counsel to appear would violate its right to have the representation of its choice.[11]

The tribunal found that Slovenia's concern about the perceived ties among barristers from the same chambers was 'understandabl[e]', noting that even the IBA, when producing its first Guidelines on Conflicts of Interest in International Arbitration in 2004, had recognized that the views of English lawyers (who at that time generally believed that barristers from the same chambers could act in different capacities in the same case without creating conflicts) were often not shared by practitioners from other jurisdictions, who, 'particularly in light of the content of the promotional material which many chambers now disseminate, [have] an understandable perception that barristers' chambers should be treated in the same way as law firms'.[12] The *Hrvatska* tribunal ultimately relied on specific language in the ICSID Convention to conclude that, once a tribunal is constituted, the 'fundamental principle' that parties may choose their

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9 *Ibid.*, at 664.

10 ICSID Case No. ARB/05/24, Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings (6 May 2008), https://www.italaw.com/sites/default/files/case-documents/italaw6289.pdf (last accessed 30 September 2018).

11 *Ibid.*, paras. 12–23.

12 *Ibid.*, para. 19 (quoting *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 Bus. L. Int'l 433, § 4.5 (2004)).

representatives must 'give way' to the 'overriding principle . . . of the immutability of properly constituted tribunals'.[13]

Scholars and practitioners generally agree with the *Hrvatska* tribunal's resolution of this problem, since arbitral proceedings might otherwise be vulnerable to disruption at advanced stages if parties could strategically add potentially conflicting counsel.[14] However, it is understood that other tribunals may not be able to adopt the same reasoning as did the *Hrvatska* arbitrators since few, if any, arbitration rules contain a provision comparable to Article 56(1) of the ICSID Convention, providing that '[a]fter a . . . Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged'. Accordingly, over the last decade, a number of wording changes have been made in other major arbitration rules to enable tribunals operating under those rules to exclude proposed new counsel if their addition as counsel of record would necessitate a reconstitution of the tribunal in order to avoid a possible conflict.

For example, UNCITRAL made a subtle change in its 2010 Arbitration Rules by modifying Article 5 to read that 'Each party may be represented or assisted by persons *chosen by it*', rather than (as formerly provided) 'The parties may be represented or assisted by persons *of their choice*' (emphases added). According to the *travaux préparatoires*, delegates adopted this change specifically 'to avoid the implication that the party had an unrestricted discretion, at any time during the proceedings, to impose the presence of any counsel'.[15] Moreover, the drafters perceived the threat they were guarding against as broader than just the circumstances presented in *Hrvatska*. Thus, they believed a tribunal should be able to prevent, as well, the belated addition, 'for example, [of] a busy practitioner that would be unable to meet reasonable time schedules set by the . . . tribunal'.[16]

By contrast, when the LCIA revised its rules in 2014, the relevant new provision plainly stated its purpose in the text of the rules themselves. Thus, the new Article 18.3 provides that, once a tribunal is formed in a given arbitration, 'any intended change or addition by a party to its legal representatives . . . shall only take effect in the arbitration subject to the approval of the Arbitral Tribunal'. The inclusion of a specific undertaking in the rules that any change in counsel must be given tribunal approval may be necessary, particularly in light of an ICSID tribunal's ruling not long after *Hrvatska*, in which the tribunal appeared to question whether tribunals possessed inherent authority to exclude counsel, even if their

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13 *Ibid.*, paras. 24–25.

14 Indeed, a tribunal's power to implement such a result is expressly affirmed in Guidelines 5 and 6 of the IBA Guidelines on Party Representation in International Arbitration (2013).

15 *See* UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (New York, 5–9 February 2007)*, UN Doc A/CN.9/619, para. 63.

16 *Ibid*.

addition might create a conflict with the tribunal.[17] A few months after the LCIA adopted its new rules, the IBA issued its revised Guidelines on Conflicts of Interest in International Arbitration (2014), which grappled more extensively with the issue of possible conflicts between barristers belonging to the same chambers. The issue remained the subject of an item on the guidelines' famous 'Orange List', which comprises 'situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence'.[18] Item 3.3.2 on the Orange List describes this circumstance: 'The arbitrator and . . . the counsel for one of the parties, are members of the same barristers' chambers.' Any circumstance described on the Orange List that arises in a given case must be disclosed by the implicated arbitrator. However, a new General Standard 7(b) of the guidelines also requires the implicated party to disclose 'any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator'.[19]

The first paragraph of Article 21 in the 2017 BCDR Rules, which is similar to the corresponding LCIA provision, states that 'there shall be no addition to any party's legal representatives following the appointment of the arbitral tribunal without the prior written approval of the arbitral tribunal'. However, the second paragraph explicitly links this provision to the *Hrvatska* problem: 'The arbitral tribunal may decline to approve an addition to any party's legal representatives if, on proper disclosure, a relationship exists between the proposed additional legal representative and any member of the arbitral tribunal that would create a conflict of interest jeopardizing the composition of the arbitral tribunal or the integrity of the proceedings.' Since Article 21.1 is framed generally (so that *any* addition of counsel after the tribunal's constitution requires tribunal approval) and since Article 21.2 appears intended to illustrate, rather than exhaust, the circumstances covered by Article 21.1, one assumes that a tribunal operating under these provisions could also address other circumstances – like that hypothesized by UNCITRAL delegates, in which a party adds unduly busy counsel who cannot adhere to the tribunal's existing schedule.

Few practitioners would question the prudence of Article 21's first two paragraphs. Although they may marginally curtail parties' choice of additional

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[17] *See Rompetrol Group N.V. v. Romania*, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010, para. 22 (noting that whether 'the inherent authority' invoked by the *Hrvatska* tribunal 'to exercise such powers as are necessary to preserve the integrity and effectiveness of its proceedings' should 'extend to the exclusion of counsel is . . . a more open question', and ultimately leaving that question unresolved after finding no significant conflict between counsel and arbitrator) (ICSID arbitration under the Netherlands-Romania BIT), https://www.italaw.com/sites/default/files/case-documents/ita0718.pdf (last consulted 14 August 2018).

[18] *See* IBA Guidelines on Conflicts of Interest in International Arbitration, Part II: Practical Application of the General Standards, para. 3 (2014).

[19] *Ibid*., Part I: General Standards Regarding Impartiality, Independence and Disclosure § 7(b) (2014).

counsel in some cases, the potential constraint is no more than what is required to guard against potentially deliberate disruption of arbitrations in their advanced stages.

We turn, then, to the remaining five paragraphs of the new Article 21 and the scholarly developments that preceded them, which address the far more thorny issue of regulating counsel's conduct in the arbitration. What is unusual about the remainder of Article 21 is its reliance on arbitration rules to set standards for counsel conduct and on tribunals to enforce those standards. By contrast, the actual standards of conduct that Article 21 adopts are quite straightforward and should occasion little controversy.

Article 21 implicates a number of more general questions about regulating the conduct of party representatives. The first question is what institution or body *should* ideally regulate counsel conduct in international arbitral proceedings. Historically, at least, most lawyers would point to the bar organizations of which they are members as the logical body to regulate counsel's ethical duties. Even in the world of international arbitration, and even with respect to legal activity outside their home country, most practitioners continue to assume that the bar organizations to which lawyers have been admitted provide the ethical rules for counsel conduct. However, it is notable that a sizable minority of international practitioners have apparently come to doubt whether such regulations really do apply to their international activities. As Professor Rogers reports, according to the IBA's 2010 practitioner survey, only about 64% of respondents believed they *were* subject to the ethics rules of their home bars when appearing in an international arbitration. On the other hand, a further 27% claimed to have followed those rules 'in an abundance of caution'.[20]

Beyond such practitioner uncertainty, however, questions have increasingly been raised as to whether it is *appropriate* or *desirable* for local bars to regulate attorney conduct in international proceedings, given the multiple weaknesses of such regulation. One weakness, as already mentioned, is that different bars have different ethical rules so that international proceedings involving counsel from more than one jurisdiction may result in these lawyers' appearing on an 'uneven playing field' from the point of view of applicable ethical standards. In addition, even when accepted on its own terms, regulation of attorney conduct abroad by local bar organizations has significant deficiencies.

In general, national or local bar organizations follow one of three approaches to regulating international conduct. First, as Professor Rogers has noted, the counsel conduct regulations for many bars do not by their terms clearly apply outside of national courts (i.e. in international arbitral proceedings), or outside the

[20] C.A Rogers, *Ethics in International Arbitration*, para. 3.12 n.29 (Oxford 2014).

territory of the country in which the bar operates (which would thus exclude application to most international arbitral proceedings).[21] Second, of those bar regulations that clearly do apply to lawyers' conduct in foreign jurisdictions, many apply the same standards for conduct regardless of where the legal activity occurs. A prime example of this approach would be the English bar, since barristers remain subject to the same rules of conduct wherever the proceedings in which they appear may be located.[22]

Third, the ethics rules of certain bars incorporate some type of 'choice of law' provision, such that a lawyer acting abroad may be subject to standards of conduct linked (for example) to the site of the foreign proceeding as a result of the lawyer's own bar rules. In other words, the lawyer's own bar rules designate the foreign rules as applicable when the lawyer acts in the foreign jurisdiction. This is an approach with which lawyers admitted in European jurisdictions are to some extent familiar, but that prevails also in the United States, as discussed further below.

Now, as previously noted, if all of the counsel appearing in an international arbitration are admitted to practise in different jurisdictions that have either of the first two types of bar regulation (i.e. a bar that either does not expressly impose its rules of conduct on lawyers appearing in international arbitrations, or that *does* apply rules of conduct to foreign proceedings but the rules remain those that also apply in the 'home' jurisdiction), then these counsel may conduct themselves in the arbitration according to very different standards of conduct. And this 'uneven playing field' may result in a procedural unfairness if, for example, one party's counsel believes, as a matter of professional diligence, that he or she must meet with and prepare his or her party's witnesses before they are cross-examined, while the other party's counsel is subject to rules barring such contact with witnesses before the hearing. Or if one counsel believes he or she can make an untruthful statement to the tribunal if the client orders him or her to do so, while the other party's counsel believes this may not be done, because he not only represents the client but also serves as 'an officer of the court' (or of the arbitral tribunal).

Such unfairness may be partly mitigated if the arbitral process is conducted by experienced arbitrators who are alert to the difficulties posed when lawyers are subject to distinct legal and ethical traditions. But this respect for cultural differences may be cold comfort for the party that believes it is nonetheless disadvantaged because its counsel must play on an uneven field. This is a topic that

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[21] *Ibid*., para. 3.11 ('Few bar authorities expressly extend their ethical rules and regulatory authority extraterritorially or into foreign arbitration contexts' (footnote omitted)).

[22] *See* The Bar Standards Board Handbook, Rule rC2(2) ('Section 2.C [Conduct Rules] applies when practising or otherwise providing legal services') (3d ed. 2018).

was persuasively explored more than fifteen years ago by Mr V.V. Veeder in his Goff lecture in 2001, entitled 'The Lawyer's Duty to Arbitrate in Good Faith'.[23]

Those bar regulations that fall in what I have called the third category (i.e. that incorporate some 'choice of law' provision) may – at least on paper – eliminate the problem of inequality of arms. That problem might be solved if all the lawyers appearing in a foreign proceeding were made subject to the ethics rules of the jurisdiction in which that proceeding takes place – as a consequence of the lawyers' home bar rules. In that case, all counsel in an arbitration, for example, might be subject to the same standard of conduct and hence a 'level playing field'. But, even if that fortuitous result were to occur in some cases, the question would then arise whether such an arrangement is likely to be *effective* in ensuring that counsel *follow* those applicable local rules. To examine this issue further, it helps to look at a concrete example.

Article 8.5 ('Disciplinary Authority; Choice of Law') of the American Bar Association's Model Rules of Professional Conduct,[24] has been adopted in some form by every US state except New York as the rules of conduct to which lawyers admitted to practise in that state are bound. Clause (b) of that article contains a classic example of a choice of law provision, which reads in relevant part as follows:

> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise;

A number of problems may arise in seeking to make this rule *effective* in practice. First, when applying this provision, it is not always clear which jurisdiction's standards apply to particular conduct. For example, suppose a lawyer admitted to practice in Washington, DC is interviewing someone in Spain whom the lawyer *may* use as a fact witness in an arbitration seated in Geneva. When the lawyer interviews this witness, is he doing so 'in connection with a matter pending before a tribunal', even though the lawyer is not sure the interviewee will become a fact witness in the arbitration? If he is, then Article 8.5(b) (which governs the conduct of lawyers admitted in Washington, DC) seems to say that the lawyer's actions will be governed by Swiss rules of attorney conduct. If he is not, then presumably the lawyer's conduct will be subject to some other rules of professional conduct. In

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[23] V.V. Veeder, *The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith*,18(4) Arb. Int'l 431 (2002).

[24] Available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last consulted 10 August 2018).

either case, the lawyer's next task is to figure out what the content of either of those regulations may be when it comes to interviewing potential witnesses in an international arbitration.

If one were to stop ten lawyers on the street in Washington, DC and tell them that, were they to appear before an international tribunal in, say, Paris, they would be subject – by virtue of being a lawyer licensed in Washington, DC – to the ethical obligations of French lawyers during that foreign proceeding, it is likely that most of those ten lawyers would be surprised to learn this. Their surprise would be consistent with one of the further results of the IBA's 2010 survey (which was conducted by its Task Force on Counsel Conduct in preparation for what became the IBA Guidelines on Party Representation in International Arbitration). As the IBA later reported in the preamble to those guidelines, '[t]he Survey revealed a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration', and this was partly because 'party representatives in international arbitration may be subject to diverse and potentially conflicting bodies of domestic rules and norms'.[25]

Secondly, if it is already expecting a lot to ask a US lawyer – even a seasoned international practitioner – to know that his or her home jurisdiction applies foreign rules of attorney conduct as part of the local bar rules (pursuant to a provision like Article 8.5(b) of the ABA's Model Rules of Professional Conduct) and to know how to apply that provision to particular types of legal activity abroad, imagine how much more difficult this same learning process may be for the poor ethics officer of the local Washington, DC bar. He or she (like many Americans) may never have travelled abroad yet must decide which foreign standards may apply to certain attorney conduct, then determine the content of those standards (which are most likely written in a foreign language that the bar employee does not understand), then determine how those foreign standards are in fact applied by the relevant regulatory authority in that foreign jurisdiction, and finally conduct an investigation to establish the facts of certain conduct that occurred abroad to decide whether a local lawyer complied with the foreign standards when practising overseas. If this sounds like a very tall order, it is. The truth is that such an investigation by a US bar authority is, at best, exceedingly rare. And thus, even though it may appear on paper as though jurisdictions that apply a 'choice of law' provision like Article 8.5(b)(1) of the ABA's Model Rules are helping to redress the problem of uneven playing fields by subjecting their attorneys to a foreign standard of conduct that might also apply to other attorneys appearing in the same proceeding, in practice this form of regulation may not differ much from the second approach to regulating lawyers' international conduct

[25] IBA Guidelines on Party Representation in International Arbitration 1 (2013).

that I mentioned earlier, since the lawyers in question may still conduct themselves abroad on the basis of the default principle that they should follow their own bar's local standards of conduct. Indeed, Professor Rogers has noted that: 'Attorneys generally assume that their "home" ethical rules – meaning the rules of the jurisdiction where they are licensed – apply in international arbitration.'[26]

Although I have used here the example of a US rule of attorney conduct to try to bring the issue of uncertain standards into focus, the same difficulty in deciding what rules of conduct apply to attorneys appearing in an international arbitration is likely to precipitate the same degree of uncertainty in many non-US jurisdictions. As Mr Veeder famously framed the point in his Goff lecture: 'To the question: what are the professional rules applicable to an Indian lawyer in a Hong Kong arbitration between a Bahraini claimant and a Japanese defendant represented by New York lawyers, the answer is no more obvious than it would be in London, Paris, Geneva and Stockholm. There is no clear answer; but perhaps, as we shall see, there should and could be.'[27]

It may be thought that the problem of addressing conduct by counsel from different jurisdictions who appear in the same proceeding is rather academic; indeed, one may be tempted to ask whether uncertain or ineffective regulation of conduct actually produces much difficulty in practice, since international arbitration continues by and large to thrive. Yet, as arbitration has grown, so has its visibility, and with increased attention has come increased criticism – both by users and by certain sectors of the public, particularly in the context of investment arbitration.[28] These critiques have ranged from more general warnings that the failure to adopt better regulation risks undermining the integrity of the system to more pointed criticisms that the 'golden age' of arbitration is now at an end. In the first category, one may include Mr Doak Bishop's keynote speech at the 2010 ICCA congress in Rio de Janeiro, which emphasized that '[t]he lack of clarity as to which ethical rules apply [in international arbitral proceedings], the existence of conflicting rules and obligations, the non-transparency and the increased size of many proceedings, combined with greater public scrutiny, creates a certain instability in the system that could result in a future crisis of confidence'.[29] He concluded that 'a uniform, binding Code of Ethics is a necessary part of maintaining that public confidence' and urged 'the major arbitral institutions to

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[26] Rogers, *supra* note 20, para. 3.12.

[27] Veeder, *supra* note 23, at 433.

[28] *See e.g.* G. Alvarez et al., *A Response to the Criticism of ISDS by EFILA*, 33(1) J. Int'l Arb. 1, 3 (2016) (rebutting, inter alia, the claim that investment treaty arbitration 'allows partisan, self-interested arbitrators to secretly overrule governments with no right of appeal').

[29] D. Bishop, *Ethics in International Arbitration* 10 (2010), https://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf (last consulted 13 August 2018).

incorporate a uniform Code of Ethics into their Arbitral Rules, thus making the Code expressly binding as a matter of the parties' contractual consent'.[30]

In the second category of more pointed criticism of the international arbitral system, one must include several speeches – which have resonated quite widely – by Singapore's former attorney general and now chief justice of the Supreme Court, Sundaresh Menon, who was formerly an arbitration practitioner in private practice. Attorney General Menon's keynote speech at the Singapore ICCA congress in 2012, which was regarded as a wake-up call to the profession, largely focused on problematic ethical issues implicating arbitrators. However, in subsequent addresses, including a keynote speech at the conference of the Chartered Institute of Arbitrators in Penang, Malaysia in 2013 (by which time he had become the chief justice), he focused directly on problems surrounding counsel conduct.

In that Penang address, for example, the chief justice noted that the growth in new entrants into arbitral practice, who 'bring with them their own conceptions of what constitutes ethically acceptable conduct', posed new dangers.[31] In that regard, he highlighted 'a recent survey which reported that 68% of respondents had experienced ethical misconduct and even deployment of guerrilla tactics in international arbitration, such as . . . 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'. He further noted that: '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.'[32] Chief Justice Menon thus concluded that at least two responses were needed: first, 'the development and implementation of codes of ethics to set uniform standards for arbitrator and counsel conduct' and, second, 'for arbitral institutions to play a larger role in developing and implementing a regulatory framework to apply and enforce such standards'.[33]

Thus, by the time that Professor Rogers published her seminal book on *Ethics in International Arbitration* in 2014, she could note that '[a]n increasing and increasingly vocal number of leading arbitrators and practitioners have described the current absence of ethical regulation as a potential crisis that can threaten the legitimacy of international arbitration'.[34] In that same year, the LCIA became the

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30 *Ibid.*, at 10, 12.

31 S. Menon, *Some Cautionary Notes For An Age Of Opportunity* 4 (22 August 2013), https://bit.ly/2KMFE8G (last consulted 11 August 2018).

32 *Ibid.*, at 5.

33 *Ibid.*, at 11.

34 Rogers, *supra* note 20, para. 3.103 (footnote omitted).

first major arbitral institution to address the challenge that she, Doak Bishop and Chief Justice Menon had raised. In the 2014 LCIA Arbitration Rules, Article 18.5 stipulated for the first time that: 'Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation.' By means of this assent mechanism, these rules place application of the annex's standards of conduct on a contractual footing, as Mr Bishop had suggested, thus sidestepping any questions about the institution's 'inherent authority' to regulate attorney conduct or a tribunal's right to enforce such standards. It appears that the decision to regulate counsel conduct through arbitral institutions' own rules has met with considerable approval. The *2015 International Arbitration Survey* conducted by Queen Mary University posed the question 'What would be the most effective way to "regulate" the conduct of party representatives?' and, among five alternative choices provided, a significant plurality of respondents (36%) chose 'through institutional rules, such as the annex to the 2014 LCIA Rules'.[35]

The conduct guidelines set forth in that annex embody the kinds of basic obligations of good faith that experienced practitioners would normally follow. They require counsel of record to refrain from 'activities intended unfairly to obstruct the arbitration', to 'not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court', to 'not knowingly procure . . . or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court', to 'not knowingly conceal or assist in the concealment of any document . . . ordered to be produced by the Arbitral Tribunal', and to not deliberately initiate or attempt to initiate *ex parte* contact with the tribunal or the LCIA Court concerning the arbitration or the parties' dispute.[36] Finally, the annex confirms that if any counsel is found to have violated these conduct guidelines following a complaint from another counsel of record (or from the tribunal, *sua sponte*), the tribunal – after giving the parties an opportunity to be heard and giving the counsel in question a chance to respond to the complaint – may decide if the guidelines were violated and, if so, may impose in its discretion one or more sanctions authorized in Article 18.6. The enumerated sanctions include any or all of a written reprimand, a written caution as to future conduct in the arbitration, and 'any other measure necessary' for the tribunal to fulfil its own duty, that is, to provide each party with

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[35] School of International Arbitration, Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* 41, https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf (last accessed 31 August 2018).

[36] Annex to the LCIA Arbitration Rules, paras. 2–6 (2014).

'a reasonable opportunity to put its case' and to ensure a fair, efficient and expeditious resolution of the dispute.

I had the privilege of serving on the subcommittee of the LCIA Court charged with drafting the 2014 rules, which was chaired by Mr V.V. Veeder, and I can therefore attest that the novelty of the approach set forth in Article 18.5 and the annex prompted some initial concerns within both the LCIA Court and the community of those who use the LCIA rules. Some users from non-Western legal systems expressed the worry that, although the standards were objectively described and difficult to disagree with, some tribunals might treat mere cultural differences in styles of advocacy as actually violating the standards of conduct (such as the pledge not to disrupt the arbitration). Others feared that incorporation of the standards might frighten away users of the rules. However, as the consultation process and drafting evolved, more and more practitioners came to see the logic of the new approach.

It was recognized, for example, that institutions promulgating arbitration rules were best situated to obtain parties' acceptance of standards for counsel conduct and that arbitrators, certainly more than bar authorities, could best judge the underlying intent and impact of counsel's misconduct, having witnessed it first hand and being familiar with the surrounding context. Moreover, the proposed list of standards in the annex to the LCIA rules focused on the most basic obligations and was preferred by many to (for example) the broad array of twenty-seven standards of conduct contained in the IBA Guidelines on Party Representation in International Arbitration, which had been promulgated the previous year. Indeed, it was undoubtedly the breadth of those guidelines' scope that provoked much of the criticism they received.

One example of what prompted such criticism may suffice: namely, Guideline 12, which was the topic of much discussion at an LCIA symposium that I attended in Asia not long after the IBA guidelines were unveiled. Guideline 12 provides that 'When the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration.' I recall that at the LCIA symposium, during discussion of this so-called 'litigation hold' provision, the general counsel of an Asian company took the floor to state that if his outside counsel instructed him to follow such a requirement, he would tell his company's employees to preserve all of the helpful documents and destroy all the others.

It is not my purpose here to engage with the criticism that has surfaced of the IBA Guidelines on Party Representation in International Arbitration. On the

whole, I find much to admire in those guidelines. But I think it is clear that, like the preceding 2004 IBA Guidelines on Conflicts of Interest in International Arbitration (whose Red, Orange and Green Lists initially elicited much criticism) and even the earlier 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration, which were originally criticized for allegedly acquiescing in too many practices (such as document disclosure) originating in the common law courts, the Guidelines on Party Representation – at least to date – have been treated as merely aspirational norms by some parties and as a dangerous misstep by others. This perception is confirmed by Queen Mary School of International Arbitration's *2015 International Arbitration Survey*, which reported that 69% of the respondents found the IBA Rules on the Taking of Evidence in International Arbitration to be an 'effective' instrument, while the corresponding number for the IBA Guidelines on Party Representation in International Arbitration was only 28%, with the remaining respondents finding the latter instrument to be either 'neutral' or 'not effective'.[37] Only over time will we be able to determine whether these guidelines will become a reference point for our profession through increased use.

In the meantime, it is worth noting that, although most international arbitrations today are conducted by reference to the IBA Rules on the Taking of Evidence in International Arbitration, relatively few terms of reference or party arbitration agreements subject the parties contractually to the IBA Guidelines on Party Representation in International Arbitration – probably, because of parties' and arbitrators' persistent belief that their arbitration either will not require such extensive ethical regulation or will require greater flexibility on certain matters than those guidelines allow. For these and other reasons, the LCIA did not consider importing anything like the IBA guidelines into its own rules and instead turned to the much narrower statement of certain basic principles of conduct that is now set forth in the rules' annex and which was designed to establish a core of common standards governing counsel in LCIA proceedings.

It is especially worth noting that the possible sanctions for violating the standards of conduct in the LCIA rules' annex do *not* include any referral of challenged counsel conduct to a bar organization with power to discipline allegedly misbehaving counsel. Although this option was considered, it was ultimately rejected on the ground that whether or not counsel is disciplined lies beyond an arbitral institution's proper realm of concern. Rather, a tribunal should concern itself only with ensuring that counsel represent their respective parties on an equal terrain in the arbitration and that the arbitration itself proceeds in an efficient and fair manner. Indeed, the annex expressly states (as do the IBA's own

[37] *See supra* note 35, at 36.

Guidelines on Party Representation in International Arbitration) that it does not displace any regulatory authority's rules of conduct to which counsel may otherwise be subject. In any event, any putative conflict between local bar rules and the annex's guidelines for conduct seems unlikely. It would be surprising, for example, if any counsel could demonstrate that the rules of his or her local bar authorize counsel to manufacture false evidence or to lie to a tribunal. The one possible area of divergence might be production of evidence ordered to be disclosed, since counsel from certain civil law jurisdictions sometimes maintain that they cannot be compelled to produce documents that are harmful to their client's case. But, even regarding this discrete issue, the annex may well serve to focus the debate on the precise contours of any conflict, which in fact is often far more apparent than real.

There was one other factor that motivated the LCIA to act in this area. If arbitral institutions take no concrete action to address the types of criticisms levelled by Chief Justice Menon, other regulators outside our field of practice who have a much poorer understanding of arbitration may seek to fill the void. It is particularly feared that national or regional bar authorities who often have no particular understanding of the distinctive problems and needs of international arbitration may seek to impose regulation on a specialized practice with which they are unfamiliar.

The most important point to be gleaned from the LCIA's adoption of its 2014 rules is that none of the concerns voiced in advance about the rules' annex has materialized. Fears that the standards might be wielded, for example, in a capricious manner against counsel from non-Western legal systems proved entirely unfounded. In fact, the LCIA registry reports that it is not aware of a single case since the 2014 rules went into effect in which either counsel or a tribunal has charged another counsel with violating the annex's standards of conduct, which would implicate the possible imposition of sanctions. Some may contend that this proves the annex was never necessary in the first place. But since the annex's standards are quite clear and therefore transgression of those standards would be readily flagged by counsel aggrieved by such misconduct, LCIA officials tend to draw a different conclusion from the apparent absence of formal complaints about violations of the annex. It is believed that the annex is likely having its desired effect by dissuading counsel who may be tempted to violate the specified standards of conduct from doing so and by providing counsel with a justification (namely, the threat of possible sanctions) for resisting any directive to disregard those standards that any client may issue.

This completes the summary of developments during the decade leading up to BCDR-AAA's adoption of Article 21 in the 2017 BCDR Rules. It can readily be seen that the five particular standards of conduct imposed in Article 21

essentially match the five set forth in the annex of the 2014 LCIA rules, and this is perhaps not surprising inasmuch as the BCDR-AAA drafting committee for its new rules included a former director general of the LCIA whose service overlapped with the 2014 rules' adoption. On the other hand, the wording of the BCDR-AAA provisions differs considerably from that of the LCIA annex and the inspiration that BCDR-AAA has cited for Article 21 is actually the IBA Guidelines on Party Representation in International Arbitration, rather than the LCIA rules. Indeed, four of the standards of conduct set forth in Article 21 are also included in those IBA guidelines, beginning with the prohibition on *ex parte* communication (Article 21.4(a)) between counsel and any member of the tribunal about the arbitration, which is set forth in IBA Guideline 7. The IBA's commentary states that, with respect to this provision, the guidelines 'seek to reflect best international practices'.[38]

Similarly, Guideline 9 provides that counsel 'should not make any knowingly false submission of fact to the Arbitral Tribunal', which corresponds to the requirement of Article 21.4(b). In this regard, the IBA's commentary clarifies that, although 'the Party Representative must have actual knowledge of the false nature of the submission', such knowledge 'may be inferred from the circumstances'.[39]

As noted, Article 21.4(c) of the 2017 BCDR Rules bars counsel from 'knowingly submit[ting] any false witness evidence to the arbitral tribunal', or encouraging or assisting 'any witness to give false evidence', and this provision has an antecedent in IBA Guideline 11, which has similar wording. Finally, Article 21.4(d) of the 2017 BCDR Rules provides that counsel should not 'suppress or conceal any document' that the party retaining such counsel has either undertaken to produce or has been ordered (by the tribunal) to produce. This requirement is also subsumed within the corresponding IBA provision, Guideline 16, but the latter text contains a broader proscription, barring suppression of any document that is even 'requested by another Party'.

With respect to Article 21.4(e), which enjoins counsel from conducting themselves 'in a manner likely or calculated to obstruct, or jeopardize the integrity of the arbitral proceedings, or to create unnecessary delay or expense', this provision does not have any full counterpart in the IBA guidelines. (Only in the much narrower context of document production does Guideline 13 enjoin counsel from requesting or objecting to production 'for an improper purpose, such as to harass or cause unnecessary delay'). Paragraph 2 of the LCIA rules' annex is perhaps closer to Article 21.4(e), since it provides that counsel 'should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the

[38] IBA Guidelines on Party Representation in International Arbitration 7 (2013).
[39] *Ibid*., at 9–10.

finality of any award', giving as an example repeated challenges to a tribunal's jurisdiction or an arbitrator's appointment that counsel knows to be legally unfounded.

It may be objected that the five standards of conduct set forth in Article 21.4 of the 2017 BCDR Rules are too limited in scope and that the drafters should have sought to cover a wider range of conduct on which ethical standards may diverge. For example, much has been written about the contrasting traditions in different legal systems regarding counsel interviews of witnesses prior to their testimony.[40] With respect to that particular issue, however, it has now been nearly twenty years since the IBA first issued its Rules on the Taking of Evidence in International Commercial Arbitration (1999), providing in Article 4(3) thereof that: 'It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.' In subsequent years, a number of national bars that traditionally prohibited such pre-testimonial witness contact have recognized its propriety in international arbitration.[41] Thus, the drafters of the 2017 BCDR Rules may have felt that, as Professor Rogers has observed, 'the international arbitration community appears to have developed consensus on the issue of pre-testimonial communication'.[42] A more general rebuttal to the complaint that Article 21.4 of the 2017 BCDR Rules sets too few unified standards would be the rejoinder given by Professor William W. Park when confronting similar criticism of the LCIA rules' annex for its allegedly overly narrow scope: '[I]t should not be surprising that standards go too far for some, while not far enough for others. Any good faith attempt to create a better playing field implicates some trial and error, with compromise in demand during the search for an optimum of aggregate social and economic welfare.'[43] Obviously, BCDR-AAA may expand its standards of conduct in future iterations of their rules if it deems that appropriate.

The final three paragraphs of Article 21 deal with potential violations of the standards of conduct set forth in Article 21.4 and the possibility of seeking sanctions against counsel for such violations. Much like Article 18.6 of the LCIA rules, Article 21.5 requires a tribunal to hear the parties' views before deciding that a standard has been breached and whether to order a sanction (although it does not expressly require that the accused counsel be heard as well). And, as with LCIA Article 18.6, BCDR Article 21.5 also sets forth suggestions for possible sanctions

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40 *See e.g.* Rogers, *supra* note 20, at 111–17 (and sources cited therein).

41 *Ibid.*, at 115–16 (citing a resolution adopted by the Paris Bar and language adopted in the deontological code of the Brussels Bar and in the Swiss deontological code).

42 *Ibid.*, at 114 (*but cf. ibid.*, noting that, despite the apparent consensus, there is a 'continued divergence of opinions regarding the nature and extent of permissible communication with witnesses').

43 W.W. Park, *supra* note 4, at 426.

that include a written admonition or a warning as to future conduct, as well as a residual category of other possible measures described as those 'that the arbitral tribunal considers appropriate to preserve the fairness and integrity of the arbitration'. Once again, this description seems designed to exclude any tribunal referral of a counsel's conduct for possible sanctions by a local bar association, which would not plausibly improve the proceeding's own 'fairness'. It will be interesting to see if these mechanisms for alleging improper conduct and for assessing possible sanctions are invoked at all in the years ahead. But even if, as with the LCIA's recent experience, such provisions are not invoked, it would again be wrong to assume that Article 21 will have served no purpose. On the contrary, by advising parties of the uniform ethical standards that counsel of all nationalities must follow in BCDR-AAA arbitrations, the Chamber may succeed in dissuading parties (and their counsel) from risking sanctions and may thus contribute to ensuring a more level playing field that will better serve arbitration practitioners everywhere.