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APPLICABLE ETHICAL FRAMEWORK IN COMMERCIAL AND INVESTMENT ARBITRATION

Jonathan Brosseau*

In memoriam H. Patrick Glenn
To whom I owe much of my understanding about ethics – and law

International law is not only a field in which rules and principles attempt to control the behaviour of its disparate but ever-increasing participants,¹ but also a legal tradition with a singular way of conceiving the past, the present, and – one should hope – the future.² Every day, a diverse group of professionals practices international law, including advisers, party representatives, judges, arbitrators, scholars and policy-makers.³ As one of the most salient examples of global institution building in the 20th century,⁴ international arbitration has overcome the historic monopoly and hostility of national courts⁵ and developed into a topic of its own within this supranational legal order.⁶ In this journey, arbitration has fostered a legal culture specific to its

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¹ The existence of an international judicial system (J. S. Martinez, ‘Towards an International Judicial System’, *Stanford Law Review*, 56 (2003), 429); or global legal system (A.-M. Slaughter, ‘Judicial Globalization’, *Virginia Journal of International Law*, 40 (2000), 1103), is now widely recognized, although the autonomy of this system from national laws is sometimes questioned in the context of private justice or international commercial arbitration. *See, e.g.*, J. Paulsson, ‘International Arbitration Is Not Arbitration’, *Stockholm International Arbitration Review*, 1 (2008), 1.

² C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983), Ch. 8 (‘Local Knowledge: Fact and Law in Comparative Perspective’), 183 (‘Law, here, there, anywhere, is part of a distinctive way of imagining the real.’).

³ *See, generally*, J. Crawford, ‘The International Law Bar: Essence Before Existence?’, in J. d’Aspremont *et al.* (eds.), *International Law as a Profession* (Cambridge University Press, 2017).

⁴ A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017), Ch. 1 (‘Judicialization and Arbitral Governance’).

⁵ Y. Dezalay and B. G. Garth, ‘Marketing and Selling Transnational “Judges” and Global “Experts”: Building the Credibility of (Quasi)Judicial Regulation’, *Socio-Economic Review*, 8 (2010), 113, 120; Y. Dezalay and B. G. Garth (eds.), *Lawyers and the Rule of Law in an Era of Globalization* (Routledge, 2011), 260.

⁶ As the modern system of international arbitration grew into its own in the 1960s, 1970s and 1980s, practitioners and academics were called upon to provide ‘the source of legitimacy of international arbitration, namely the source of the arbitrator’s power to adjudicate.’ Professor Gaillard is one of those who spent a lifetime answering this very question. He is a proponent of the transnational vision, which ‘recognizes an arbitral legal order that is founded on national legal systems, while at the same time transcending any individual national legal order.’ *See* E. Gaillard, ‘Transcending National Legal Orders for International Arbitration’, in A. J. van den Berg (ed.), *International Arbitration: The Coming of a New Age? (ICCA Congress Series, no. 17)* (Kluwer, 2012); E. Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010), Ch. I (‘The Representations of International Arbitration’). In this Compendium, *see also* E. Gaillard, Ch. 1.2 – ‘Theories of Arbitration.’

community where obligations emerge from the values shared by its participants and the institutions they have erected.⁷

Despite this progress, one type of breakdown can significantly disrupt the tradition of international arbitration, as with other traditions generally. As Professor Glenn explained, institutional and intellectual ‘corruption,’ which may not necessarily be criminal, will invariably destroy any system from within.⁸ Institutions can either promote *or* oppose improper behaviour.⁹ To properly fulfil its function, arbitration must constantly strive to uphold an ethic that fosters the mission and logic of the rule of law. This represents a tall order because arbitration participants come from the four corners of the earth and no supreme bodies are charged with their comprehensive ethical regulation at the international level.¹⁰

The rapid expansion of investment arbitration and the public attention it has received in the past fifteen years has brought increased scrutiny about the legitimacy of this dispute settlement mechanism, especially on ethical issues.¹¹ This vigorous debate has driven apart not only the public and civil society, but also members of the arbitration community itself.¹² In an October 2017 letter, hundreds of law and economics professors, including leading thinkers such as Nobel laureate Joseph Stiglitz, went so far as to make the somewhat misleading claim that, ‘there is no

⁷ W. Kidane, *The Culture of International Arbitration* (Oxford University Press, 2017); J. Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press, 2013); A. J. van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration Culture (ICCA Congress Series, no. 8)* (Kluwer, 1998). Cf. M. Sornarajah, *The International Law on Foreign Investment*, 4th ed. (Cambridge University Press, 2017), 61-7 (highlighting the Western bias of investment arbitration); A. Roberts, *Is International Law International?* (Oxford University Press, 2017) (using empirical data to challenge that international law today is ‘universal’ and to show how Western academic approaches have had a disproportionate influence in defining what counts as the ‘international’).

⁸ H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed. (Oxford University Press, 2014), 28.

⁹ W. W. Park, ‘A Fair Fight: Professional Guidelines in International Arbitration’, *Arbitration International*, 30 (2014), 409.

¹⁰ See *infra* Section IV.C.

¹¹ See, e.g., M. Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’, in K. P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008); A. Afilalo, ‘Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11’, *Northwestern Journal of International Law and Business*, 25 (2005), 279; S. D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’, *Fordham Law Review*, 73 (2005), 1521; A. Afilalo, ‘Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis’, *Georgetown International Environmental Law Review*, 17 (2004), 51; C. N. Brower *et al.*, ‘The Coming Crisis in the Global Adjudication System’, *Arbitration International*, 19 (2003), 415.

¹² See, e.g., S. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) (out of the twenty-five contributions in the book, some acknowledge the crisis, while others do not).

oversight or accountability of the private lawyers who serve as arbitrators.’¹³ This negative press has also sometimes (indiscriminately) spread to commercial arbitration.¹⁴

The myths, realities and challenges associated with ethics in both fields of international arbitration may be easily mixed up.¹⁵ Nevertheless, stakeholders have made impressive strides to improve participants’ professional conduct.¹⁶ This chapter aims to contribute to this endeavour through an informed discussion of ethical issues based on facts and figures. It argues that the New York and ICSID Conventions shape the applicable ethical obligations of arbitration participants, which today are sometimes present, sometimes absent, and sometimes distant; that is, these conventions induce light, darkness and shadow in the arbitral ethical space.¹⁷ These matters, and professional conduct more broadly, are of practical and theoretical importance in the field.

While contributions typically address the various participants separately, this chapter seizes the opportunity to discuss them all together as much as possible. The goal is to depict broad trends in arbitration and to inform each participant – who can play multiple roles simultaneously¹⁸ or concurrently¹⁹ in the system – about its relationship with others. Given the breadth of the topic, it cannot address in the allotted space all aspects related to each participant. As such, the chapter is intended for practitioners primarily as an introduction to ethics and as an overview of the key topics and issues. Scholars and policy-makers, for their part, may sink teeth even further into the theoretical and critical insights it intends to provide about the dynamics of the system and the

¹³ Public Citizen, ‘230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts’ (25 October 2017), 2, available at www.citizen.org/wp-content/uploads/migration/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf (last accessed 5 January 2020). Contra McGill University, Yves Fortier Chair, ‘An Open Letter About Investor-State Dispute Settlement’ (20 April 2015), available at www.mcgill.ca/fortier-chair/isds-open-letter (last accessed 5 January 2020) (‘International arbitration includes a number of procedural protections that resemble protections often found in national court systems.’).

¹⁴ See T. Jones and A. Ross, ‘Let There Be Light’, *Global Arbitration Review* (19 April 2018), available at www.globalarbitrationreview.com/article/1168168/-let-there-be-light (last accessed 5 January 2020) (Sir Bernard Rix closed the 2018 ICCA event in New Zealand by opining there is a feeling that both commercial arbitration and investment are too private, self-interested, unaccountable and un-transparent to be legitimate). For an in-depth analysis, see Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 218-52.

¹⁵ A. J. van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges (ICCA Congress Series, no. 18)* (Kluwer, 2015).

¹⁶ See *infra* Section IV. See especially C. A. Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014) (in his foreword, Reisman rightly notes the book ‘reshapes the intellectual landscape of this fundamental dimension of international arbitration’); ‘Bibliography: Ethics in International Arbitration’, *Arbitration International*, 27 (2011), 527.

¹⁷ As part of – and contributing to – applied ethics and normative theory, the chapter seeks to contribute to defining moral standards in international arbitration. The argument elaborated is more in line with consequentialism than with virtue ethics or the deontological theories behind the traditional regulation of professionals. See also Jones and Ross, ‘Let There Be Light’ (2018) (In the final speech of the AMINZ-ICCA International Arbitration Day in Queenstown, Sir Bernard Rix opined, ‘in the dark, things go astray... Light, however uncomfortable at times, is cleansing and uplifting.’).

¹⁸ For instance, they can be party representatives and third-party funders in the *same* proceedings: see C. Kaplan, ‘Third-Party Funding in International Arbitration: Issues for Counsel’, in B. M. Cremades and A. Dimolitsa (eds.), *Third-Party Funding in International Arbitration* (ICC Services, 2013).

¹⁹ For instance, they can be party representatives and arbitrators in *different* proceedings: see Park, ‘A Fair Fight’ (2014), 416-7 (‘Sitting as arbitrator, attorneys might struggle between their obligations as members of the bar, to make a disciplinary report, and their duties to respect the parties’ legitimate expectation that the proceedings will remain confidential.’). On ‘role-switching,’ see *infra* Section II.B.

potential for reforms. The chapter attempts to deal with a multitude of issues and to connect them conceptually, even if this is a tall task that proves challenging at times.

The chapter focuses more on the concepts underlying the various ethical themes than the solutions adopted in particular jurisdictions. It also highlights the commonalities on ethics in international arbitration generally.²⁰ Common themes indeed emerge from participants' ethical regulation in both commercial arbitration and investment arbitration,²¹ which share many procedural aspects and, at times, even parties, subject matters and governance traits. Despite these similarities, States' participation in arbitral proceedings raises special considerations that do not appear in typical commercial arbitration between private parties. Among others, states-as-litigants involve public policies with regulatory aims and affect a broad range of political institutions.²² Furthermore, investment arbitration, where states act as the sole respondents, is a global public law system providing a unique form of governance.²³

This distinction is drawn, not to address the ethics *of* international arbitration and the system's legitimacy as a whole,²⁴ but rather to better study ethics *in* international arbitration and the legitimacy of its participants' conduct. The mere participation of states (or democratic states at least) in arbitral proceedings calls for heightened and more transparent ethical regulation of its participants.²⁵ In investment arbitration, disputes have legal and policy impacts far beyond a specific respondent state and its population – that is, on foreign investors, civil societies and other states more generally. These repercussions, brought about by the near systematic publicization and the eventual consideration of investment awards by all actors in their decision-making process, make stringent ethical obligations crucial in investment arbitration,²⁶ especially for arbitrators.²⁷

²⁰ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 6 (seeing the difference between investment and commercial arbitration as a matter of degree and not of kind).

²¹ T. Landau, 'A Pause for Thought', in van den Berg (ed.), *International Arbitration: The Coming of a New Age?* (2012), 18 ('As we contemplate these problems of moral hazard, ethics, inadequate supply and conflicts of interests associated with international arbitrators, it seems surprising that there are no controls or regulations to maintain the quality, standards and legitimacy of the industry.').

²² See J. K. Sharpe, 'Representing a Respondent State in Investment Arbitration', in C. Giorgetti (ed.), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill, 2014).

²³ A. Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012), 97.

²⁴ H. P. Glenn, 'The Ethic of International Law', in D. E. Childress (ed.), *The Role of Ethics in International Law* (Cambridge University Press, 2012), 246 (opining the ethic of international law 'consist[s] of the set of moral or normative principles that have controlled, and that continue to control, what we have known since Bentham as international law.'). In this Compendium, see D. Fernandez Arroyo, Ch. 12.4 – 'Legitimacy of International Arbitration: Commercial v. Investment Arbitration' and S. Schill, Ch. 12.5 – 'Legitimacy of Investment Arbitration.'

²⁵ K.-H. Böckstiegel, 'The Role of the Arbitrators in Investment Treaty Arbitration', in A. J. van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer, 2003), 373-4 (analyzing particularities of states as disputing parties).

²⁶ In this Compendium, see M. Bungenberg, Ch. 2.3 – 'Investment Arbitration and Democracy' and A. K. Bjorklund, Ch. 1.5 – 'Particularities of Investment Arbitration.' See also European Union, *Possible Reform of Investor-State Dispute Settlement (ISDS)* (A/CN.9/WG.III/WP.145, UNCITRAL Working Group III 2017), 3-5; G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), Ch. 7.

²⁷ J. Paulsson, *The Idea of Arbitration* (Oxford University Press, 2014), 149. See also *infra*, Section II.A.

This chapter engages principally with one type of ethical regulation, namely institutional controls.²⁸ This clarification is important because it helps to dispel confusion in the policy discussion about the appropriate function of arbitration’s ethical governance. It specifies as well the scope of analysis, thus ensuring that readers with different backgrounds share a common understanding about the subject of study.²⁹ As Wilkins explains, various mechanisms may function to enforce ethical standards within a legal system, each of them serving different objectives. While *liability controls* offer reparation to injured parties based on *ex-post* complaints, *institutional controls* sanction misconduct promptly and directly within the organizations where participants work to ensure their proper functioning.³⁰ Despite these differences, both types of controls share conceptually an important trait: they are equally concerned with protecting a party with ‘vested interests’ from potential wrongdoings. In comparison, *disciplinary controls* focus on punishment and deterrence for the sakes of the public and stakeholders largely.³¹

In international arbitration, most (if not all) ethical issues are currently handled through institutional controls based on procedural rules – and rightly so.³² Participants must abide by ethical rules within the institutions in which they operate to preserve the fairness and integrity of arbitral proceedings.³³ This requirement is the linchpin of arbitration’s key coordinating instruments,³⁴ namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’)³⁵ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’).³⁶

²⁸ See, similarly, Rogers, *Ethics in Arbitration* (2014), para. 6.20, n. 20 (‘[R]egulation [is] a sustained and focused attempt to ensure that the conduct of arbitrators, attorneys, experts, and third-party funders comports with ethical standards in order to ensure the fairness of arbitral outcomes.’).

²⁹ In a conference on party representatives’ ethics, the panel was asked to further define the notion of ethical regulation precisely because of its incidence on the current understanding and ways forward with standard of conduct in the system. See E. O’Hara O’Connor *et al.*, ‘Who Should Regulate the Advocates and What Should Be Regulated? The Future of Ethics Regulation in International Arbitration’, *World Arbitration & Mediation Review*, 10 (2016), 335, 355.

³⁰ D. B. Wilkins, ‘Who Should Regulate Lawyers’, *Harvard Law Review*, 105 (1992), 799, 806-8.

³¹ Wilkins, ‘Who Should Regulate Lawyers’ (1992), 805-6.

³² Swiss Arbitration Association, ‘ASA Working Group on Counsel Ethics Releases Latest Findings’, *Arbitration-ch* (3 October 2016), Recommendation 2, available at www.arbitration-ch.org/en/asa/asa-news/details/993.asa-working-group-on-counsel-ethics-releases-latest-findings.html (last accessed 5 January 2020) (‘It would appear that what is sometimes referred to as issues of “counsel ethics” actually relates to [a] orderly conduct and integrity of the arbitral proceedings, [b] admissibility and weighing of evidence and [c] independence and impartiality of arbitrators.’). Moreover, most participants are not subject to liability controls: on immunity from legal process, see *infra* Section III.A.

³³ O’Hara O’Connor *et al.*, ‘Who Should Regulate the Advocates and What Should Be Regulated?’ (2016), 339 (‘[T]here is a necessity [...] for regulating conduct that is relevant to a specific international arbitration case, such as to prevent improper counsel conduct that could compromise the integrity or the fairness of the case, or to disqualify counsel for a conflict of interest in a given case.’).

³⁴ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 30-31 (‘The New York and ICSID Conventions, which have been ratified by the vast majority of states, perform inherently constitutional functions. These treaties explicitly recognize arbitral authority, and require national judges to enforce awards, subject to exceptions such as “public policy” and “in arbitrability.”’).

³⁵ United Nations, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 UST 2517, 330 UNTS 38 (7 June 1959), Article V.

³⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (14 October 1966), Article 52(1).

In contrast with national authorities, forums in international arbitration today do not themselves exercise deontological controls.³⁷ In *Fraport v. Philippines*, the *ad hoc* annulment committee correctly noted:

[it] does not have deontological responsibilities or jurisdiction over the parties' legal representatives in their own capacities. Despite the agreement of the parties to submit the present application to it, the Committee has no power to rule on an allegation of misconduct under any such professional rules as may apply. Its concern is therefore limited to the fair conduct of the proceedings before it.³⁸

The arbitration community almost unanimously considers that forums in the system, as it presently stands, should refrain from imposing professional disciplinary sanctions, such as removing a professional's right to practise.³⁹ The decentralized nature of arbitration impedes their ability to tackle properly system-level, public-interest issues. In any event, '[t]he proper administration of justice requires a separation between the judicial body that decides the case on the merits and the *disciplinary* body that decides whether [a participant] has breached any ethical duty.'⁴⁰ Thus, this chapter delves mostly into narrow ethical issues and focuses on institutional controls, except where national authorities and policy alternatives are considered.

With these methodological issues now clarified, theoretical perspectives on ethical governance in international arbitration are briefly presented, emphasizing what the New York and ICSID Conventions address and omit. While these international conventions provide very few express ethical obligations (and are thus themselves rarely directly raised to challenge alleged ethical misconduct),⁴¹ they both play a significant role in participants' ethical regulation. By providing mandatory obligations,⁴² the grounds for challenging arbitral awards establish the extent

³⁷ Crawford, 'The International Law Bar' (2017), 353-4. Even the LCIA's forward-looking Guidelines for Representatives focus almost exclusively on ensuring the fairness and integrity of proceedings: London Court of International Arbitration Arbitration Rules (1 October 2014), Article 18.6 and Annex. Moreover, as of June 2018, the LCIA Secretariat had not seen any sanctioning by tribunals under this article (Email from LCIA Deputy Registrar dated 14 June 2018, on file with the author).

³⁸ *Fraport v. The Philippines*, ICSID Case no. ARB/03/25, Annulment Decision, 23 December 2010, para. 39. One apparent exception comes from the Chartered Institute of Arbitrators ('CIArb') that has removed arbitrators' membership as a consequence of ethics violations. Yet, CIArb is a *voluntary* professional membership organization, which is much different from national bars and professional associations that are *mandatory* to practise in a particular jurisdiction.

³⁹ Swiss Arbitration Association, 'ASA Working Group on Counsel Ethics Releases Latest Findings' (2016) (*cf.* note 32), Recommendation 4 ('As for issues that are truly of an ethical nature [...] there was a general consensus that it is highly undesirable for an arbitral tribunal to take decisions on such matters against counsel appearing before it.')

⁴⁰ A.-C. Cremades, 'The Creation of a Global Arbitration Ethics Council: A Truly Global Solution to a Global Problem', *Kluwer Arbitration Blog* (24 November 2015), available at <http://arbitrationblog.kluwerarbitration.com/2015/11/24/the-creation-of-a-global-arbitration-ethics-council-a-truly-global-solution-to-a-global-problem/> (last accessed 5 January 2020) (emphasis added).

⁴¹ In the New York Convention regime, institutional arbitration rules, not the Convention, decisively determine approximately ninety per cent of arbitrator challenges. See C. A. Rogers, 'Is International Arbitration in a Race to the Top?', *Kluwer Arbitration Blog* (15 March 2018), available at <http://arbitrationblog.kluwerarbitration.com/2018/03/15/is-international-arbitration-in-a-race-to-the-top/> (last accessed 5 January 2020) (Professor Rogers estimates this figure based on her professional experience).

⁴² In this context, the term 'mandatory' refers to how the parties cannot agree in advance to derogate from Article V of the New York Convention and Article 52 of the ICSID Convention: C. Schreuer *et al.*, *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge University Press, 2009), 919. Even if the parties in theory can waive certain procedural irregularities through their words and deeds, in practice, they do not and these obligations become binding

and limit of both party autonomy and tribunal authority regarding ethical issues.⁴³ The New York and ICSID Conventions thus set boundaries to parties' agreements and with respect to the sources they can introduce into arbitral proceedings, such as institutional arbitration rules and soft law instruments.⁴⁴ By requiring that proceedings and resulting awards meet 'basic requirements of procedural fairness,'⁴⁵ these conventions explicitly and implicitly command that participants' conduct upholds the fairness and integrity of this judicial process.⁴⁶ In the day-to-day practice of arbitration, however, the number and diversity of applicable national and international sources invariably leads to questions about which rules apply and when, and how to resolve conflicts between them.⁴⁷

In terms of substantive ethical obligations, the New York and ICSID Conventions reflect the objective of protecting the parties from fundamentally unfair arbitral procedures.⁴⁸ While obligations stemming from national bars and professional associations mainly bear upon on duties and values (similarly to deontology and virtue ethics), the international arbitration conventions focus on proceedings and awards (similarly to consequentialism).⁴⁹ Indeed, flows from the grounds for challenging awards the requirements of 'independent' professional judgement, conflict of interest disclosure, due process, etc.⁵⁰ Furthermore, the minimal but mandatory obligations established by these conventions have slowly but steadily been complemented by endogenous sources, which have refined and specified participants' ethical obligations.⁵¹ But because of arbitration's structure, the further a participant is from the core of the arbitral process, the less his or her duties have been developed up to this point.

To enforce these ethical obligations, the New York and ICSID Conventions coordinate a multi-level network of forums. They envisage that the parties, tribunals and arbitral institutions all govern participants' ethical conduct one way or another.⁵² They grant limited powers to national courts and *ad hoc* annulment committees, respectively, in reviewing arbitral awards.⁵³ These powers extend to ethical issues in certain circumstances. In this context, it is sometimes uncertain

on the tribunal, the arbitral institution, etc. See G. B. Born, *International Commercial Arbitration*, 2nd ed. (Kluwer, 2014), 2188-9.

⁴³ D. P. Fernández Arroyo, 'Arbitrator's Procedural Powers: The Last Frontier of Party Autonomy?', in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration* (Juris, 2016), 202-6.

⁴⁴ These sources, hence, often incorporate challenges grounds entirely or at least mirror them in a significant way, in the process raising the bar about what is and what is not 'ethical.' See, generally, E. Sussman, 'Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives', in L. W. Newman and M. J. Radine (eds.), *Soft Law in International Arbitration* (Juris, 2014).

⁴⁵ G. B. Born, *International Arbitration: Law and Practice* (Kluwer, 2012), 2144, 2154.

⁴⁶ See *infra* Section I.A.

⁴⁷ Rogers, *Ethics in Arbitration* (2014), para. 2.50.

⁴⁸ This imperative has roots in the concepts of natural justice and due process that have developed in domestic jurisdictions over the centuries: Schreuer *et al.*, *The ICSID Convention* (2009), 980; A. Armer Ríos *et al.* in H. Kronke *et al.* (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer, 2010), Article V(1)(B), 234-5; Born, *International Arbitration* (2012), 2144, 2154.

⁴⁹ UNCITRAL, 'Report on the Work of Its Eighteenth Session' (3-21 June 1985), 63.

⁵⁰ See *infra* Section II.

⁵¹ See, e.g., Rogers, *Ethics in Arbitration* (2014), Chs. 6-7.

⁵² Rogers, *Ethics in Arbitration* (2014), para. 2.90.

⁵³ See, e.g., *Chevron Corporation v. Republic of Ecuador*, Civil Action no. 2012-1247 (US DC Circuit, District of Columbia District Court, 6 June 2013). In the ICSID Convention regime, ethical issues are also commonly resolved not by relying on the Convention's specific wording, but rather based on the practice developed by the Centre and tribunals. See E. Obadia, 'Challenge Decisions – Introductory Note', *ICSID Review*, 23 (2008), 376.

which forum has jurisdiction and is effectively competent to enforce a standard of professional conduct.⁵⁴ This situation is exacerbated by the silence of these conventions regarding the role of national bars and professional associations in regulating participants. It is also complicated because the conventions do not institute any supreme international bodies to carry on this task.⁵⁵

In evaluating alternatives to the system, the starting point of this analysis should be the successes of the regime coordinated by the New York and ICSID Conventions, in addition to its gaps and failures. Arbitral institutions now act as the *de facto* regulators (and, with regards to arbitrators, enforcers) of ethical obligations. Indeed, they have for the most part efficiently filled the void in ethical regulation left by these conventions.⁵⁶ While legitimacy issues remain in using private institutions to regulate participants when states are involved, the main challenge today relates to arbitral institutions' powers – and, by delegation, arbitral tribunals' powers – to satisfactorily address deontological issues of a 'public' and 'systemic' nature.⁵⁷ To tackle this problem, one option is to create central supranational bodies capable of dealing with these types of issues. A more politically viable option, and one perhaps more coherent with the *ethos* of international arbitration, would be for states to complement the New York and ICSID Conventions by drafting international 'model' choice-of-law rules pertaining, notably, to party representatives' standard of conduct.⁵⁸

This chapter proceeds in four sections. The first section (I) identifies the sources governing ethical obligations. Starting with the principles of party autonomy and state consent, it considers the authorities guiding participants' conduct in the system. Specifically, this section examines international conventions, national laws, institutional arbitration rules, and soft law instruments. Each source is examined in turn with respect to its treatment of arbitrators, party representatives,⁵⁹ experts and third-party funders. The objective is to provide, as far as possible, choice-of-law principles governing participants' obligations by presenting when and how the various rules apply.

Informed by this superstructure, the second section (II) engages with the substantive content of those sources. Broadly, arbitration participants must exercise the level of care, diligence and skill prescribed by their professional functions and contractual arrangements. For arbitrators, the applicable rules concern independence and impartiality, and the oft-discussed concerns with party appointment and the potential for issue conflicts and 'double-hatting.' The rules governing party representatives address, in particular, conflicts of interest, confidentiality, as well as document production and witness preparation. Experts' obligations relate to professional independence and focus on disclosure requirements. The rules applicable to third-party funders similarly concern disclosure requirements.

⁵⁴ Born, *International Commercial Arbitration* (2014), 2888.

⁵⁵ See *infra* Section III.

⁵⁶ S. Wilske, 'The Duty of Arbitral Institutions to Preserve the Integrity of Arbitral Proceedings', *Contemporary Asia Arbitration Journal*, 10 (2017), 201.

⁵⁷ See *infra* Section IV.

⁵⁸ See, e.g., Rogers, *Ethics in Arbitration* (2014), paras. 6.159-165.

⁵⁹ This chapter adopts the terminology used in the IBA Representation Guidelines (p. 4), according to which: "Party Representative" or "Representative" means any person, including a Party's employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar.'

The third section (III) surveys the forums that enforce these ethical obligations. Before all else, certain participants' immunity from legal process is studied, as it involves policy considerations and raises practical issues. The forums include arbitral tribunals, arbitral institutions, as well as national courts and regulatory authorities. Each forum is examined, once more, with respect to its treatment of arbitrators, party representatives and experts. It excludes, however, third-party funders who are subject to very few enforcement mechanisms. This section demonstrates that a competent, effective and harmonized network of forums is a distant but attainable goal.

Having mapped the rules and settings related to ethical obligations, the final section (IV) turns its gaze forward, with an eye to recent proposals and future developments. The section considers how epistemic communities and self-regulation have shaped, and ought to shape, painstaking reforms on ethics. The section then explores the role of various actors in forging ahead with these reforms, analysing the parties, arbitral institutions, arbitral tribunals, national authorities and potential international bodies. It argues that, instead of adding substantive obligations, a better option is to address the important coordination issues with participants' regulation.

I. SOURCES: ETHICS AND APPLICABLE LAW

The sources governing participants' ethical obligations are numerous and varied. This situation occurs mostly because they are not subject to the discipline of an internationally regulated profession.⁶⁰ Presenting a general survey of all potentially applicable sources at the outset lays the foundation for the later analysis, where these sources determine participants' specific substantive obligations.

The foundation of any discussion on sources in international arbitration is invariably party autonomy and state consent,⁶¹ expressed either in the arbitration agreement, International Investment Agreement ('IIA') or investment legislations in domestic jurisdictions.⁶² Moreover, one can safely assume that at least one contractual arrangement regulates each participant as well. Where the *lex arbitri* provides the basic framework of the proceedings, the contract between an arbitrator and the parties certainly defines parts of that arbitrator's rights and obligations.⁶³

⁶⁰ Paulsson, *Idea of Arbitration* (2014), 147 (discussing as this applies to international arbitrators). See also *infra* Section IV.C.

⁶¹ There is no doubt that state consent and party autonomy are paramount in international adjudication. See H. Thirlway, *The Sources of International Law* (Oxford University Press, 2014) 10-13; A. M. Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012). For the sake of clarity, this starting point does not negate the completely independent regulatory regime that governs attorneys in local/national law: see *infra* Section I.C.

⁶² Institutional arbitration rules and national arbitration laws require that the arbitral proceedings be conducted in accordance with the parties' arbitration agreement (and any subsequent procedural agreements between the parties). See, e.g., UNCITRAL Model Law on International Commercial Arbitration, with Amendments as Adopted in 2006 ('UNCITRAL Model Law'), Article 19; International Chamber of Commerce Arbitration Rules (1 March 2017) ('ICC-ICA Rules'), Article 19; ICSID Rules of Procedure for Arbitration Proceedings (10 April 2006), Rule 20(2).

⁶³ This is the case of virtually all commercial arbitrations and of some investment arbitrations. One notable exception is ICSID arbitrations, as these proceedings are part of a largely self-contained system where the 'important rights and duties of ICSID arbitrators follow from the arrangements made for the constitution of arbitral tribunals under the Convention': A. R. Parra, 'The Rights and Duties of ICSID Arbitrators', in I. F. I. Shihata (ed.), *The Status of the Arbitrator: ICC Bulletin Special Supplement* (International Chamber of Commerce, 1995).

Representation agreements, expert contracts, and litigation-funding agreements, respectively, similarly govern the relationship of the parties with the other arbitration participants.

These *consent*-based sources are fundamental because international tribunals operate in a decentralized system and depend largely on the will of their own architects.⁶⁴ Through expressed contractual and treaty terms, the parties, both public and private, can determine a tribunal's jurisdiction, the substantive law it may apply and some of its ethical obligations and standards.⁶⁵ Broadly speaking, 'sophisticated parties can agree to *almost* anything in a contract.'⁶⁶ They are certainly permitted to endorse heightened ethical standards for the various participants in arbitral proceedings. As Born explains, '[t]here is no reported authority denying effect to an agreement imposing heightened standards of impartiality and independence and there would be no justification for reading national arbitration legislation as requiring such a result (at least not absent very clear statutory language to that effect).'⁶⁷

Yet, *jurisdictional*-based sources circumscribe the parties' will.⁶⁸ An agreement between the parties requires 'the essential markers of adjudication' in order to carry binding effect. Non-adjudicatory procedural results are not considered awards for the purposes of recognition and enforcement in national courts, even if the parties may well incorporate non-adjudicatory results (such as settlement agreements or mediated outcomes) in a binding award to ensure that recognition and enforcement mechanisms may be secured. This situation stems from mandatory provisions in the New York Convention, national arbitration laws and institutional arbitration rules, which provide a minimum standard of justice and fairness in international law.⁶⁹ These markers of adjudication are also necessary because national rules of professional responsibility may purport to apply even in the context of an international arbitration.⁷⁰

Before surveying these sources in detail, a few important takeaways should be highlighted. The first relates to choice-of-law principles governing participants' obligations.⁷¹ The number and diversity of sources invariably lead to questions about which law applies and when. More

⁶⁴ See A. Pellet, 'Judicial Settlement of International Disputes', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2013), para. 5; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford University Press, 2012), Ch. 31.

⁶⁵ D. Shelton, 'Form, Function, and the Powers of International Courts', *Chicago Journal of International Law*, 9 (2009), 537, 542-3.

⁶⁶ Rogers, *Ethics in Arbitration* (2014), para. 9.30 (emphasis added).

⁶⁷ Born, *International Commercial Arbitration* (2014), 1814.

⁶⁸ J. Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer, 2012), Ch. 2 ('Powers, Rights and Duties of Arbitrators'), 49-51.

⁶⁹ Professor Mayer defines mandatory law as 'an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship' (P. Mayer, 'Mandatory Rules of Law in International Arbitration', *Arbitration International*, 2 (1986), 274). Mandatory rules are typically associated with the practice of commercial arbitration, although there are a few instances where they may apply as well in investment arbitration: A. K. Bjorklund, 'Investment Arbitration', in G. A. Bermann and L. A. Mistelis (eds.), *Mandatory Rules in International Arbitration* (Juris, 2011).

⁷⁰ See *infra* Section I.B.

⁷¹ Discussing arbitrators, Born notes: 'There are several possible choices of applicable law to govern this issue. As suggested above, these possibilities include the law of the arbitral seat, the procedural law selected by the parties to govern the arbitration (almost always, also the law of the arbitral seat), the law governing the arbitration agreement, the law governing the arbitrator's contract, or the law of the arbitrator's domicile.' See Born, *International Commercial Arbitration* (2014), 1824.

regulation indeed does not necessarily lead to clearer ethical standards.⁷² It can create instead an incoherence and confusion between the various obligations.⁷³ When these sources not only overlap, but also conflict, this problem magnifies.

The second takeaway concerns the historical development of the rules. Generally, ‘hard law’ is binding but less developed. Conversely, ‘soft law’ is often optional but more detailed. This trend can be observed in the periods of cross-fertilization in the system: primarily from commercial arbitration to investment arbitration in the first few years of the twenty-first century; and, since the turn of the decade, mainly the other way around.⁷⁴ The distinction between hard law and soft law, however, is not always clear in international arbitration, as guiding principles routinely determine key aspects of cases.

In this section, state consent and party autonomy are addressed when compared and tested against the other sources governing participants’ obligations. These sources are presented in sequence based on their *de jure* primacy in the field. They include, first, (A) international conventions and (B) national laws. The will of the parties is also considered as part of, and as being complemented by, (C) institutional arbitration rules that regularly serve as default laws in the system. Lastly, (D) soft law instruments purporting to regulate participants’ ethical conduct are examined, as they offer guidance when faced with an ethical dilemma and can even be binding when so decided by the parties.⁷⁵

A. International Conventions

International conventions leave participants’ ethical obligations largely undefined.⁷⁶ Although IIAs always had procedural mechanisms for arbitrator disqualification in investment arbitration, they rarely elaborated with great specificity or clarify on what basis such disqualification ought to be occurring. Notably, first-generation IIAs contain little ethical requirements for participants in the arbitral processes. In the last few years, states have increasingly attempted to regulate the framework for the arbitral settlement of international disputes. For instance, recent efforts by the European Union and its trade partners to reform Investor-State Dispute Settlement (‘ISDS’) have included complex rules of adjudication, codes of conduct for

⁷² Rogers, *Ethics in Arbitration* (2014), para. 2.50.

⁷³ Z. J. J. Lim, ‘Ethical Issues in International Law Practice’, *ASIL Cables* (13 April 2015) (opining that international legal practice ‘was characterized as an ethical no-man’s land due to the plurality of inconsistent rules and expectations of how lawyers should behave.’).

⁷⁴ Compare F. Schwarz, ‘Limits of Party Autonomy in International Commercial Arbitration’, in C. Knahr *et al.* (eds.), *Investment and Commercial Arbitration: Similarities and Divergences* (*International Commerce and Arbitration*, vol. 3) (Eleven International, 2010) with N. Rubins and B. Lauterburg, ‘Independence, Impartiality and Duty of Disclosure in Investment Arbitration’, in Knahr *et al.* (eds.), *Investment and Commercial Arbitration* (2010). See also G. Cordero Moss, ‘Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?’, in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009).

⁷⁵ See, generally, M. Hirsch, ‘Sources of International Investment Law’, in A. K. Bjorklund and A. Reinisch (eds.), *International Investment Law and Soft Law* (Edward Elgar, 2012).

⁷⁶ In international law, there are very few structures for the control of participants: R. Higgins, ‘Ethics and International Law’, *Leiden Journal of International Law*, 23 (2010), 277, 287. While the ICSID Convention is an international treaty in the sense of Article 38 of the ICJ Statutes, it can be better analyzed and assessed with the rules of arbitral institutions, with which it shares greater similarities in terms of application and purpose.

decision makers and provisions regarding third-party funding.⁷⁷ These developments, however, remain the exception rather than the norm in the system as a whole.⁷⁸ Moreover, they represent *attempts* to heighten the ethical standard through state consent in international law.

The New York Convention is chiefly concerned with the recognition and enforcement of the awards themselves, and has no express provisions addressing participants' ethical obligations. Further, for states having made a commercial reservation, disputes arising out of national proceedings to regulate the conduct of party representatives in international proceedings are considered outside the Convention's application scope, as these disputes have been deemed 'non-commercial.'⁷⁹

Nevertheless, the New York Convention, by attempting to protect the rights of disputing parties in an arbitral proceeding, can regulate the conduct of participants in certain circumstances. Parties can raise misconduct in the proceedings as a ground for challenging an award when the alleged conduct 'implicitly violates one of the exceptions for the enforcement of an award.'⁸⁰ While this approach does not directly discipline participants, it criticizes their ethical conduct. In a competitive market where reputation and symbolic capital are key,⁸¹ this form of reprimand can be powerful.⁸²

More frequently, parties challenging awards for ethical misconduct allege that enforcing the award would violate public policy. Article V(2)(b) of the New York Convention arguably protects an international conception of public policy that is distinct from national public policy.⁸³ Further, a violation of impartiality under a national arbitration law would not necessarily violate

⁷⁷ Further, the T-TIP proposal, the CETA, and the EU-Vietnam FTA subject the decision makers to a code of conduct that is appended to the treaty, as well as to ethical obligations contained within the treaty itself: *see* especially Canada-EU Comprehensive Economic and Trade Agreement ('CETA') (February 2016); S. Brekoulakis *et al.*, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding In International Arbitration* (ICCA, 2018), 61-2; Kaplan, 'Third-Party Funding in International Arbitration (2013) (analysing questions of standing with regard to the nationality requirement of a BIT and the ICSID Convention).

⁷⁸ *See, e.g., Limited Liability Company Amto v. Ukraine*, Arbitration no. 080/2005, Final Award, 26 March 2008, para. 56 ('The applicable law in the present arbitration is the ECT itself, and "applicable rules and principles of international law" [Article 26(6)]. There is no requirement in the ECT relating to powers of attorney, and nor has the Respondent identified any relevant principles of international law relating to powers of attorney.').

⁷⁹ A state having made a commercial reservation applies the New York Convention only to disputes arising out of 'legal relationships considered as commercial under the national law of the State making such declaration': UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, 2016 ed. (United Nations, 2016), 35. In the USA, a court found that a case related to proceedings to disqualify an attorney was non-commercial. *See R3 Aerospace v. Marshall of Cambridge Aerospace Ltd (USA)*.

⁸⁰ Rogers, *Ethics in Arbitration* (2014), para. 2.90.

⁸¹ As a group of transnational professionals, international arbitrators are all individuals who have accumulated significant social, political, and legal capital: Y. Dezalay and B. G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996), Chs. 2-3; S. Puig, 'Social Capital in the Arbitration Market', *European Journal of International Law*, 25 (2014), 387, 397-401. Common knowledge in and anecdotal accounts in international arbitration, where large amounts are regularly in dispute and high fees are charged, confirms this situation equally applies to party representatives, experts, and third-party funders.

⁸² Karton, *The Culture of International Arbitration* (2013), 76 ('Market competition obliges arbitrators to maintain neutrality [or at least the appearance of neutrality]; biased arbitrators lose credibility with their fellow tribunal members, so parties are unlikely to appoint arbitrators with a reputation for partiality.').

⁸³ Armer Ríos *et al.* in Kronke *et al.* (eds.), *Recognition and Enforcement of Foreign Arbitral Awards* (2010), Article V(1)(B), 365.

public policy under the Convention.⁸⁴ National courts, however, have interpreted the public policy exception in the Convention in reference to national arbitration laws, refusing recognition and enforcement of an award in particular ‘when the core values of a legal system have been deviated from.’⁸⁵ In light of the above, the New York Convention indirectly regulates arbitrators’ and representatives’ conduct. It impacts much less, however, experts and funders.

As mentioned above, parties can challenge arbitrator behaviour by invoking grounds in the New York Convention that are, on their face, related to other issues. Commonly, parties argue that as a result of alleged ‘arbitrator partiality or non-disclosure [...] the tribunal was not constituted in accordance with the parties’ agreement or, failing agreement, the law of the arbitral seat.’⁸⁶ Parties have also claimed that the alleged behaviour violated public policy or that it prevented them from presenting their case.⁸⁷ More frequently, alleged arbitrator misbehaviour could be argued to exceed their legitimate powers in certain exceptional circumstances.⁸⁸ These grounds for refusing recognition of awards in Article V can therefore operate as ethical constraints on arbitrators.

In addition to controlling arbitrator behaviour, the requirement in Article V(1)(b), which protect parties’ right to present their case, can also be raised to reprimand party representatives obliquely. A national court may refuse to recognize an award if it finds that a representative’s actions prevented their opponents from being ‘heard regarding their claims, evidence and defences.’⁸⁹ This option is available to parties seeking to challenge their opponents’ behaviour, but courts have understandably been reluctant to find a breach when the claimant failed to ‘remedy [its] own defaults.’⁹⁰ As an Italian court described the standard under Article V(1)(b), a party must demonstrate that the behaviour made presenting one’s case impossible, not simply difficult.⁹¹ On several occasions, US and Swiss courts have faulted parties themselves for their inability to present their case.⁹²

Whereas other parties’ obligations can be gleaned from certain provisions of the New York Convention, the law’s effect on experts is unclear.⁹³ Notably, the Convention says nothing about experts, let alone their ethical obligations during an arbitration. When experts have been mentioned in a challenge to an award, the challenge has mainly concerned a tribunal’s or a representative’s conduct. For example, parties have attempted to challenge enforcement over concerns about how an expert was appointed⁹⁴ and how document production was carried out with respect to an

⁸⁴ Rogers, *Ethics in Arbitration* (2014), para. 2.91.

⁸⁵ UNCITRAL Secretariat, *Guide on the New York Convention* (2016), 240.

⁸⁶ Rogers, *Ethics in Arbitration* (2014), para. 2.90.

⁸⁷ Armer Ríos *et al.* in Kronke *et al.* (eds.), *Recognition and Enforcement of Foreign Arbitral Awards* (2010), Article V(1)(B), 256 (‘[P]arties and arbitrators alike have no reason to fear the due process exception, provided that parties receive adequate notice of all meetings and hearings and are afforded sufficient time to respond or appear.’).

⁸⁸ *SA J & P Avax v. Société Tecnimont SPA* (Cour d’appel de Reims, 2 November 2011, case no. 10/02888). In this case, the Reims Court of Appeal sets aside an ICC-ICA award for a chairman’s failure to disclose conflict of interest during proceedings.

⁸⁹ UNCITRAL Secretariat, *Guide on the New York Convention* (2016), 163.

⁹⁰ UNCITRAL Secretariat, *Guide on the New York Convention* (2016), 163.

⁹¹ UNCITRAL Secretariat, *Guide on the New York Convention* (2016), 164 (citation omitted).

⁹² UNCITRAL Secretariat, *Guide on the New York Convention* (2016), 164.

⁹³ To the author’s knowledge, there are no known cases in which an award has been challenged under the New York Convention based on third-party funding or expert misconduct.

⁹⁴ *Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Commercial*, Southern District Court of New York, USA, 24 August 1990, 90 Civ. 0720 (KC).

expert's testimony.⁹⁵ Tribunals have also rightly been challenged for consulting experts *ex parte*.⁹⁶ Notably, these challenges have concerned the expert's own conduct only as a second-hand issue.

The New York Convention does not specify rules on third-party funding, but the Convention's interaction with national laws may provide guidance. As is the case with ethics under the Convention, regulation stems from broad rules. Third-party funding could possibly raise public policy concerns, which would necessitate considering the enforcing state's national laws on this practice.⁹⁷

As the above shows, the New York Convention provides only a few ethical obligations explicitly. Nevertheless, it plays a significant role in participants' ethical regulation.⁹⁸ By requiring that proceedings and resulting awards meet 'basic requirements of procedural fairness,'⁹⁹ the Convention expressly *and* implicitly compels participants to uphold certain standards of conduct.¹⁰⁰ Unethical behaviour, or even an unlevelled playing field, could compromise the fairness and integrity of this judicial process.¹⁰¹ A teleological interpretation of the New York Convention reveals that it brings about the concept of inherent powers,¹⁰² which provides, 'substance to fulfill the tribunal's duty to restore, *proactively*, the equality of arms.'¹⁰³ As

⁹⁵ *X S.A. v. Y Ltd.*, Federal Tribunal, Switzerland, 8 February 1978, P.217/76; *L Ltd. v. C S.A. (GE)*, Court of Justice, Geneva, Switzerland, 17 September 1976, 549; *Société Unichips Finanziaria SPA et Société Unichips International BV v. Consorts Gesnouin*, Court of Appeal, Paris, France, 12 February 1993, 92-14017.

⁹⁶ *Chrome Resources S.A. v. Léopard Lazarus Ltd.*, Federal Tribunal, Switzerland, 8 February 1978, in *ICCA Yearbook Commercial Arbitration*, vol. XI (Kluwer, 1986), 538.

⁹⁷ Rogers, *Ethics in Arbitration* (2014), para. 5.53.

⁹⁸ The New York Convention is widely considered the building block of modern international arbitration: International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011), p. v (Sanders notes in the foreword, '[t]he 1958 New York Convention is the most successful multilateral instrument in the field of international trade law. It is the centrepiece in the mosaic of treaties and arbitration laws that ensure acceptance of arbitral awards and arbitration agreements. Courts around the world have been applying and interpreting the Convention for over fifty years, in an increasingly unified and harmonized fashion.');

M. J. Mustill, 'Arbitration: History and Background', *Journal of International Arbitration*, 6 (1989), 43, 49 ('This Convention [...] perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.'). It is emphasised here that the New York Convention also shapes ethical issues in the field. As mentioned, the ICSID Convention similarly affects ethical issues, but it is examined under institutional arbitration rules.

⁹⁹ Born, *International Arbitration* (2012), 2144, 2154.

¹⁰⁰ Park, 'A Fair Fight' (2014), 417 ('[B]y submitting to the arbitral process, the parties have presumptively entrusted to arbitrators a wide-ranging power to determine just how to proceed.'). See also F. G. Sourgens *et al.* (eds.), *Evidence in International Investment Arbitration* (Oxford University Press, 2018), Part V ('Safeguarding the Process'); O'Hara O'Connor *et al.*, 'Who Should Regulate the Advocates and What Should Be Regulated?' (2016), 338-9.

¹⁰¹ Arguably, this is more readily apparent in the case of arbitrators' conduct than any other participants (Sussman, 'Ethics in International Arbitration' (2014), 240), although misbehaviour by the latter could as well compromise the proceedings; International Bar Association, *Guidelines on Party Representation in International Arbitration* (IBA, 2013) ('IBA Representation Guidelines'), 1 (Preamble).

¹⁰² Inherent powers can be derived from multiple – and partly overlapping – sources: they can be express, they can be discretionary, they can be implied from the judicial function, or they can be rule-based with a grounding in general principles: A. K. Bjorklund and J. Brosseau, 'Sources of Inherent Powers', *European International Arbitration Review*, 6 (2018), 1, Part II.

¹⁰³ T. Wälde, "Equality of Arms" in Investment Arbitration: Procedural Challenges', in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), 182 (emphasis added). In *Libananco v. Turkey*, the tribunal held that the parties have an obligation to arbitrate fairly and in good faith. The court also held that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation

discussed next, national standards also frequently come into the consideration of participants' ethical behaviour.

B. National Laws

Depending on which participant is concerned, national sources can also be important in defining and elaborating ethical obligations. These sources include not only national arbitration laws, but also the regulations, codes of conduct, and decisions of professional associations as well as the jurisprudence of courts at the national level. In the rare cases of serious misconduct, national criminal laws can even apply.¹⁰⁴ Because they have similar objectives (*i.e.*, ensuring the quality of professional services and protecting the public),¹⁰⁵ it is perhaps unsurprising that these national rules of conduct embrace, in general terms, comparable approaches and principles. Despite these broad similarities, national sources provide at times different answers to specific ethical issues, which is often a consequence of the distinctive role each participant plays in its own legal system.¹⁰⁶ In practice, this situation can be problematic because there is considerable uncertainty about which national rules are applicable: Is it those of that professional's home jurisdiction, or those of the arbitral seat? Neither or both? These issues are considered below.

First, national arbitration laws inform the ethical obligations governing arbitrators, prescribing standards of independence and impartiality. They provide a necessary 'safety net' in case an ethical issue is not appropriately dealt with in arbitral proceedings based on the institutional arbitration rules. More than eighty states¹⁰⁷ have enacted laws based on the UNCITRAL Model Law, considerably harmonizing national practices.¹⁰⁸ Despite these efforts, national arbitration laws can complicate, rather than clarify, the standard applicable to arbitrators. National legislators and courts have expended great energy developing 'tests and analytical frameworks,' supported by 'detailed jurisprudence' to determine arbitrators' obligations and assess their conduct.¹⁰⁹ But,

is complied with: *Libananco Holdings Co Limited v. Republic of Turkey*, ICSID Case no. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, para. 78.

¹⁰⁴ See, e.g., K. Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (Cambridge University Press, 2017), Ch. 8 ('Issues of Applicable Criminal Law').

¹⁰⁵ States delegate the authority to regulate professionals to organisations that must protect the public interest, which can sometimes conflict with the stakes of their members. See M. Dent *et al.*, *The Routledge Companion to the Professions and Professionalism* (Routledge, 2016), Ch. 5.

¹⁰⁶ Rogers, *Ethics in Arbitration* (2014) ('The blueprints for the functional role of actors within a particular adjudicatory regime are the procedural arrangements of that regime. Procedures, in turn, are chosen to reflect and promote the values that underlie the larger legal culture or adjudicatory goals of a particular legal system.' [footnote omitted]). See generally Glenn, *Legal Traditions of the World* (2014), Ch. 2 (discussing the relationship between tradition, identity, and law).

¹⁰⁷ UNCITRAL, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006', available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed 5 January 2020).

¹⁰⁸ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 43-4.

¹⁰⁹ Rogers, *Ethics in Arbitration* (2014), para. 2.89. Rogers is also particularly sceptical, with reasons, of national standards for arbitrators' professional obligations developed by bar authorities since they 'would be applied by bar authorities or courts in the jurisdictions where arbitrators are licensed (assuming they are licensed attorneys),' with the result that 'individual arbitrators on the same tribunal could be subject to different ethical obligations.' See Rogers, *Ethics in Arbitration* (2014), para. 2.95.

as more authorities from distinct traditions weigh in on these questions, their contributions increasingly conflict and thus contribute to a ‘global judicial cacophony.’¹¹⁰

The wording introduced by these national laws often matters less than the facts of a particular case. Irrespective of the ‘articulated legal standard,’ the parties’ contracted terms and expectations with respect to the arbitrator are heavily influential in determining whether an ethical standard is met or not.¹¹¹ Such fact-responsive decision-making has left us with a somewhat ill-defined understanding of ‘appropriate arbitrator conduct.’¹¹²

Regarding party representatives, national sources are an especially rich source of ethical obligations, which can sometimes lead to conflicts at the international level: ‘Lawyers are not musicians or ballet dancers: a lawyer’s training, skills and ethics, are still essentially rooted in a national legal system; and it is far from clear how and to what extent national professional rules apply abroad to the transnational lawyer in the international arbitration process.’¹¹³

Most countries regulate the legal profession through codes of conduct that apply to how representatives join and participate in the profession. These codes are generally enforceable by local bar authorities, courts, or other national regulatory authorities. Notably, the rules set out by these national codes are often mandatory, and some even assert primacy in cases of conflicts with other ethical obligations.¹¹⁴ Professional codes of conduct in most countries generally share similar goals. Overall, codes aim to protect clients, third parties, and the overall system.¹¹⁵

However, the specific rules of these codes can vary widely. Most importantly, expectations around key stages of the process such as witness and expert preparation as well as document production can be significantly varied depending on the system. Notably, the common law, civil law, Chinese law and Islamic law each approach these issues uniquely.¹¹⁶ For instance, whereas codes in civil law countries often exhaustively detail appropriate conduct in particular instances, common law jurisdictions rely on more broadly applicable prescriptions.¹¹⁷ Compare the following two sets of rules: on the one hand, the common law-inspired American Bar Association Model Rules of Professional Conduct (2013) are mainly concerned about representatives encouraging

¹¹⁰ See International Bar Association, ‘The Arbitral Tribunal: Revisiting Established Practices (Conference Report, IBA Annual Conference 2010, Vancouver)’, *IBA Arbitration News*, 16(1) (2011), 28, 29 (comments by Constantine Partasides).

¹¹¹ Born, *International Commercial Arbitration* (2014), 1772.

¹¹² Rogers, *Ethics in Arbitration* (2014), para. 2.88.

¹¹³ V. V. Veeder, ‘The 2001 Goff Lecture – The Lawyer’s Duty to Arbitrate in Good Faith’, *Arbitration International*, 18 (2002), 431-2.

¹¹⁴ Born, *International Commercial Arbitration* (2014), 2872.

¹¹⁵ C. A. Rogers, ‘Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration’, *Stanford Journal of International Law*, 39 (2003), 1, 20 (‘In national legal systems, the goals of ethical regulation are to guide, punish, and deter attorney conduct in an effort to protect client and third parties, and to ensure the proper functioning of the state adjudicatory apparatus.’).

¹¹⁶ Kidane, *Culture of Arbitration* (Oxford University Press, 2017), Ch. 8 (examining the diversity of basic assumptions and methodologies, including ethical and professional expectations, related to the fact-finding process in traditions as the common law, civil law, Chinese law and Islamic law).

¹¹⁷ C. Menkel-Meadow, ‘Are Cross-Cultural Ethics Standards Possible or Desirable in International [SEP] Arbitration?’, in P. Gauch *et al.* (eds.), *Mélanges en l’honneur de Pierre Tercier* (Schulthess, 2008), 895.

false testimony; on the other hand, the Swiss Bar Association is going further in 2005 civil law-based rules, prohibiting representatives from merely *influencing* witnesses and experts.¹¹⁸

Furthermore, such differences derive from more than simply the tradition divide. Each jurisdiction's distinct views on participants' roles in the adjudicatory process beget differing views on how party representatives should conduct themselves. Continuing with the witness and expert preparation example, even England and Wales, a common law jurisdiction like the USA, adopts a different approach and forbids representatives from 'rehears[ing], practic[ing], or coach[ing] a witness in relation to [their] evidence.'¹¹⁹ Thus, even countries from the same tradition can be out of sync on integral elements of procedure.

These differences in national laws can be particularly problematic if (or when) representatives are subject to mandatory rules from their home jurisdiction. Codes regulating representatives' conduct often reach beyond national boundaries, explicitly or implicitly regulating members of the bar when they participate in international arbitration.¹²⁰ Most national authorities do not provide an 'arbitration exception,' meaning representatives are subject to the same rules that govern them during regular professional activity.¹²¹

In addition to the confusion that can ensue from representatives' obligations to their home bars, the arbitral seat may potentially impose rules on representatives participating in an arbitration under its auspices.¹²² With respect to arbitral proceedings, '[t]he better interpretation appears to be that the applicable rules of professional conduct of the arbitral seat are to be drawn from the rules that would apply to a local lawyer participating in an international arbitration seated locally.'¹²³

If such rules conflict with representatives' professional obligations from their home jurisdictions, Lim advises that representatives should disclose this conflict to the body in their home jurisdiction and to the international tribunal.¹²⁴ Given the tangled web of obligation potentially applying to representatives in international proceedings, this is sage advice in theory. After all, a 'clash of culture' may commonly stem from representatives having different training and experiences in their jurisdiction of origin. It is then the role of the tribunal to manage the proceedings and parties' expectations.¹²⁵

Much like representatives, determining experts' ethical obligations in an international context is difficult because the role they play in legal proceedings varies substantially across

¹¹⁸ P. Ashford, *IBA Guidelines on Party Representation in International Arbitration* (Cambridge University Press, 2016), Appendix 2 ('Interaction of IBA Rules with major professional conduct rules').

¹¹⁹ Ashford, *IBA Guidelines on Party Representation* (2016), Appendix 2 ('Interaction of IBA Rules with major professional conduct rules').

¹²⁰ Council of Bars and Law Societies of Europe, *Code of Conduct for European Lawyers* (2013), para. 4.5 ('The rules governing a lawyer's relations with the courts apply also to the lawyer's relations with arbitrators.').

¹²¹ Born, *International Commercial Arbitration* (2014), 2852.

¹²² However, jurisdictions have increasingly exempted foreign party representatives from their local ethical rules in an effort to attract more arbitration business.

¹²³ Born, *International Commercial Arbitration* (2014), 2873.

¹²⁴ Lim, 'Ethical Issues in International Law Practice' (2015). The difficult question, of course, is when and how would such disclosure be possible and/or beneficial.

¹²⁵ B. M. Cremades, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration', in S. N. Frommel and B. A. K. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (Kluwer, 1999).

jurisdictions. Experts' involvement in arbitral proceedings invokes controversy that raises fundamental differences between the common and civil law traditions.¹²⁶ Generally, in common law countries, experts serve the purposes of the representatives who select them. Indeed, in the USA, Australia and Canada, representatives directly coordinate and communicate with their experts, and ultimately compensate them.¹²⁷ This practice is antithetical to experts' role in civil law proceedings, in which experts serve to assist, and even 'function as the ancillary' to the adjudicator.¹²⁸

Beyond the differences between national systems, the individual systems themselves may provide inadequate or non-existent guidance for expert ethics. With few exceptions, states usually do not directly regulate expert witnessing, which is not considered an occupation or profession in and of itself.¹²⁹ Instead, an individual expert's own profession may draw ethical guidelines. Often, however, whatever rules may apply to the expert as a member of their profession does not set out regulations for serving as an expert witness in national settings, and even more rarely for serving in international arbitral proceedings.¹³⁰

Finally, national sources only play a minor role in elaborating the ethical standard of third-party funders. As mentioned, the New York Convention does not directly regulate third-party funding, leaving room for national law to fill the gap through national-level public policy analysis. Generally, however, most jurisdictions provide little indication of what funding arrangements are acceptable, especially with respect to international arbitration.¹³¹ In practice, whether third-party funding conflicts with public policy under the Convention depends on where the claimant applies for enforcement.¹³²

National laws, especially national arbitration laws, can thus define participants' ethical obligations in many cases. In conjunction with the New York Convention and as part of its regime, national arbitration laws set limits on the content of parties' agreements and the sources they can introduce in proceedings, including institutional arbitration rules.

C. Institutional Arbitration Rules

Regarding participants' conduct, institutional arbitration rules focus mainly on the arbitral process, the resulting award and the participant that is at the core of it all, namely the arbitrator. As such, they are much less developed with regards the conduct of party representatives, experts,

¹²⁶ J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration*, 2nd ed. (Sweet & Maxwell, 2007), 662 ('As numerous legal scholars have pointed out, evidence by expert opinion is one of those subjects where the differences between common law and civil law countries are most marked.').

¹²⁷ Rogers, *Ethics in Arbitration* (2014), paras. 4.18-4.30.

¹²⁸ Rogers, *Ethics in Arbitration* (2014), para. 4.02.

¹²⁹ Rogers, *Ethics in Arbitration* (2014), para. 4.04.

¹³⁰ Rogers, *Ethics in Arbitration* (2014), para. 4.05.

¹³¹ Brekoulakis *et al.*, *Report of the ICCA-Queen Mary Task Force* (2018), 56-60 (noting to date only Singapore and Hong Kong appear to have taken any action to regulate third-party funding in international arbitration).

¹³² Considering the USA as an example, Rogers notes that no federal law prohibits third-party funding. Absent such a proscription, she concludes that it is unlikely that an American court could invoke public policy to deny enforcement for an award whose claimant benefitted from third-party funding: Rogers, *Ethics in Arbitration* (2014), para. 5.108. See also Y. Dautaj *et al.*, 'Third-Party Funding: Enforcement as a Cornerstone in the Funding Calculus', *Kluwer Arbitration Blog* (9 December 2017), available at <http://arbitrationblog.kluwerarbitration.com/2017/12/09/states-taking-two-bites-apple-chewing-non-complying-states-enforcement-stage-can-create-issues-third-party-funding-calculus-thus-hinder-investor-accessing-j/> (last accessed 5 January 2020).

and third-party funders. Moreover, ‘most arbitral rules function like default rules (generally subject only to the mandatory rules of the arbitral forum). They generally provide that the arbitrator should conduct the proceedings in a manner consistent with the parties’ agreement and, only when such agreement is lacking, may exercise his or her discretion.’¹³³

Generally, rules are largely comparable across institutions on arbitrators; they require them to be independent and impartial, while instituting ‘mechanisms for appointing, challenging, and removing arbitrators.’¹³⁴ Arbitrators must disclose potential conflicts of interest before their appointment, and in some cases, sign a statement affirming their independence.¹³⁵ These procedures have gained widespread acceptance in international commercial contracts and are broadly adopted by leading arbitral institutions.¹³⁶ Given the array of institutional options available to parties, such consistency is integral to ensuring arbitrators’ independence and impartiality in international arbitration. More recently, a few ‘progressive’ institutional arbitration rules have appended ‘codes of ethics’ to their arbitration rules to formalize arbitrators’ standard of conduct.¹³⁷

While these codes are helpful, the standards governing arbitrators under institutional rules remain mostly ‘vague, qualitative standards.’¹³⁸ As Rogers points out, important terms such as ‘independence,’ ‘impartiality,’ and expressions like ‘justifiable doubts’ and ‘in the eyes of the parties,’ can be unhelpful in certain factual or cross-cultural contexts.¹³⁹ Undoubtedly, challenges would be more limited and predictable if institutions did more to define these standards.

Institutional arbitration rules ‘establish a *largely* stand-alone mechanism whereby objections to arbitrators may be resolved expeditiously by a contractually-agreed appointing authority, without recourse to national courts, under prescribed contractual standards of impartiality.’¹⁴⁰ Institutional appointment and challenge procedures enforce these standards, through methods decided by the arbitral institution. Indeed, institutions themselves may also reserve the power to refuse an appointment.¹⁴¹ Arbitral institutions are thus highly influential in determining and upholding independence and impartiality among arbitrators.

Perhaps a bit surprisingly, arbitral institutions do not provide much guidance on representatives’ obligations. Notably, there is no common standard of conduct binding upon representatives before ICSID tribunals.¹⁴² This omission distinguishes arbitral institutions from other international legal bodies, particularly public ones, which provide broad guidelines for

¹³³ C. R. Drahozal and P. B. Rutledge, ‘Contract and Procedure’, *Marquette Law Review*, 94 (2011), 1103, 1114.

¹³⁴ Born, *International Commercial Arbitration* (2014), 1827. *See, e.g.*, UNCITRAL Arbitration Rules, Article 12(1); LCIA Arbitration Rules, Articles 5.3-5.4; ICC-ICA Rules, Article 11.

¹³⁵ Rogers, *Ethics in Arbitration* (2014), para. 2.54.

¹³⁶ Born, *International Commercial Arbitration* (2014), 1827.

¹³⁷ Rogers, *Ethics in Arbitration* (2014), paras. 2.79-2.80 (referring notably, to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes).

¹³⁸ Rogers, *Ethics in Arbitration* (2014), para. 2.67.

¹³⁹ Rogers, *Ethics in Arbitration* (2014), para. 2.67.

¹⁴⁰ Born, *International Commercial Arbitration* (2014), 1828 (emphasis added). Both the New York Convention and national laws typically give effect to parties’ agreements pursuant to arbitral institutional rules, including their agreement regarding the independence obligations and the removal procedures of arbitrators, so long as they meet the minimum standard of justice: *see supra* Sections I.A and I.B.

¹⁴¹ LCIA Arbitration Rules, Article 7.1 (‘[T]he LCIA Court shall refuse to appoint any nominee if it determines that the nominee is not [suitable or independent or impartial].’).

¹⁴² A. Sarvarian, *Professional Ethics at the International Bar* (Oxford University Press, 2013), 173.

counsel. For example, the International Criminal Court ('ICC') Regulations contain a chapter on 'Counsel Issues and Legal Assistance,'¹⁴³ and the International Court of Justice ('ICJ') Handbook has a part devoted to 'Agents, counsel and advocates.'¹⁴⁴ Comparable guidelines are underdeveloped in institutional arbitration rules.

The London Court of International Arbitration ('LCIA'), however, is one of the rare institutions that have recently enacted more defined rules for party representatives. The LCIA has annexed guidelines for representatives to its institutional arbitration rules. The tribunal may now decide if a representative has violated these guidelines, and has the discretion to impose the sanctions defined in Article 18.6.¹⁴⁵ While this is a promising development, these sanctions may arguably be too weak. Notably, the LCIA Rules do not explicitly empower tribunals to 'exclude counsel for the whole or part of the arbitration for misconduct.'¹⁴⁶ Rather, Article 18.6 provides for 'a written reprimand' or 'written caution,' while leaving open 'any other measure necessary to fulfill [...] the Arbitral Tribunal[']s duties.'¹⁴⁷ This omission leaves the rules with less bite than comparable guidelines, such as the IBA Guidelines on Party Representation in International Arbitration ('IBA Representation Guidelines').¹⁴⁸ These admonishments remain confidential as between the participants in the proceedings and may thus not deter misconduct in the future.¹⁴⁹

Despite these drawbacks, the LCIA Rules do provide certain advantages. For example, parties must ensure that their representatives have agreed to comply with the guidelines, which prevent them from 'obstruct[ing] the arbitration or [...] jeopardis[ing] the finality of any award.'¹⁵⁰ This restriction deters representatives from incessantly challenging the arbitrators or their jurisdiction, which should expedite proceedings. In this respect, the LCIA Rules are superior to the IBA Representation Guidelines, which target relatively narrow forms of misconduct, while covering remaining statements with a vague blanket provision.¹⁵¹ The latter, however, recently received a strong endorsement from the International Chamber of Commerce's International Court of Arbitration ('ICC-ICA'). As part of its latest modernization efforts, the ICC-ICA revised its 'Note to Parties and Arbitral Tribunals,' encouraging them to adopt the Guidelines.¹⁵²

To an even greater extent than party representatives, experts in international arbitration are not subject to detailed ethical standards. This lack of regulation is less surprising with respect to

¹⁴³ International Criminal Court, Regulations of the Court (26 May 2004), Ch. 4.

¹⁴⁴ ICJ Registrar, *The International Court of Justice: Handbook* (2013), 45-7. Still, the guidelines for counsel at the ICJ are relatively minimal, as the Court has only adopted two practice directions for use by states appearing before it to limit possibility of conflicts of interest.

¹⁴⁵ LCIA Arbitration Rules, Article 18.6.

¹⁴⁶ D. Hacking and S. Berry, 'Ethics in Arbitration: Party and Arbitral Misconduct', in J. C. Betancourt (ed.), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (Oxford University Press, 2016), para. 20.

¹⁴⁷ LCIA Arbitration Rules, Article 18.6.

¹⁴⁸ IBA Representation Guidelines, Guideline 27. See also *infra* Section I.D.

¹⁴⁹ S. Jhangiani and K. Moyeed, 'How Far Do the New LCIA Guidelines for Parties' Legal Representatives and the IBA Guidelines on Party Representation Go?', *Kluwer Arbitration Blog* (21 May 2014), available at <http://arbitrationblog.kluwerarbitration.com/2014/05/21/how-far-do-the-new-lcia-guidelines-for-parties-legal-representatives-and-the-iba-guidelines-on-party-representation-go/> (last accessed 5 January 2020).

¹⁵⁰ LCIA Arbitration Rules, Annex, para. 2.

¹⁵¹ IBA Representation Guidelines, Guidelines 26-7.

¹⁵² International Chamber of Commerce, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration* (International Chamber of Commerce, 2017), 7.

experts since their conduct is not precisely regulated either in most national proceedings.¹⁵³ As Kantor has outlined, the regulations that do apply to experts are less than definitive on key issues.¹⁵⁴ For example, ICSID Arbitration Rule 35(3) simply requires experts to affirm their genuine belief in their testimony.¹⁵⁵ Furthermore, while this is not a requisite in the leading institutional arbitration rules, ‘most experts now include some form of declaration in their reports to say that they are giving objective opinion evidence on the matters on which they are instructed.’¹⁵⁶ In the end, the rules that do govern experts’ behaviour leave something to be desired.

Some institutions have developed innovative responses to issues raised by third-party funding, but these challenges remain largely undefined and unaddressed.¹⁵⁷ The Singapore International Arbitration Centre (‘SIAC’) has emerged lately as a leader on matters related to what it terms ‘external funding.’ The 2017 SIAC Investment Arbitration Rules empower tribunals to order parties to disclose the existence and details of third-party funding arrangements, including the funder’s identity and their interest in the proceeding.¹⁵⁸

While these rules do not define third-party funding, the Singapore Institute of Arbitrators has released guidelines for third-party funders that do: ‘Third-party funding arises when a third party (the Funder) provides financial support to enable a party (the Funded Party) to pursue or defend an arbitration or related court or mediation proceedings. Such financial support is provided in exchange for an economic interest in any favourable award or outcome that may ensue.’¹⁵⁹

The ICC-ICA has adopted a similar definition of funding.¹⁶⁰ In its note addressing the scope of disclosures required of arbitrators, the ICC-ICA brought attention to ‘[r]elationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award.’¹⁶¹ Disclosing these relationships, ‘should also be considered in the circumstances of each case.’¹⁶²

¹⁵³ Rogers, *Ethics in Arbitration* (2014), para. 4.51.

¹⁵⁴ M. Kantor, ‘A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?’, *Arbitration International*, 26 (2010), 323. Notably, the rules of the ICC-ICA, LCIA, ICSID and UNCITRAL allow expert evidence but impose no requirements on experts.

¹⁵⁵ ICSID Convention Arbitration Rules, Rule 35(3) (requiring that experts ‘solemnly declare upon [their] honour and conscience that [their] statement[s] will be in accordance with [their] sincere belief[s]’). See also Rogers, *Ethics in Arbitration* (2014), para. 4.56 (‘While historically arbitral rules were more predisposed towards either common law or civil law approaches, institutions are increasingly hybridizing and addressing in more detail the manner expert evidence is assimilated.’).

¹⁵⁶ P. Haberman, ‘The Role of the Expert in Advocacy’, in S. Jagusch *et al.* (eds.), *The Guide to Advocacy*, 2nd ed. (Global Arbitration Review, 2017).

¹⁵⁷ Kaplan, ‘Third-Party Funding in International Arbitration’ (2013).

¹⁵⁸ Singapore International Arbitration Centre, Investment Arbitration Rules of the Singapore International Arbitration Centre (2017), Article 24(1).

¹⁵⁹ C. L. Sun *et al.*, *SIARB Guidelines for Third Party Funders* (Singapore Institute of Arbitrators, 2017), para. 1.1.

¹⁶⁰ See A. Goldsmith and L. Melchionda, ‘The ICC’s Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction’, *Kluwer Arbitration Blog* (14 March 2016), available at <http://arbitrationblog.kluwerarbitration.com/2016/03/14/the-iccs-guidance-note-on-disclosure-and-third-party-funding-a-step-in-the-right-direction/> (last accessed 5 January 2020).

¹⁶¹ International Chamber of Commerce, *Note on the Conduct of the Arbitration Under the ICC Rules* (2017), 6.

¹⁶² International Chamber of Commerce, *Note on the Conduct of the Arbitration Under the ICC Rules* (2017), 6.

SIAC and the ICC-ICA are early movers on the issue of funding, but other institutions, including ICSID, have taken note of their efforts and are creating their own rules on funding.¹⁶³ Given recent academic and public interest in this practice, further developments are likely to come.

In complementing parties' agreement, institutional arbitration rules thus provide much more developed sets of rules for arbitrators than for any other participants. Nevertheless, the above illustrates that arbitral institutions have responded quickly to shifts in the system regarding ethical issues. They have been particularly keen on revising their rules to reflect changes actively sought by their clients. The next source studied derives not only from the parties' will, but also from the efforts of specialists and stakeholders more broadly.

D. Soft Law Instruments

In addition to institutional arbitration rules, disputing parties can also include soft law instruments in their proceedings.¹⁶⁴ International organizations like the International Law Association's ('ILA') Committee on International Commercial Arbitration, the Chartered Institute of Arbitrators ('CI Arb'), the United Nations Conference on Trade and Development ('UNCTAD') and United Nations Commission on International Trade Law ('UNCITRAL') have reformed, harmonized and modernized international trade law, in part through the creation of soft law rules entrenching best practices.¹⁶⁵

The International Bar Association ('IBA') is another prominent player in this respect. While not a regulatory body itself, and thus not overseeing the licence any of the participants in international arbitration, it is nevertheless shaping arbitration reforms and fosters the development of ethical rules in the system.¹⁶⁶ In arbitral proceedings, its rules and guidelines can be rendered applicable and binding when included into the parties' contractual agreements.¹⁶⁷ Even when they are not formally incorporated in the proceedings, these rules and guidelines can be applied, or at least referred to, in arbitrators' decisions since 'the arbitral community does not [always] sharply distinguish between hard and soft law.'¹⁶⁸ They can represent a check on the decision-making process, especially when arbitrators rely on their inherent powers.¹⁶⁹ Their creation and wide-ranging use are reflective of a recurring desire within the international arbitration community to self-regulate.¹⁷⁰

¹⁶³ T. Jones, 'Kinnear Sheds Light on ICSID Rules Amendment', *Global Arbitration Review*, (2018) (while third-party funding will be permitted, both arbitrators and disputing parties will be required to disclose their affiliation with funders).

¹⁶⁴ Sussman, 'Ethics in International Arbitration' (2014).

¹⁶⁵ See, e.g., United Nations Conference on Trade and Development, 'Reform of the IIA Regime: Four Paths of Action and a Way Forward', *IIA Issues Note*, 3 (2014); F. De Ly *et al.*, 'Report for the Biennial Conference in Johannesburg' (International Law Association, August 2016), 17-9.

¹⁶⁶ International Bar Association, 'About the IBA', available at www.ibanet.org/About_the_IBA/About_the_IBA.aspx (last accessed 5 January 2020).

¹⁶⁷ H. Smit, 'A-National Arbitration', *Tulane Law Review*, 63 (1989), 629, 631 (suggesting text to include ethical codes into the arbitration agreement by reference to some national body of law); O. Dillenz, 'Drafting International Commercial Arbitration Clauses', *Suffolk Transnational Law Review*, 21 (1998), 221 (recommending contractual text to include the IBA's Rules of Ethics for International Arbitrators in parties' agreements).

¹⁶⁸ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 41-2.

¹⁶⁹ Park, 'A Fair Fight' (2014), 420-22.

¹⁷⁰ See *infra*, Section IV.A. See, e.g., P. Sands, 'Comments on The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals', *Law and Practice of International Courts and Tribunals*, 10

The IBA's Rules of Ethics for International Arbitrators ('IBA Ethics Rules')¹⁷¹ and its Guidelines on Conflicts of Interest in International Arbitration ('IBA Conflicts Guidelines')¹⁷² have become important sources for delineating the content of arbitrator independence. They have attracted extensive academic commentary¹⁷³ as well as citation by adjudicative bodies like arbitral institutions and, less commonly, national courts.¹⁷⁴

The IBA Conflicts Guidelines are distinct from the rules of most arbitral institutions in two ways. Firstly, they impose a duty to investigate potential conflicts of interest before disclosure.¹⁷⁵ Secondly, they go beyond mere qualitative standards of impartiality in providing quantitative categories of information that attempt to delineate the meaning of these standards more comprehensively.¹⁷⁶ Specific guidance regarding their application is aided by the inclusion of examples where an arbitrator must, may, or may not be disqualified.¹⁷⁷

Initial criticism that the IBA Conflicts Guidelines were overly burdensome and misguided¹⁷⁸ has largely attenuated. They are now the go-to source for arbitrators considering whether to make a conflict disclosure or rule on a disqualification, for party representatives in assessing whether to pursue a challenge, and – slowly but surely – for national court's rulings on awards.¹⁷⁹ The latter's reticence relates to difficulties with according ethical standards in specific agreements with those of national arbitration laws.¹⁸⁰ Nevertheless, their ultimate success has been

(2011), 1, 3 ('The composition of the Study Group – including practitioners and academics from a variety of jurisdictions and professional backgrounds – was intended to bring together a diverse range of views concerning these issues, in order to produce a balanced text that reflected different approaches and met with practical needs.' [footnote omitted]).

¹⁷¹ International Bar Association, *Rules of Ethics for International Arbitrators* (1987).

¹⁷² International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2014).

¹⁷³ M. Ball, 'Probity Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?', *Arbitration International*, 21 (2005), 323 (viewing the Guidelines as bringing certainty and uniformity to the question of conflicts of interest).

¹⁷⁴ For instances of court decisions referring to the IBA Guidelines, see, e.g., Arbitration Guidelines and Rules Subcommittee, *Report on the Reception of the IBA Arbitration Soft Law Products* (IBA, 2016). See also P. Halprin and S. Wah, 'Ethics in International Arbitration', *Journal of Dispute Resolution*, (2018), 87, 247-9 (following a survey of the case law, the authors summarize that 'while courts may look to the Guidelines as persuasive authority in evaluating conflicts in international arbitration, courts look to applicable law first, and the weight given to the Guidelines may vary.').

¹⁷⁵ IBA Conflicts Guidelines, General Standard 7(c) ('An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflicts of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned.').

¹⁷⁶ Rogers, *Ethics in Arbitration* (2014), para. 2.85.

¹⁷⁷ K. Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer, 2012), 244.

¹⁷⁸ L. Shore and E. Cabrol, 'A Comment on the IBA Guidelines on Conflicts of Interests: The Fragile Balance between Principles and Illustrations, and the Mystery of the "Subjective Test"', *American Review of International Arbitration*, 15 (2004), 599 (criticizing the Guidelines for being too burdensome); R. Mullerat, 'Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration', *Dispute Resolution International*, 4 (2010), 55 (stating that the Guidelines are too favorable to arbitrators).

¹⁷⁹ Rogers, *Ethics in Arbitration* (2014), para. 2.86.

¹⁸⁰ Rogers, *Ethics in Arbitration* (2014), para. 2.87.

evidenced by the fact that the arbitral institutions who initially disclaimed any reliance on the Guidelines now treat them as a touchstone in ruling on challenges to arbitrator appointment.¹⁸¹

The way in which ICSID decisions have referred to the IBA Conflicts Guidelines is of interest. It has been argued that these decisions have regularly applied the guidelines as hard standards when they support the rejection of a challenge, but have still treated them as a ‘rule of thumb’ when they risked impugning an arbitrator’s impartiality or independence.¹⁸² Yet, on a closer reading, ICSID decisions have consistently found that the guidelines do not ‘apply’ *per se*, as the ICSID Convention and Rules establish the standard, but that they offer highly useful guidance.

Returning to the regulation of party representatives, the dozens of efforts to draft ethical codes applicable to them underscore the necessity and difficulties associated with providing clear standards of conduct for industry practitioners.¹⁸³ One notable attempt is the 2013 IBA Representation Guidelines.¹⁸⁴ They apply when incorporated into the parties’ agreement or where a tribunal, after determining it has authority over matters of party representation, chooses to rely on them in order to ensure the integrity and fairness of the proceedings.¹⁸⁵ In practice, studies show that tribunals have regularly referred to the guidelines in their procedural orders.¹⁸⁶ Submissions to the tribunal, information exchange and disclosure, as well as witness and expert evidence are governed by the guidelines.¹⁸⁷

A readily identifiable issue with the IBA Representation Guidelines is that of double-deontology. The Guidelines state that they are not meant to displace applicable mandatory laws and professional or disciplinary rules, avoiding the vesting of power reserved for bar associations and other professional bodies.¹⁸⁸ This situation risks creating inertia whereby the sometimes-uneven playing field of ethical standards between representatives remains unchanged.¹⁸⁹ Even worse, it could create further uncertainty and confusion regarding applicable rules.¹⁹⁰

Another problem is that the IBA Representation Guidelines fail to explicitly list exclusion and the ability to make cost awards as general remedies for party misconduct.¹⁹¹ While the list of

¹⁸¹ IBA Conflicts Guidelines, i. ([A]rbitral institutions and courts also often consult the Guidelines in considering challenges to arbitrators’).

¹⁸² J. D. Fry and J. I. Stampalija, ‘Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes’, *Arbitration International*, 30 (2014), 189, 249. The authors also observed that *Perenco v. Ecuador* is a notable exception.

¹⁸³ Rogers, *Ethics in Arbitration* (2014), para. 3.85.

¹⁸⁴ IBA Representation Guidelines.

¹⁸⁵ IBA Representation Guidelines, Guideline 1.

¹⁸⁶ S. Chadderton, ‘Arbitration: What Does the Future Hold?’, *International Bar Association* (2 April 2014), available at www.ibanet.org/Article/NewDetail.aspx?ArticleUId=16a5fa49-45dc-402e-bd79-6908ff8a0216 (last accessed 8 January 2020).

¹⁸⁷ IBA Representation Guidelines, Guidelines 9, 25.

¹⁸⁸ IBA Representation Guidelines, Guideline 3.

¹⁸⁹ Rogers, *Ethics in Arbitration* (2014), paras. 2-88-2.89 ([T]he ILA Principles deal mostly in abstractions and fail to articulate its own relationship to national ethical rules, particularly when those rules conflict with the ILA Principles.’). According to Rogers, while it creates some questions about applicable law, it also provides a coordinating function, as do most soft laws.

¹⁹⁰ M. E. Schneider, ‘President’s Message: Yet Another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation’, *ASA Bulletin*, 31 (2013), 497, 499.

¹⁹¹ IBA Representation Guidelines, Guideline 26.

powers under the guideline is non-exhaustive, these are important tools whose express inclusion would have been useful for practitioners as well as for enunciating best practices, especially for developing states who often impose less onerous standards under national law.¹⁹² Nevertheless, the IBA Representation Guidelines represent an important development within a larger effort to create an effective regulation and enforcement regime for representatives in international arbitration.

Another relatively recent endeavour is the 2010 ILA Hague Principles on Ethical Standards for Counsel appearing Before International Courts and Tribunals ('ILA Hague Principles'). They have entrenched best practices into basic and broad level obligations in disputes that include a state.¹⁹³ It is unclear why they do not apply to international courts and tribunals where states are not involved, which has the effect of excluding many (but not all) international commercial arbitrations.¹⁹⁴ Similarly to the IBA Representation Guidelines, they fail to articulate a meaningful relationship with national ethical rules, particularly when these rules conflict.¹⁹⁵

Going forward, one measure which could contribute to greater clarity and ease in enforcement is requiring party representatives of all parties to sign and deposit a copy of a 'code of conduct' at the commencement of proceedings, such as the IBA Representation Guidelines or ILA Hague Principles. Putting representatives on notice regarding the standards of conduct expected of them would not only act as a deterrent upon flagrant misconduct and a clarification of the finer issues, but also provide tribunals with a more concrete basis for sanctions.¹⁹⁶

Moreover, calls for the clarification and reform of ethics standards for experts in international arbitration have increased in concert with a rising awareness of how their ambiguity affects the proceedings' accuracy and efficiency.¹⁹⁷ The IBA Rules on the Taking of Evidence in International Arbitration ('IBA Evidence Rules'), although chiefly evidentiary and only tangentially ethics-related,¹⁹⁸ attempted to address some of these issues by reserving separate articles on party- and tribunal-appointed experts.¹⁹⁹ The explicit distinction could lead to measured progress, but the rules may ultimately do more to highlight issues than resolve them, with some predicting that the obligations imposed may need to be reconsidered in subsequent iterations of the rules.²⁰⁰

¹⁹² Hacking and Berry, 'Ethics in Arbitration' (2016), para. 17.

¹⁹³ L. Boisson de Chazournes *et al.*, 'The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals' (September 2010), Principle 1.2.

¹⁹⁴ See generally M. Kazazi, 'Commentary on the Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals', *Law & Practice of International Courts & Tribunals*, 10 (2011), 17, 19.

¹⁹⁵ ILA Hague Principles (2010), Principle 1.3: '[C]ounsel has a duty to ensure, so far as possible, compliance with these Principles in proceedings before an international court or tribunal and with such national ethical rules as may be applicable to him or her.'

¹⁹⁶ Sarvarian, *Professional Ethics* (2013), 183. Traditionally, costs and adverse inferences have been the only real 'sanctions' tribunals have employed. It is worth considering if, and how, other sanctions could be enforced.

¹⁹⁷ Rogers, *Ethics in Arbitration* (2014), para. 4.59.

¹⁹⁸ Sourgens *et al.* (eds.), *Evidence in Investment Arbitration* (2018), Part V ('Safeguarding the Process').

¹⁹⁹ International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010), Articles 5-6.

²⁰⁰ Kantor, 'A Code of Conduct for Party-Appointed Experts' (2010), 374 ('The process of selecting, educating and paying a party-appointed expert creates an environment that inherently puts pressure on the expert's independence.').

As is the case with the sources of experts, soft law instruments have yet to develop a comprehensive regulatory framework for third-party funders because of their relative novelty in international arbitration. One of the first attempts at regulation has been by funders themselves. Released in 2011 and revised periodically,²⁰¹ the Association of Litigation Funders of England and Wales's Code of Conduct for Litigation Funders ('ALF Code') seeks to clarify best practices and delineate reasonable expectations of conduct for its members in forming, using, and terminating funding agreements.²⁰² This is an encouraging first step for UK funders, but the Code has also been criticized for being vague and permitting, lacking meaningful enforcement mechanisms, as well as for being solely applicable to members of a voluntary association.²⁰³ Strident reviews from the Institute for Legal Reform and European Justice Forum were also emphatic that these are no substitute for the development of formal binding regulation.²⁰⁴

In brief, a plethora of sources govern participants' ethical conduct, including parties' agreements, international treaties, national laws, institutional arbitration rules and soft law instruments. The New York Convention also controls or limits what all these sources may legally provide.²⁰⁵ Further, the number and diversity of applicable sources at times lead to questions about which law applies and when. In addition, confusion is sometimes added when many of these sources apply simultaneously. From this complex framework of authorities, participants' substantive obligations emerge.

II. OBLIGATIONS: CONTENT OF ETHICAL STANDARD

Are participants in international arbitration over- or under-regulated? Are formal and informal obligations adequate today? What is the appropriate balance between fairness and efficiency in arbitral proceedings? Examining these tensions, this section deals with participants' substantive ethical obligations. These obligations derive from the process of compiling and comparing the sources previously surveyed, and can thus be said to represent current 'best practices.' Evidently, participants aiming to determine their specific obligations in an arbitration should revert to the sources directly applicable to them in these particular proceedings. Yet, participants share, conceptually, core ethical obligations stemming mostly from the nature of their work and their legal mandate.

To begin with, arbitration participants must exercise the level of care, diligence, and skill prescribed by their professional functions and contractual arrangements. This means, among others, that participants should accept mandates only when they have the appropriate expertise and the required availability. In the case of arbitrators and party representatives, their relationship of trust with the parties demands even more; this special relationship brings about a fiduciary duty. This duty incumbent on arbitrators is widely recognized, including by the ICC-ICA Rules.

²⁰¹ Association of Litigation Funders of England and Wales, Code of Conduct for Litigation Funders (January 2018).

²⁰² Rogers notes that it is still unclear whether the Code applies solely to the location of the funder or the litigant being funded ('funding [...] within England and Wales'), or also to the situs of the dispute proceedings ('disputes within England and Wales'), Rogers, *Ethics in Arbitration* (2014), para. 5.118.

²⁰³ Rogers, *Ethics in Arbitration* (2014), para. 5.109.

²⁰⁴ M. Carlisle, 'EJF Response to Lord Justice Jackson's Final Report on the Costs of Civil Litigation', *European Justice Forum* (26 February 2010), 6-8.

²⁰⁵ W. M. Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press, 1992), Ch. 4.

Article 11(5) states, '[b]y accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.'²⁰⁶ In a like fashion, Article 44 of the ICSID Convention provides, '[a]ny arbitration proceeding shall be conducted in accordance with the provisions of this Section [on the "Powers and Function of the Tribunal"] and, except as the parties otherwise agree, in accordance with the Arbitration Rules.'²⁰⁷

Professional independence constitutes another ethical obligation shared by participants. Karton refers to 'neutrality' as a core social norm shared in international arbitration and as a guiding principle of both procedural and substantive rules in the system.²⁰⁸ On ethical matters, the expectations of independence vary between the different participants. Arbitrators, obviously, should display greater independence than representatives, experts and funders.²⁰⁹ But all participants should exercise independent professional judgement. The goal behind this necessity is to protect the integrity of the proceedings – as the New York and ICSID Conventions require²¹⁰ – and the interests of both clients and stakeholders.²¹¹

In addition to these shared obligations, each participant has specific ethical duties based on its functions in the arbitral process. This section analyses these duties as well as the issues and hot spots related to them. It presents consecutively (A) arbitrators, (B) party representatives, (C) experts and (D) third-party funders. Before that, however, one word should be said about tribunal secretaries.

In international arbitration, secretaries sit uneasily between representatives (they are often in fact lawyers) and arbitrators (they play a role akin to arbitrators'). Procedural rules demand that secretaries satisfy requirements of independence and impartiality.²¹² Other than this basic obligation, it is concerning that they are not 'regulated in a way that accords with – rather than denies – our present reality.'²¹³ The use of secretaries has indeed become routine, and their tasks

²⁰⁶ ICC-ICA Rules, Article 11(5).

²⁰⁷ ICSID Convention, Article 44.

²⁰⁸ Karton, *The Culture of International Arbitration* (2013), 114-21.

²⁰⁹ In the case of party representatives, see also International Bar Association, *International Principles on Conduct for the Legal Profession* (28 May 2011), Principle 1 ('A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.').

²¹⁰ See, e.g., IBA Representation Guidelines, Guideline 27(a): 'In addressing issues of Misconduct, the Arbitral Tribunal should take into account: [...] the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award.'

²¹¹ See generally M. DeStefano, 'Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?', *Fordham Law Review*, 80 (2012), 2791, 2794. In this Compendium, see Ch. 3 – 'Stakeholders in Arbitration.'

²¹² See, e.g., International Chamber of Commerce, *Note on the Conduct of the Arbitration Under the ICC Rules* (2017), 21 ('Administrative Secretaries must satisfy the same independence and impartiality requirements as those which apply to arbitrators under the Rules.'). IBA Conflicts Guidelines, Guideline 5(b) ('Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.').

²¹³ C. Partasides, 'Secretaries to Arbitral Tribunals', in B. Hanotiau and A. Mourre (eds.), *Players' Interaction in International Arbitration* (International Chamber of Commerce, 2012), 91. In this Compendium, see also J. van Haersolte-van Hof, Ch. 6.4 – 'Secretaries to the Arbitral Tribunal.'

have often been enhanced. The main ethical issue surrounding secretaries' regulation is thus what tasks arbitrators can legitimately delegate to them.²¹⁴

A. Arbitrators

Independence requirements for arbitrators are so long-standing that they are nearly canonical. Adjudicators' independence has always depended upon, and still depends upon, stakeholders' concerns and values, but also on adjudicators' role in their respective legal system. Ralston notes inter-state arbitrations in ancient times were presided by high-ranked, respected citizens from neutral states, and often called upon to take an oath to the gods before performing their duties.²¹⁵ Dworkin presented the ideal national judge as a Hercules embodying superhuman skill, patience and acumen.²¹⁶ Dezalay and Garth similarly identified top commercial arbitrators as individuals with high status, independence and symbolic capital.²¹⁷

In this context, this chapter analyses the main ethical obligations of international arbitrators, namely to remain independent, impartial and to disclose potential conflicts. These fundamental obligations, of which traces can be found in early international arbitrations,²¹⁸ are based on the long-standing principle that arbitrators need to be neutral third-party decision-makers if their rulings are to be considered legitimate.²¹⁹ In addition, arbitrators' other noteworthy obligations include the duty to conduct the arbitration fairly, to ensure the proceedings' confidentiality, to act competently and to issue the award within a reasonable timeframe.²²⁰

Despite the large number of sources regulating arbitrators, there is a common understanding about what should be required of them in terms of independence and/or impartiality.²²¹ This idea comes from the fact arbitrators are, in the eloquent wording of two distinguished counsel, 'legal creatures with a predominantly judicial function.'²²² Independence

²¹⁴ M. Polkinghorne and C. B. Rosenberg, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard* (IBA, 2015), 'The Debate.'

²¹⁵ The oath in the case between Calymna and Cos was the following: 'I swear by Jupiter, by the Lycian Apollo, and by the earth that I will judge in the case joined between the parties under oath as will appear to me most Just. I will not judge according to one witness if this witness does not appear to me to tell the truth. I have not received any present with relation to this suit, neither myself nor any other for me, man or woman, nor by any detour whatsoever. May I prosper as I adhere to my oath, but unhappiness to me if I perjure myself' (J. H. Ralston, *International Arbitration, from Athens to Locarno* (Oxford University Press, 1972), 161).

²¹⁶ R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), 105.

²¹⁷ Dezalay and Garth, *Dealing in Virtue* (1996), 18-21.

²¹⁸ Ralston, *International Arbitration* (1972), Ch. XV. See also M. Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (Kluwer, 2013), 1.01.

²¹⁹ L. Neudorf, 'Judicial Independence: The Judge as a Third Party to the Dispute' (LL.M. Thesis, McGill University 2009). See also the IBA's 'Fundamental Rule': IBA Ethics Rules, Rule 1 ('Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias.').

²²⁰ See, e.g., IBA Ethics Rules; ILA Hague Principles; Chartered Institute of Arbitrators, Code of Professional and Ethical Conduct for Members (October 2009).

²²¹ See, generally, H. E. M. Buechel, 'The Independence of International Arbitrators', in S. Shetreet and C. Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012); F. Gélinas, 'The Independence of International Arbitrators and Judges: Tampered with or Well-Tempered?', *New York International Law Review*, 24 (2011), 1.

²²² S. Wilske and M. Raible, 'The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues?', in C. A. Rogers and R. P. Alford (eds.), *The Future of Investment Arbitration* (Oxford University Press, 2009), 272.

and impartiality are complex concepts, hotly debated, and involve numerous components such as the duty to disclose, the duty to investigate, as well as other considerations. In the end, however, differences lie more in the application than in the wording of these lofty principles.

The first issue concerning arbitrators' independence standard relates to the different terminology used by each source. Article 14(1) of the ICSID Convention states, '[p]ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise *independent judgement*.'²²³ Sources like the 1996 English Arbitration Act require that the tribunal be *impartial*,²²⁴ and others simply call on arbitrators to be *neutral*.²²⁵ Despite these divergences, contemporary rules increasingly use the twin concepts of independence *and* impartiality, of which the most notable are the UNCITRAL Rules,²²⁶ the Permanent Court of Arbitration ('PCA') Arbitration Rules²²⁷ and the IBA Conflicts Guidelines.²²⁸ This is also the case for national arbitration laws.²²⁹ Some institutions like the ICC-ICA have changed the wording of their rules to move toward using both concepts,²³⁰ even if they had traditionally been sceptical of such approaches and had long resisted them.²³¹ This overview illustrates that, while the ICSID Convention only requires that arbitrators be in a position to exercise independent judgement, most other rules, laws and guidelines include an express independence and impartiality standard.²³²

²²³ ICSID Convention, Article 14(1).

²²⁴ Arbitration Act 1996, Sections 1, 24, 33.

²²⁵ J. H. Carter, 'Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for "Nonneutrals"', *American Review of International Arbitration*, 11 (2000), 295, 298-9; C. Menkel-Meadow, 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not', *University of Miami Law Review*, 56 (2002), 949-51. See also C. Verbruggen, 'The Arbitrator as a Neutral Third Party', in J. Schäfer (ed.), *Walking A Thin Line: What an Arbitrator Can Do, Must Do or Must Not Do: Recent Developments and Trends* (Bruylant, 2010).

²²⁶ UNCITRAL Arbitration Rules, Article 11.

²²⁷ Permanent Court of Arbitration, Arbitration Rules (17 December 2012), Article 11-2.

²²⁸ IBA Conflicts Guidelines, General Principle 1 ('Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.').

²²⁹ See, e.g., Netherlands Arbitration Act (2014), Article 1033 (refers to impartiality and independence). On the changes brought by the new Dutch law, see D. Strik and M. Krestin, 'New Dutch Arbitration Law Adopted', *Kluwer Arbitration Blog* (28 May 2014), available at <http://kluwerarbitrationblog.com/blog/2014/05/28/new-dutch-arbitration-law-adopted/> (last accessed 11 January 2020).

²³⁰ ICC-ICA Rules, Article 11(1) ('Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.').

²³¹ Bond highlights that 'the very first ICC Arbitration Rules of 1923 [and of 1955] contained no mention of either independence or impartiality, nor did they contain provisions for the challenging of an arbitrator.' He submits that this is because the concept of impartiality lacked any satisfactory definition: S. R. Bond, 'The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration', in International Chamber of Commerce, International Court of Arbitration (ed.), *The Arbitral Process and the Independence of Arbitrators* (International Chamber of Commerce, 1991), 9.

²³² A. Sheppard, 'Arbitrator Independence in ICSID Arbitration', in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), 138. Yet, the ICSID Convention and Rules have been interpreted and applied to incorporate the concept of independence and impartiality. For instance, the extensive debate has discussed the different wording in English and Spanish, and concluded that both concepts were included. Although this may not be persuasive in light of the wording of the provisions, it has nevertheless been universally accepted.

Scholars both within and outside of the arbitration community have interpreted the wording used by these sources differently, echoing a debate that has been going on in many other adjudicatory contexts. For instance, Cristani contends that independence and impartiality should be distinguished,²³³ Paulsson and Van Harten argue that the terms overlap,²³⁴ while Rogers asserts that there are no practical differences between the two.²³⁵ A closer look at these arguments, however, shows that they are not in direct opposition. More precisely, it is correct to say that independence concerns the external connections or relations of an arbitrator, while impartiality has to do with his or her subjective state of mind.²³⁶ But it is also right that ‘the concept of impartiality entirely subsumes that of independence, since an arbitrator whose interests lie with a party, or with the outcome of a case, is unlikely to be perceived as impartial.’²³⁷ Lastly, the significance of the independence and impartiality standard is for the greater part determined by its application by arbitral tribunals and national courts.²³⁸

Each source further details the independence standard for arbitrators through its own ‘test.’ Such tests are central in the determination of an arbitrator’s bias or conflicts. The tests themselves are different, apply at different stages and in different contexts.²³⁹ For instance, ICSID’s threshold for a successful challenge is one of a ‘manifest’ lack of the prescribed qualities.²⁴⁰ For its part, the very influential UNCITRAL Model Law prescribes that arbitrators should be disqualified in circumstances raising ‘justifiable doubts’ about their independence or impartiality. The IBA Conflicts Guidelines go along the same line, albeit using a different language: ‘[d]oubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.’²⁴¹ Referring to the standard of ‘justifiable doubts’ is becoming a trend in institutional arbitration rules.²⁴² If the jurisprudence in England leans towards requiring a ‘real danger of bias’ to warrant

²³³ F. Cristani, ‘Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview’, *Law and Practice of International Courts and Tribunals*, 13 (2014), 153, 155. For the different views of arbitral institutions on the matter, see Cristani, ‘Challenge and Disqualification of Arbitrators’ (2014), 156.

²³⁴ Paulsson, *Idea of Arbitration* (2014), 149; G. Van Harten, ‘Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law’, in S. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), 629.

²³⁵ Rogers, *Ethics in Arbitration* (2014), 91.

²³⁶ D. D. Caron and L. M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd ed. (Oxford University Press, 2013), 213. For instance, the jurisprudence of the Supreme Court of Canada definitely makes a distinction between the two: K. Eltis and F. Gélinas, ‘Judicial Independence and the Politics of Depoliticization’ (2009), Pt. 1 (‘Components, Dimensions and Sources’), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366242 (last accessed 11 January 2020).

²³⁷ Paulsson, *Idea of Arbitration* (2014), 149. See also P. Pasquino, ‘Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History’, *Law & Practice of International Courts & Tribunals*, 2 (2003), 11, 25 (‘[I]ndependence of the judicial power has always to be understood as an instrument to achieve the goal of impartiality; and that independence has to be conceived of as neutrality, and absence of the subordination of the judge a) from the parties to the conflict, b) from any other power interested in a given resolution of the conflict, and as far as possible c) from the bias of passions and partiality of the judge himself or herself’ [emphasis omitted]).

²³⁸ Rogers, *Ethics in Arbitration* (2014), 91.

²³⁹ Rogers, *Ethics in Arbitration* (2014), 91. See also Sheppard, ‘Arbitrator Independence’ (2009), 138.

²⁴⁰ ICSID Convention, Article 14(1). See, however, the long case law on meaning of ‘manifest’ in this context, further discussed below.

²⁴¹ IBA Conflicts Guidelines, General Principle 2(c).

²⁴² PCA Arbitration Rules, Articles 11-2.

arbitrators' removal,²⁴³ it appears that most national arbitration laws follow the trend of arbitral institutions.²⁴⁴ In short, almost all sources require 'justifiable doubts' as the threshold for a successful challenge, which is a lower standard than the ICSID Convention's 'manifest' lack of the prescribed qualities.²⁴⁵

Despite the different phraseology used to define arbitrators' independence standard, institutional arbitration rules and national arbitration laws have many common points. First of all, '[they] do not generally require proof of actual bias, partiality, or lack of independence by an arbitrator, but instead require some showing of risk, potential, or appearance of bias.'²⁴⁶ There is a compelling rationale for this lower threshold of proof: actual bias is very difficult to demonstrate since the law cannot creep into the minds of adjudicators in order to contemplate if they are affected by extraneous influences,²⁴⁷ and arbitral disputes offer limited opportunities for circumstantial evidence. Moreover, while the multiplication of sources governing (and attempting to govern) arbitrators has partly increased the confusion about what these standards and obligations specifically entail, the different formulations have mattered less in practice than their application by arbitral tribunals and national courts based on alleged improper conduct.²⁴⁸

Because the notions of independence and/or impartiality are subject to interpretation, ethical codes, institutional arbitration rules and national arbitration laws all require that arbitrators disclose information to the parties in the dispute in which they will be appointed. This ensures that parties, as well as the arbitral institution administering the dispute, have the relevant information to evaluate if an arbitrator has the ability to serve in a particular case: '[d]isclosure thus helps to select the *right* arbitrator and to avoid selecting an arbitrator who could potentially *subsequently* be challenged by the other side on account of a conflict of interest.'²⁴⁹ Since disqualifications grounded on facts already disclosed and accepted by the parties are proscribed, disclosure prevents parties from interrupting and frustrating ongoing arbitration proceedings with late challenges. At a broader level, disclosures increase transparency and confidence in the system by providing stakeholders with the relationships and experiences that could significantly affect the actual or perceived decision-making capacity of arbitrators.²⁵⁰

Furthermore, arbitrators generally sign a statement affirming their independence. A good example of how this duty of divulgation manifests itself is found the ICC-ICA Rules, which requires that arbitrators 'disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the

²⁴³ *AT&T Corporation v. Saudi Cable Co.*, 2 Lloyd's Rep. 201, ADD (Ct. App. 2000).

²⁴⁴ See, e.g., Dutch Arbitration Act, Article 1033; Swiss Private International Law Act (1987), Article 180(1)(c).

²⁴⁵ The ground-breaking decision in *Blue Bank*, where the challenge was upheld, arguably lowered the disqualification threshold by affirming that to establish an 'appearance' of bias is sufficient: *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB 12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013. While this standard comes close to the 'reasonable doubts' test, it still remains more stringent: K. Daele, 'Saint Gobain v Venezuela and Blue Bank v Venezuela: The Standard for Disqualifying Arbitrators Finally Settled and Lowered', *ICSID Review*, 29 (2014), 296, 302-3, 305.

²⁴⁶ Rogers, *Ethics in Arbitration* (2014), 91.

²⁴⁷ *Locabail v. Bayfield Properties* [2000] QB 451.

²⁴⁸ Rogers, *Ethics in Arbitration* (2014), paras. 2.50, 2.103.

²⁴⁹ Daele, *Challenge and Disqualification of Arbitrators* (2012), 1. The issue of late proposals is also specifically addressed by time limits to file a challenge, that is, promptly after the facts are known or should have been known. Importantly, the duty of disclosure is continuous throughout the proceedings.

²⁵⁰ Rogers, *Ethics in Arbitration* (2014), 91.

parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.²⁵¹ The ICSID Arbitration Rules also provide an illustrative example of independence statements. Under these rules, arbitrators must confirm they have never had any 'past and present professional, business and other relationships (if any) with the parties,' as well as 'any other circumstance that might cause [their] reliability for independent judgement to be questioned by a party.'²⁵²

Given how they are framed, most rules and laws leave a significant discretion to arbitrators about the type of information that they should disclose. Broad terms such as independence and impartiality are subject to the arbitrators' interpretation.²⁵³ In response to this pitfall, there have been limited efforts to include 'quantitative and categorical descriptions of the specific content that must be disclosed.'²⁵⁴ For instance, the IBA Conflicts Guidelines set forth specific circumstances and relationships that should be disclosed by arbitrators. While some have criticized these efforts²⁵⁵ and others have praised them,²⁵⁶ most rules and laws have not adopted such an approach, and have instead left the decision about what to disclose to arbitrators' subjective assessment.

Although the duty to disclose applies to information known by arbitrators, the duty to investigate asks them to make certain inquiries about circumstances that would also require disclosure. Few institutional arbitration rules and national arbitration laws directly impose a duty to investigate on arbitrators. Among them, the IBA Conflicts Guidelines' General Standard 7(d) provides, '[a]n arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence.'²⁵⁷ However, the UNCITRAL Rules, ICC-ICA Rules, and LCIA Rules, as well as many national arbitration laws,²⁵⁸ are silent about whether arbitrators have a duty to investigate potential conflicts of interests.²⁵⁹ This is also the case for the ICSID Convention, ICSID Arbitration Rules and ICSID Additional Facility Rules. In a nutshell, most rules and laws themselves generally do not address this duty, at least not explicitly.

Despite the absence of a textual foothold, arbitral and national case law has recognized the duty to investigate potential conflicts, grounding it in the arbitrator's duty to disclose. The rationale for doing so is that an arbitrator cannot simply rely on his or her existing knowledge when making disclosures.²⁶⁰ Yet arbitral and national courts have diverged on the scope of the inquiries. For

²⁵¹ ICC-ICA Rules, Article 11(2); LCIA Arbitration Rules, Article 5.4.

²⁵² ICSID Convention Arbitration Rules, Rule 6(2); ICC-ICA Rules, Article 11(2); UNCITRAL Arbitration Rules, Article 11. See also Daele, *Challenge and Disqualification of Arbitrators* (2012), 63.

²⁵³ See generally C. A. Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct', *Stanford Journal of International Law*, 41 (2005), 53.

²⁵⁴ Rogers, *Ethics in Arbitration* (2014), 94.

²⁵⁵ Ball, 'Probity Deconstructed' (2005), 323.

²⁵⁶ Rogers, *Ethics in Arbitration* (2014), 94 ('Categorical descriptions of specific types of information may reduce the risk that an institution or national court will reach a different conclusion than the arbitrator did during the appointment process about whether a disclosure was necessary.').

²⁵⁷ It goes on to say that '[f]ailure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries' (IBA Conflicts Guidelines, General Standard 7(d)).

²⁵⁸ G. B. Born, *International Commercial Arbitration* (Kluwer, 2009), 1959-60.

²⁵⁹ Daele, *Challenge and Disqualification of Arbitrators* (2012), 49-56.

²⁶⁰ J. D. M. Lew *et al.*, *Comparative International Commercial Arbitration* (Kluwer, 2003), 269. By signing a declaration of independence, one arguably has an obligation of due diligence to investigate what might reasonably be

instance, two schools of thought have emerged from the interpretation of ICSID Rule 6(2).²⁶¹ Under the first one, limited investigation is needed, and part of the duty lies on third parties.²⁶² Under the second school, arbitrators themselves are required to carry out a comprehensive investigation.²⁶³ Similarly, the jurisprudence of national courts is divided on the duty to investigate. Using the USA to exemplify this divide, Rogers writes that ‘[s]ome courts have found that an arbitrator cannot be biased if he or she does not know about an alleged conflict, and therefore has no duty to investigate unknown facts, while other courts have reasoned that, since the standards for impartiality are framed to also prevent perceptions of bias, potential arbitrators must investigate potential conflicts.’²⁶⁴ Thus, even if arbitral and national courts have filled the void left by most rules and laws and established a duty to investigate, they have done so inconsistently, and therefore found different parameters to this duty.

Concretely, several issues have emerged from the appraisal of arbitrators’ independence. One of these issues, which has been raised in both commercial arbitration and investment arbitration, is whether party-appointed arbitrators and chairpersons should be held to the same standard of independence. Recent reviews of dissenting opinions in international arbitration have shown that party-appointed arbitrators generally favour their appointing party. Redfern, for instance, has reported that every dissenting opinion in 2001 ICC-ICA arbitrations has sided with the party having nominated the dissenting arbitrator.²⁶⁵ Similarly, van den Berg found that all dissents he studied in investment arbitration favoured the party that appointed the dissenting arbitrator,²⁶⁶ which brings about concerns akin to those of *ad hoc* ICJ judges.²⁶⁷

While these trends do not indicate an actual bias from party-appointed arbitrators,²⁶⁸ they nevertheless suggest that parties have ‘actively [sought] out arbitrators whom they believe would be pre-disposed to rule in their favour,’²⁶⁹ and that parties have had success in predicting

considered a conflict. See P. Turner and R. Mohtashami, *A Guide to the LCIA Arbitration Rules* (Oxford University Press, 2009), 59; A. M. Whitesell, ‘Independence in ICC Arbitration: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators’, *ICC International Court of Arbitration Bulletin Special Supplement* (2007), 7, 13.

²⁶¹ ICSID Convention Arbitration Rules, Rule 6(2).

²⁶² See, e.g., *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case no. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 June 2008.

²⁶³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case no. ARB/97/3, Decision on the Argentine Republic’s Request for Annulment of the Award, 20 August 2007.

²⁶⁴ Rogers, *Ethics in Arbitration* (2014), 94.

²⁶⁵ A. Redfern, ‘The 2003 Freshfields Lecture: Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly’, *Arbitration International*, 20 (2004), 223. Intrigued by such findings, Silva Romero made a similar inquiry in 2003, and found almost identical results: E. Silva Romero, ‘Brèves Observations Sur l’Opinion Dissidente’, in J. Rosell (ed.), *Les Arbitres Internationaux: Colloque du 4 Février 2005* (Société de Législation Comparée, 2005).

²⁶⁶ A. J. van den Berg, ‘Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration’, in M. H. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff, 2010), 824.

²⁶⁷ ‘The posture adopted by *ad hoc* judges in the International Court of Justice, almost invariably espousing the theses of their appointing states, has over many years been similarly inglorious – with a few notable exceptions’ (Paulsson, *Idea of Arbitration* (2014), 163).

²⁶⁸ van den Berg, ‘Dissenting Opinions by Party-Appointed Arbitrators’ (2010), 834.

²⁶⁹ S. Menon, ‘Keynote Address’, in A. J. van den Berg (ed.), *International Arbitration: The Coming of a New Age?* (ICCA Congress Series, no. 17) (Kluwer, 2012), 17.

arbitrators' views. '[C]laiming that the independence of a party-appointed arbitrator can be equated to that of a domestic judge, or that of a presiding arbitrator, has [thus] been called hypocrisy, an ideological façade, a fiction, a mythology, and a triumph of rhetoric for the naïve.'²⁷⁰

By acknowledging that there are degrees of impartiality, some have asserted that party-appointed arbitrators should be *sufficiently* impartial while presiding arbitrators have to be *particularly* neutral.²⁷¹ With a functional role more akin that of a devil's advocate, and with parties expecting less neutrality from them,²⁷² these commentators have argued that party-appointed arbitrators should be independent, but potentially have less stringent obligations than arbitral chairpersons.²⁷³ Given this role, information asymmetry between the parties in selecting party-appointed arbitrators would be particularly problematic.²⁷⁴ To resolve this issue, *Arbitrator Intelligence*, a non-profit, academically affiliated institution, has been set up 'to promote transparency, fairness, and accountability in the selection of international arbitrators by increasing and equalizing access to critical information about arbitrators and their decision making.'²⁷⁵

A further issue is whether arbitrators in investment disputes should be held to higher ethical standards than the ones in commercial disputes. In light of the governance implications of their decisions, it has been contended that they should.²⁷⁶ There have been many reforms in the last decade setting forth new procedures to increase transparency in investment arbitration, including publicizing awards rendered by arbitrators.²⁷⁷ For instance, the 2014 UNCITRAL Rules on Transparency provide for public access to documents issued by arbitrators as well as the hearings related to investment arbitral proceedings.²⁷⁸ Because awards are now widely available,

²⁷⁰ Gélinas, 'The Independence of International Arbitrators and Judges' (2011), 27.

²⁷¹ For example, Bellet, who has been the premier président of the French Court of Cassation, the president of the Iran-US Claims Tribunal in The Hague, and later a well-known arbitrator, acknowledged in case review that such degrees exist: P. Bellet, 'Note: Cour d'appel de Paris (1ere Ch. Suppl), 28 Juin 1991, KFTCIC c Icori Estero', *Revue de l'Arbitrage*, 1992 (1992), 573, 579.

²⁷² *In re Astoria Medical Group*, 11 NY 2d 128, 133 (US New York Court of Appeals 1962) ('The right to appoint one's own arbitrator [...] would be of little moment were it to comprehend solely the choice of a neutral. It becomes a valued right, which parties bargain for and litigate over, only if it involves a choice of one believed to be sympathetic to his position or favourably disposed to him.').

²⁷³ C. A. Rogers, 'Ethics in International Arbitration', in G. J. Horvath and S. Wilske (eds.), *Guerrilla Tactics in International Arbitration: Ethics, Practice and Remedies* (Kluwer, 2013), 330-32.

²⁷⁴ S. Menon and J. Paulsson, 'Is Self-Regulation of International Arbitration an Illusion?', *4th LSE Arbitration Debate* (Old Theatre, Old Building, 9 May 2013), available at www.arbitration-icca.org/AV_Library/4th_LSE_Arbitration_Debate.html (last accessed 11 January 2020).

²⁷⁵ 'About AI', *Arbitrator Intelligence* (2018), available at www.arbitratorintelligence.org/about-us (last accessed 11 January 2020).

²⁷⁶ See, e.g., Van Harten, *Investment Treaty Arbitration and Public Law* (2007), Ch. 7; E. de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press, 2014), Ch. 3: 'The Role, Function and Qualifications of Arbitrators in Investment Treaty Arbitration'.

²⁷⁷ See, e.g., A. J. Menaker, 'Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration', in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010). See also N. Blackaby, 'Public Interest and Investment Treaty Arbitration', in A. J. van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer, 2003), 355.

²⁷⁸ UNCITRAL, Rules on Transparency in Treaty-Based Investor-State Arbitration (2013). See also D. Wilkie, 'UNCITRAL Unveils New Transparency Rules – Blazing a Trail Towards Transparency in Investor-State Arbitration?', *Kluwer Arbitration Blog* (25 July 2013), available at <http://kluwerarbitrationblog.com/blog/2013/07/25/uncitral-unveils-new-transparency-rules-blazing-a-trail-towards-transparency-in-investor-state-arbitration/> (last accessed 11 January 2020).

arbitrators, parties and states have started to rely on them in numerous parts of the process. Even without a formal system of *stare decisis*, ‘tribunals [will] identify where they disagree with earlier tribunals, and provide reasons for siding with one camp when there is already divergence, or for deviating from lines of consistent cases.’²⁷⁹ This has the effect of ‘crafting treaty-overarching, multilateral rules that govern investment treaty arbitrations and that generate an international public dimension in the settlement of individual investment disputes.’²⁸⁰ This governance implication of arbitrators’ work²⁸¹ informs the calls for expanding their independence.

The precedential value of awards,²⁸² coupled with closed personal and professional connections in this specialist community, have also prompted concerns related to ‘role switching’ and ‘issue conflict.’ The first relates to the situation in which a professional works contemporaneously as an arbitrator and as a party representative in the field.²⁸³ A role confusion may occur since an arbitrator could be tempted, even unconsciously, to render a particular decision in a case from which he or she might benefit in the future.²⁸⁴ Many critics from civil society and academia believe that allowing the dual role of arbitrators and representatives concurrently compromises due process.²⁸⁵ The second concern – issue conflict – refers to arbitrators’ relationship, not with the parties or counsel in the case, but rather with the subject matter of the dispute itself.²⁸⁶ On this question, the distinction between acceptable and unacceptable predisposition is notoriously difficult to draw. A recent task force on the subject has taken the view that ‘prior opinions about similar *legal* issues, without more, are generally not disqualifying, [while] views about *factual* matters specific to the case at hand have been found to be of concern.’²⁸⁷

In sum, arbitrators’ central obligation to remain independent and impartial raises many practical issues in the system, which have intensified as a consequence of arbitration’s ever-increasing growth, complexification, and diversification. That arbitrators remain independent – and be perceived as such – is fundamental for this dispute resolution method to maintain its legitimacy and judicial character. As professionals, service providers, and contractual counterpart,

²⁷⁹ I. M. Ten Cate, ‘The Costs of Consistency: Precedent in Investment Treaty Arbitration’, *Columbia Journal of Transnational Law*, 51 (2013), 418, 476.

²⁸⁰ S. W. Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’, *Leiden Journal of International Law*, 23 (2010), 401, 413-4. See also S. W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009).

²⁸¹ See generally M. Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart, 2018).

²⁸² In this Compendium, see Y. Banifatemi, Ch. 11.1 – ‘Precedents in Arbitration’.

²⁸³ N. Bernasconi-Osterwalder *et al.*, ‘Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel’, *IV Annual Forum for Developing Country Investment Negotiators Background Papers, New Delhi, 27-9 October 2010* (International Institute for Sustainable Development, 2011), 3.

²⁸⁴ W. W. Park, ‘Arbitrator Integrity: The Transient and the Permanent’, *San Diego Law Review*, 46 (2009), 629, 648-55.

²⁸⁵ T. Buergenthal, ‘The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law’, *ICSID Review*, 21 (2006), 126, 129-30.

²⁸⁶ See A. P. Velazquez, ‘Arbitrators and Issue Conflict: Treading a Tightrope of Legitimacy? A Civil Law Perspective’, in I. A. Laird and T. Weiler (eds.), *Investment Treaty Arbitration and International Law*, vol. 2 (JurisNet, 2009); M. L. Harrison, ‘Issue Conflict in International Arbitration: Much Ado about Nothing’, in Laird and Weiler (eds.), *Investment Treaty Arbitration* (2009).

²⁸⁷ L. Boisson de Chazournes and J. R. Crook, ‘Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration’, *The ICCA Reports*, no. 3 (ICCA, 2016), 62-3.

arbitrators also have other obligations to the parties and stakeholders, such as competence and confidentiality.

B. Representatives

In contrast to arbitrators, the substantive ethical obligations of party representatives do not stem largely from institutional arbitration rules, as these rules do provide little guidance on this matter. Representatives' regulation, instead, comes primarily from national sources. Without exception, these sources prohibit representatives from participating in criminal misconduct, as they must refuse assisting any party in such endeavour.²⁸⁸ Yet, these national sources also significantly differ in terms of the standards of conduct prescribed. Divergence occurs on issues such as witness preparation, *ex parte* communications, conflicts of interest, confidentiality and privilege, decorum, sanctioned fee arrangements, and others.²⁸⁹

The discrepancy between national standards is problematic. The legal, cultural and professional diversity of party representatives means they sometimes have differing views about what is ethical and what is not.²⁹⁰ As a relative and context-dependent concept, fairness can thus be compromised in these adversarial processes.²⁹¹

Additionally, the financial and political stakes in international arbitration can create important pressure upon representatives to achieve victory at all costs.²⁹² The line between zealous advocacy and dishonest conduct can therefore be thin. Sarvarian summarizes the types of problematic behaviour that can occur – albeit rarely:

While particular types of litigation misconduct may more frequently be engaged in by States, one needs to bear in mind that a good deal of such misconduct can be, and at times is, committed by private parties. Forgery and concealment of documents, illegal surveillance of communications (mail, phone, e-mail, and computer hacking), intimidation of the participants in arbitration (arbitrators, party representatives, counsel, experts and witnesses), lies, and false testimony are not reserved for States only. Arbitration against or between business oligarchs in countries with an underdeveloped system of 'rule of law' seems often to involve the use of private detectives to spy on and sometimes visibly follow arbitrators, either to intimidate them or to find evidence for suspected corruption; eavesdropping; threatening witnesses; and forgery, including forged 'evidence' of arbitrator corruption.²⁹³

In light of the foregoing, this section distils representatives' shared ethical obligations, which are mainly found in national sources and soft law instruments. These core obligations, when self-evident or raising little practical concerns, are left out of the analysis.²⁹⁴ For instance, candour

²⁸⁸ Sarvarian, *Professional Ethics* (2013), 178.

²⁸⁹ Born, *International Commercial Arbitration* (2014), 2855.

²⁹⁰ C. Benson, 'The IBA Guidelines on Party Representation: An Important Step in Overcoming the Taboo of Ethics in International Arbitration', *Cahiers de l'Arbitrage*, 1 (2014), 47, 48.

²⁹¹ Veeder, 'The 2001 Goff Lecture' (2002), 435; UNCITRAL Secretariat, *Possible Future Work in the Field of Dispute Settlement: Ethics in International Arbitration* (A/CN.9/916, UNCITRAL Working Group III, 2017), para. 42.

²⁹² As Rogers notes, '[I]eading arbitrators are called on to resolve everything from delicate matters of diplomacy, to controversies involving sums larger than the annual operating budget of some smaller nations, to issues at the edge of the legal frontiers of international and transnational law.' See Rogers, *Ethics in Arbitration* (2014), 61.

²⁹³ Sarvarian, *Professional Ethics* (2013), 171.

²⁹⁴ See, generally, IBA Ethics Rules. Failure to produce documents, which is a common (and controversial) issue in practice, is not addressed here due to space constraints.

and honesty,²⁹⁵ diligence and competence,²⁹⁶ and loyalty do not require detailed rehashing.²⁹⁷ Instead, the focus is on more complicated issues, including conflicts of interest, confidentiality and attorney-client privilege, as well as document production and witness preparation.

Before all, it should be pointed out to whom representatives owe their ethical obligations in arbitral proceedings. Chiefly, these obligations are aimed to their clients and the arbitrators sitting on the tribunal, but representatives also interact with many other participants towards whom they have basic responsibilities. This includes experts, arbitral institutions' employees, tribunal secretaries, witnesses and experts, and sometimes even third parties. These obligations, however, are only indirectly 'owed' to these participants, as representatives are required to cooperate with the tribunal in ensuring the fairness and integrity of proceedings.²⁹⁸

First of all, representatives are precluded from representing a client before an arbitral tribunal where a conflict or an appearance of such conflict would arise because of either their personal responsibilities or their responsibilities towards other participants.²⁹⁹ Representatives should disclose, 'any personal links with the opposing party or with the Tribunal such as may give rise to an appearance of conflict and in certain cases should probably be obliged to refuse or withdraw from a case.'³⁰⁰

Numerous national sources create prohibitions on representatives' conflicts of interest.³⁰¹ Certain ethical obligations raise issues regarding applicable sources and enforcement venues in international arbitration – and disputes over representatives' alleged conflicts of interest is one of them. Different jurisdictions provide distinct and sometimes divergent conflicts of interest rules.³⁰² In addition to national sources, the IBA Representation Guidelines address conflicts of interest tangentially.³⁰³ They notably empower tribunals to 'take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.'³⁰⁴

Conflicts of interest involve the practical question of the (in)appropriate relationship between arbitrators and representatives. A few ICSID tribunals, recently examining this matter, have developed an approach to the exclusion remedy that puts heavy emphasis on temporality.³⁰⁵ In *Hrvatska*, a representative was excluded instead of the arbitrator – who was also a colleague elsewhere at a barristers' chambers – because this arbitrator was appointed first and it would have

²⁹⁵ See, e.g., IBA Representation Guidelines, Guideline 9 ('A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.').

²⁹⁶ See, e.g., Born, *International Commercial Arbitration* (2014), 2870 ('Most national codes of professional conduct require that legal services be rendered in accordance with certain minimum standards of competence and skill.').

²⁹⁷ See, e.g., Sarvarian, *Professional Ethics* (2013), 172.

²⁹⁸ Sarvarian, *Professional Ethics* (2013), 182.

²⁹⁹ IBA Hague Principles, Principle 4 (identifying situations in which representative may be precluded from defending a client before an international court or tribunal).

³⁰⁰ Sarvarian, *Professional Ethics* (2013), 172.

³⁰¹ Born, *International Commercial Arbitration* (2014), 2865 (referring to 2013 ABA Model Rules of Professional Conduct and the 2008 Europe Charter of Core Principles of the European Legal Profession).

³⁰² Rogers, *Ethics in Arbitration* (2014), paras. 3.55-3.63.

³⁰³ Notably, the IBA Guidelines only address conflicts with arbitrators, not with clients, former clients or third-party funders. The reason may be that the national differences on these topics are too broad.

³⁰⁴ IBA Representation Guidelines, Guideline 26.

³⁰⁵ Sarvarian, *Professional Ethics* (2013), 172.

been unfair and disruptive to do otherwise.³⁰⁶ In doing so, the tribunal held that ‘as a judicial formation governed by public international law, [it] has an inherent power to take measures to preserve the integrity of its proceedings.’³⁰⁷

In *Rompetrol*, exclusion was denied because the tribunal ruled that the representative had no obligation to be impartial and independent – only diligent and honest, as well as in compliance with applicable rules of professional conduct.³⁰⁸ The only challenge was therefore to the tribunal’s impartiality, which had fulfilled its own obligations before the representative had been appointed.

Conflicts of interest rules also encompass contemporaneous representation of clients whose legal interests clearly diverge.³⁰⁹ Notably, the tribunal in *Fraport v. Philippines I* found that, where the allegation relates to the representation of a former client, the issue is whether there is a real risk that the representative could have received confidential information from that client which may be of significance in subsequent proceedings and may accordingly prejudice the fair trial of those proceedings.³¹⁰

Second, party representatives must respect confidentiality obligations and lawyer-client privileges. Arbitral proceedings can indeed be significantly disrupted by a breach of these obligations,³¹¹ whether intentional or inadvertent. As Wälde explains,

[i]f one party is aware of all internal plans within the other party (identification of witnesses, experts, strengths and weaknesses, legal and factual strategy, remuneration arrangements, financial situation), it has an immense strategic advantage. It can persuade (or intimidate) experts and witnesses identified, it can manipulate the arbitration so that the other side reaches the bottom of its war chest and can exploit weaknesses discussed confidentially in the client-counsel relationship.³¹²

The ILA Hague Principles summarize these obligations broadly: ‘[representatives] shall not disclose any information communicated by the client to [representatives] in a professional capacity unless authorised to do by the client.’ They also specify, ‘[t]his duty applies in preparation for and during the proceedings and continues after their conclusion.’³¹³

Certain types of communication are widely considered inappropriate. For one, direct communication with opposing clients should be approved with their representatives in advance.³¹⁴

³⁰⁶ *Hrvatska Elektroprivreda, d.d v. The Republic of Slovenia*, ICSID Case no. ARB/05/24, Tribunal’s Ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008, para. 26.

³⁰⁷ *Hrvatska Elektroprivreda v. Slovenia*, para. 33.

³⁰⁸ *The Rompetrol Group NV v. Romania*, ICSID Case no. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010. This chapter, however, contends party representatives must exercise ‘independent’ professional judgement.

³⁰⁹ Sarvarian, *Professional Ethics* (2013), 172 (explaining, however, that national rules differ regarding whether such conflicts may be waived).

³¹⁰ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case no. ARB/03/25, Decision on Application for Disqualification of Counsel, 18 September 2008, paras. 42-4.

³¹¹ Rogers, *Ethics in Arbitration* (2014), para. 3.64.

³¹² Wälde, “‘Equality of Arms’ in Investment Arbitration” (2010), 172.

³¹³ ILA Hague Principles, Principle 3.4.

³¹⁴ C. Benson, ‘Can Professional Ethics Wait? The Need for Transparency in International Arbitration’, *Dispute Resolution International*, 3 (2009), 78, 83 (‘Many national codes or rules of professional conduct provide that a lawyer may not communicate directly with an adverse party the lawyer knows to be represented by counsel absent permission or extraordinary circumstances.’).

Representatives must also refrain from discussing the merits of the case with the opposing client without their colleagues' consent in order to prevent miscommunication and possible corruption.³¹⁵ Moreover, witnesses should be made aware that they have a right to inform their own representatives about contact with other parties, as well as their ability to discontinue communication with other representatives.³¹⁶ In order to facilitate negotiations, confidentiality also generally extends to settlement communications and other information disclosed 'without prejudice' by the opposing party, which cannot be used in legal proceedings.³¹⁷

While privilege and confidentiality obligations are widely recognized across jurisdictions, they differ significantly in a few respects. These legal principles diverge regarding the scope of privilege, the types of participants and communications covered, and the waivers of privilege.³¹⁸ There is not only a divide between civil law and common law jurisdictions, but specificities also emerge between jurisdictions of the same tradition.³¹⁹ Representatives in proceedings should thus be acutely aware at least of the rules of bar association where they are qualified and potentially of others.³²⁰

Third, ethical standards for party representatives in document production and witness preparation have historically given rise to controversy in international arbitration. This is mostly because witness interviews, familiarization and preparation vary under national law. Most common law jurisdictions allow representatives to carefully interview potential witnesses and assist them in testimony preparation.³²¹ In contrast, civilian jurisdictions generally consider it unethical and potentially criminal to guide a witness's testimony.³²²

In recent years, this discrepancy has partly subsided in international arbitration through the progressive development of international standards addressing the issue. Some arbitral institutions, for instance, have adopted explicit provisions on witness interviews. The LCIA Rules state that, '[s]ubject to the mandatory provisions of any applicable law, rules of law and any order of the

³¹⁵ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case no. ARB(AF)/07/01, Award, 4 August 2010, paras. 30-40 (The *Foresti* incident is noteworthy in this respect in that the corrupt bargain was proposed in a meeting between an agent for the Claimants and Respondents' lawyer in the absence of Claimants' lawyer. While that meeting occurred with the lawyers' permission on the understanding that it was a 'social meeting', it illustrates the importance of contacts to be done only with caution. Since the Claimants in this case stalled in informing the Respondents that their lawyer had solicited a bribe, the Tribunal held the Claimants responsible for a portion of the Respondents' costs (*Foresti v. South Africa*, para. 119). The Tribunal also noted, however, that '[t]he Respondent very correctly and wisely withdrew that element of its claim for costs that was attributable to [the lawyer who sought a bribe]'s work. A Tribunal cannot properly order that the costs of a Party's adviser who engages in the solicitation of bribes should be recovered from the other Party.' (*Foresti v. South Africa*, para. 120).

³¹⁶ IBA Representation Guidelines, Guideline 4; Born, *International Commercial Arbitration* (2014), 2862-3 (summarizing the position of many national systems).

³¹⁷ IBA Evidence Rules, Articles 9(2)(b), 9(3)(b).

³¹⁸ C. A. Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration', *Michigan Journal of International Law*, 23 (2002), 341, 371.

³¹⁹ Rogers, *Ethics in Arbitration* (2014), para. 3.67 (explaining that the Consultative Committee of the Council of Bars and Law Societies of Europe came to the conclusion that, '[w]hile there can be no doubt as to the essential principle of the duty of confidentiality, [...] there are significant differences between member countries as to the precise extent of lawyer's rights and duties.' [footnote omitted]).

³²⁰ On choice-of-law issues related to representatives' obligations, see *supra* Section I. B.

³²¹ Among common law jurisdictions, there are also some important differences, particularly on the crucial issue of rehearsing questions and answers.

³²² Born, *International Commercial Arbitration* (2014), 2858.

Arbitral Tribunal otherwise, it shall not be improper for any party or its legal representatives to interview any potential witness for the purpose of presenting his or her testimony in written form to the Arbitral Tribunal or producing such person as an oral witness at any hearing.’³²³ Still, provisions like this one generally provide little guidance on the permissible scope and character of this preparation.

The IBA Representation Guidelines address the subject of witness preparation in greater detail. Guideline 20 provides, ‘[a] Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.’³²⁴ Guideline 24 opines that a representative may meet or interact with witnesses and experts in order to discuss and prepare their prospective testimony provided that he or she acts consistent with the principle that the evidence given ‘should reflect the Witness’s own account of relevant facts, events or circumstances, or the Expert’s own analysis or opinion.’³²⁵

Witness preparation in the guidelines thus broadly adopts the common law model. It allows question rehearsal and other forms of preparation, while requiring only that witness testimony be genuine and represents the witness’s own account and opinion.³²⁶ In this respect, Rogers makes an interesting point regarding the synchronization of seemingly incompatible systems: ‘[t]his ethical norm is often characterized as a harmonization of or compromise between common law and civil law traditions. But that explanation is not quite right. How exactly do you compromise or harmonize between being ethical and unethical?’³²⁷ Indeed, ethical standards are not black and white. They depend on the functional role given to each participant in the arbitral system. In practice, tribunals consider ‘complaints about witness preparation in assessing the credibility and weight of the witness’s testimony.’³²⁸

With documentary evidence, there are the risks of forgery and witness tampering and, more commonly, of accidental contamination of evidence through improper handling. On this matter, ethical standards are largely derived from the procedural law(s) governing how evidence may be adduced in the proceedings. Yet, these issues have an ethical dimension, and international tribunals currently have a limited array of tools to regulate or deter improper conduct, except perhaps via the use of their inherent powers.³²⁹

In a nutshell, representatives should carefully consider conflicts of interest, confidentiality obligations and attorney-client privilege, and document production and witness preparation, in addition to their more obvious ethical obligations as professionals. They must do so even though

³²³ LCIA Arbitration Rules, Article 20.5.

³²⁴ IBA Representation Guidelines, Guideline 20.

³²⁵ IBA Representation Guidelines, Guideline 24.

³²⁶ IBA Representation Guidelines, Comments to Guidelines 18-25 (‘[A] Party Representative may meet with Witnesses and Experts [or potential Witnesses and Experts] to discuss their prospective testimony. A Party Representative may also help a Witness in preparing his or her own Witness Statement or Expert Report. Further, a Party Representative may assist a Witness in preparing for their testimony in direct and cross-examination, including through practise questions and answers [Guideline 24]. This preparation may include a review of the procedures through which testimony will be elicited and preparation of both direct testimony and cross-examination. Such contacts should however not alter the genuineness of the Witness or Expert evidence, which should always reflect the Witness’s own account of relevant facts, events or circumstances, or the Expert’s own analysis or opinion.’).

³²⁷ Rogers, *Ethics in Arbitration* (2014), 303.

³²⁸ Born, *International Commercial Arbitration* (2014), 2862.

³²⁹ Sarvarian, *Professional Ethics* (2013), 178-9.

the guidance from institutional arbitration rules is minimal and despite the confusion created by differing national sources. Respecting these obligations ensures zealous advocacy remains fair and both parties proceed to international arbitration in good faith.³³⁰

C. Experts

Like those applicable to party representatives, the ethical obligations incumbent on experts are somewhat disjointed. National sources regulating expert conduct are indeed rarely meant for international arbitral proceedings. Apart from this similitude, these sources vary considerably across jurisdictions. To take one example out of many, the Supreme Court of Canada recently took the approach that independence and impartiality requirements bear not just on the weight but also on the admissibility of evidence.³³¹ This is not a universal principle, however.

Against this backdrop, one of the best attempts to address expert witnessing in international arbitration is found in the IBA Evidence Rules, even if they touch on ethical issues only indirectly. Experts' obligations relate to professional independence and focus on disclosure requirements. Specifically, Article 5 and Article 6 deal with party-appointed and tribunal-appointed experts, respectively.

As mentioned, the IBA Evidence Rules set forth two interrelated ethical obligations for experts. The first is 'independence.'³³² Both types of experts should exercise independent professional judgement, being required to make 'an affirmation of his or her genuine belief in the opinions expressed in the Expert Report'.³³³ Further, Article 5 requires party-appointed experts to be independent from the other participants, putting emphasis on 'outward manifestation of partiality' rather than on the more relevant but less tangible expert state of mind.³³⁴ In satisfying this requirement, the expert must examine these relationships and confirm that he or she is independent.³³⁵ For example, the Commentary on the IBA Evidence Rules states that the party-appointed expert must have 'no financial interest in the outcome or otherwise ha[ve] relationships that would prevent the expert from providing his or her honest and frank opinion.'³³⁶ Similarly, Article 6 refers to 'independent Tribunal-Appointed Experts.'³³⁷

³³⁰ For instance, the tribunal in *ADF v. United States* discussed good faith and its relevance to document production. It held the appropriate assumption in every case is that, both parties having proceeded to international arbitration in good faith, neither would withhold documents for its own benefit and that good faith will render any practical problems of document production susceptible of prompt resolution without undue hardship or expense on either party. See *ADF Group Inc v. United States of America*, ICSID Case no. ARB(AF)/00/1, Procedural Order no. 3, 4 October 2001, para. 4.

³³¹ See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

³³² IBA Evidence Rules, Article 5(2)(c), Article 6(2).

³³³ IBA Evidence Rules, Article 5(2)(g), Article 6(4)(c). See also P. Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013), 115 ('The formal requirement to state a genuine belief, however, serves to reinforce in the expert's mind the importance of their independence and impartiality, as well as giving the arbitral tribunal increased confidence that it is being presented with the whole picture. It might be added that this approach is also in accordance with one of the fundamental tenets of the Rules – the requirement to act in good faith in relation to the taking of evidence.').

³³⁴ Ashford, *IBA Rules on the Taking of Evidence* (2013), 112.

³³⁵ International Bar Association, *Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* (IBA, 2010), 19.

³³⁶ International Bar Association, *Commentary on the Revised IBA Evidence Rules* (2010), 19.

³³⁷ IBA Evidence Rules, Article 6(2).

It is advisable that tribunal-appointed experts display strict neutrality to avoid any potential charge of bias, especially given how ‘remote’ they are from each disputing party. Less clear, however, is whether this same hallmark should apply to party-appointed experts. In terms of their functional role, these experts are similar to party-appointed arbitrators, as they are chosen and compensated by only one party. In addition, party-appointed experts routinely communicate and collaborate with appointing parties and their representatives. For these reasons, it may be naïve, if not misguided, to require that they meet this high independence standard.³³⁸

Second, the IBA Evidence Rules explicitly establish disclosure obligations. These requirements represent an important way of increasing transparency, which may in turn ‘press parties to be more careful in selecting experts who are free from obvious and discrediting conflicts.’³³⁹ Party-appointed experts must disclose all relationships they may have with the parties, their representatives and the tribunal.³⁴⁰ For their part, tribunal-appointed experts must make a statement of his or her independence with the parties, their representatives, and the tribunal.³⁴¹

The disclosure obligations thus differ partly between the two types of experts. A principal difference between these obligations is that tribunal-appointed experts submit their statement *before* accepting the appointment³⁴² for the tribunal and the parties to evaluate their independence and avoid tactical challenges later in the proceedings.³⁴³ The second difference is less justified. There is indeed an *unexplained* variation in the rules between the ‘statement of independence’ required of tribunal-appointed experts and the ‘statement of relationships’ to be provided by party-appointed experts.³⁴⁴ Is there a material difference between these statements? Is it indeed that tribunal-appointed experts are subject to less stringent disclosure obligations? In the end, IBA Evidence Rules represent an imperfect but much-needed effort to define experts’ ethical requirements.

D. Funders

More than any of the obligations discussed regarding arbitrators, representatives and experts, the substantive obligations applicable to third-party funding are currently undergoing fundamental transformations.³⁴⁵ The areas that require reform are well-known and frequently debated, but few binding sources have addressed them with definitive solutions. One issue is whether funders should be subject to obligations comparable to those of parties and representatives given the influence they can exercise in the conduct of proceedings, even if such influence may be

³³⁸ Rogers, *Ethics in Arbitration* (2014), para. 4.68. Indeed, what ‘independence’ means in the context of experts is open to question. It cannot mean the same as when that term is used with arbitrators or party representatives, and it is particularly complicated when same term is used for both party-appointed and tribunal-appointed experts.

³³⁹ Rogers, *Ethics in Arbitration* (2014), para. 4.64.

³⁴⁰ IBA Evidence Rules, Article 5(2)(c).

³⁴¹ IBA Evidence Rules, Article 6(2).

³⁴² Ashford, *IBA Rules on the Taking of Evidence* (2013), 126.

³⁴³ International Bar Association, *Commentary on the Revised IBA Evidence Rules* (2010), 21.

³⁴⁴ Ashford, *IBA Rules on the Taking of Evidence* (2013), 126.

³⁴⁵ See, in particular, Brekoulakis *et al.*, *Report of the ICCA-Queen Mary Task Force* (2018). Although the report could be incorporated into arbitration agreements and arbitral proceedings, and thus be binding as between the parties, it is primarily intended as guidance to stakeholders about key issues related with funding in the system.

asserted behind the scenes. For instance, depending on the arrangements in force, funders may be instrumental in selecting the party-appointed arbitrator.

Yet the key issue now is whether the involvement of a third-party funder should be disclosed, as this participant may be related in some way or another to an arbitrator on the tribunal. This relationship could then raise doubts as to the independence of this arbitrator.³⁴⁶ Arbitrators must be aware of a funder's presence to make appropriate disclosures, or, if their relationship with funders is confidential, to resign.³⁴⁷ Conflicts of interest and disclosure are thus once again central and intertwined.

Disclosure matters since conflicts can occur between arbitrators and funders. A few examples show this is far from hypothetical in today's arbitration practice. For instance, an arbitrator consistently appointed by the same funder may raise concerns about influence and interdependency.³⁴⁸ An arbitrator's firm having an interest in one proceedings' outcome – because of its relationship with a funder in another arbitration or otherwise – can be equally problematic. Further concerns may arise from an arbitrator advising a funder in various capacities.³⁴⁹ Assessing if these situations are common is challenging since funders keep their activities and arrangements closely guarded. In any event, even the rare cases that have surfaced support comprehensively addressing funders' conflicts of interest and disclosure.³⁵⁰

The burden of disclosing funding could fall on various participants. One may believe third-party funders themselves should voluntarily provide this information. They are, however, generally not enthusiastic about the prospect of disclosing their involvement.³⁵¹ Notably, the ALF Code (the self-imposed rulebook of UK funders) is silent on this question.³⁵² Funders fear that disclosure serves as a pretext for delaying and frustrating the natural course of proceedings, as well as obtaining sensitive information about the case from the other side. These concerns are perhaps overstated, as communications with party representatives relating to the case are deemed privileged under national and international rules.³⁵³

Against this backdrop, the parties sometimes fulfil, and should arguably fulfil, disclosure obligations. To this end, General Standard 7 of the IBA Conflicts Guidelines requires parties to inform arbitrators about funding.³⁵⁴ But the scope of such disclosure remains contentious,

³⁴⁶ M. Scherer *et al.*, 'Third Party Funding of International Arbitration Proceedings – A View from Europe: Part II: The Legal Debate Roundtable', *International Business Law Journal*, (2012), 649, 652.

³⁴⁷ Brekoulakis *et al.*, *Report of the ICCA-Queen Mary Task Force* (2018), 81 ('In light of any disclosures made [...], arbitrators and arbitral institutions should assess whether any potential conflicts of interest exist between an arbitrator and a third-party funder, and the need to make appropriate disclosures or take other appropriate actions that may be required under applicable laws, rules, or Guidelines.').

³⁴⁸ Rogers, *Ethics in Arbitration* (2014), para. 5.72.

³⁴⁹ This situation has already occurred and attracted significant public attention: 'Beechey to Advise Third-Party Funder', *Global Arbitration Review* (2013), available at <https://globalarbitrationreview.com/article/1032778/beechey-to-advise-third-party-funder> (last accessed 12 January 2020).

³⁵⁰ J. A. Trusz, 'Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration', *Georgetown Law Journal*, 101 (2013), 1649, Pt. III.

³⁵¹ Rogers, *Ethics in Arbitration* (2014), para. 5.115 ('[T]here remains disagreement within the funding community about disclosure, and a reluctance by some to commit to disclosure absent a legal mandate.').

³⁵² Rogers, *Ethics in Arbitration* (2014), para. 5.115.

³⁵³ Park, 'A Fair Fight' (2014), 423.

³⁵⁴ IBA Conflicts Guidelines, General Standard 7.

especially given the wording used in the guidelines can give rise to varying legitimate interpretations. More recently, the Report of the Task Force on Third-Party Funding has suggested parties should, of their own initiative, disclose the existence of ‘a third-party funding arrangement and the identity of the funder to the arbitrators and the arbitral institution or appointing authority (if any).’³⁵⁵ This disclosure should be done either at first appearance or submission, or ‘as soon as practicable after funding is provided or an arrangement to provide funding for the arbitration is entered into.’³⁵⁶

A small number of institutional arbitration rules, national arbitration laws and IIAs go further, explicitly granting tribunals the power to order disclosure. Notably, the 2017 SIAC Investment Arbitration Rules provide that arbitral tribunals have the power to ‘order the disclosure of the existence of a Party’s third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder’s interest the proceedings’ outcome, and/or whether or not the third-party funder has committed to undertake adverse costs liability.’³⁵⁷ The rules thus expressly allow, but do not require, tribunals to force disclosure of funding.³⁵⁸ Mandatory disclosure requirements only appear in national legislative reforms such as those of Hong Kong and Singapore, as well as in a few modern IIAs.³⁵⁹

Recent developments suggest the trend towards heightened ethical regulations of funders, as well as more robust tools at the disposal of arbitrators, is likely to increase. For example, ICSID is considering rules governing disclosure of third-party funding as part of the process of updating its rules and regulations.³⁶⁰ Any reform of funding rules must consider not only how the involvement of a funder may affect arbitrators’ independence, but also ensure that new tools are designed to protect – rather than obstruct – arbitral proceedings. As an illustration, one suggestion is to limit disclosure to arbitrators, and not to the opposing party. In the end, what is important is that funders should not be considered suspicious or required to disclose more than what is necessary, and are regulated appropriately.

From this analysis of participants’ substantive obligations, many principles emerge and provide insights on the tensions mentioned in this section’s introduction. Are participants over- or under-regulated? It depends. Perhaps unsurprisingly, the further a participant is from the core of the arbitral process, the less his or her obligations have been developed up to this point. What is the appropriate balance between due process and effective proceedings? This also varies between participants. Interpretations of arbitrators’ independence requirements have on occasion gone overboard and have unduly burdened proceedings, thus risking ‘curr[ing] the disease but kill[ing] the patient.’³⁶¹ On the other hand, the rules of other participants, such as funders, remain quite rudimentary and must be elaborated with greater precision in the future. At last, participants’ obligations would be trivial without enforcement mechanisms.

³⁵⁵ Brekoulakis *et al.*, *Report of the ICCA-Queen Mary Task Force* (2018), Principle A.1..

³⁵⁶ Brekoulakis *et al.*, *Report of the ICCA-Queen Mary Task Force* (2018), Principle A.1.

³⁵⁷ SIAC Investment Arbitration Rules (2017), Article 24(1).

³⁵⁸ Brekoulakis *et al.*, *Report of the ICCA-Queen Mary Task Force* (2018), 220-21.

³⁵⁹ Brekoulakis *et al.*, *Report of the ICCA-Queen Mary Task Force* (2018), 220-21.

³⁶⁰ Jones, ‘Kinnear Sheds Light’ (2018) (while third-party funding will be permitted, both arbitrators and disputing parties will be required to disclose their affiliation with funders).

³⁶¹ Landau, ‘A Pause for Thought’ (2012), 528.

III. FORUMS: ENFORCEMENT OF ETHICAL STANDARD

The applicable ethical rules can set aspirational standards, shaping participants' behaviour even in the absence of enforcement mechanisms.³⁶² This has been the case of soft law instruments, which play a 'norm setting function' in international arbitration.³⁶³ But poetic justice alone is not enough. By definition, coercive forums give teeth to ethical obligations. In the system, the New York and ICSID Conventions coordinate a multi-level network of forums to perform this task. Before these forums are presented, a few points should be highlighted to demonstrate why and how these obligations go sometimes realized and sometimes unrealized.

First, it is at times uncertain which forum has jurisdiction to enforce a standard of professional conduct.³⁶⁴ Even assuming that the relevant arbitral tribunal, arbitral institution, or national authority can play this role in a specific case, questions remain about these actors' awareness of the situation and their ability to intervene. Indeed, who has an incentive in reporting improper conduct or in initiating proceedings against a participant? What type of interest – private *or* public, individual *or* systemic, etc. – is at stake?

Two examples, among many others, illustrate potential concerns with one participant enforcing an ethical obligation against another and vice versa. For instance, while challenge procedures represent a significant procedural safeguard in arbitration, their use has become increasingly disconnected from this purpose.³⁶⁵ As one interviewee in a study summarized, '[c]hallenging arbitrators for conflict is a new way of appealing. You don't like the way the case is going so you find a conflict and try to get rid of the arbitrator.'³⁶⁶ Even if the role that expanded disclosure standards have played in the recent increase of arbitrator challenges is not fully explored

³⁶² From a normative standpoint, one could say law subsists even in the absence of enforcement mechanisms through the figure of 'the other' found within the subject of law (an individual or a State) itself: N. Kasirer, 'Le droit robinsonien', in O. Moréteau and J. Vanderlinden (eds.), *La Structure des Systèmes Juridiques: XVIe Congrès de l'Académie Internationale de Droit Comparé* (Bruylant, 2003).

³⁶³ O'Hara O'Connor *et al.*, 'Who Should Regulate the Advocates and What Should Be Regulated?' (2016), 353.

³⁶⁴ For a discussion on how this applies to lawyers, see Born, *International Commercial Arbitration* (2014), 2888 ('[T]here is a high degree of uncertainty concerning the application and enforcement of national codes of professional conduct to counsel in international arbitrations. That uncertainty is reflected in both formal doctrine [which reflects a diversity of positions and lack of clear authority] and practical experience [where counsel are surprisingly uncertain about what rules of professional conduct govern their activities and where actual enforcement of such rules is very limited].').

³⁶⁵ IBA Conflicts Guidelines, Introduction, para. 1 ('Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges.').

³⁶⁶ Karton, *The Culture of International Arbitration* (2013), 116. See also M. Lalonde, 'Quo Vadis Disqualification?', in M. N. Kinnear *et al.* (eds.), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer, 2016), 652-3.

at this point,³⁶⁷ the relationship between ethical regulations and so-called ‘guerrilla’ tactics is well-known,³⁶⁸ and examples of bad-faith challenges surge.³⁶⁹

Further, some have alleged misconduct against representatives to elicit sanctions from national bar associations.³⁷⁰ While in many cases there may be no reason to question the good intention behind such a practice, one may cynically wonder whether it has been used, or could be used, as another tool for misguided representatives engaged in guerrilla tactics.

Second, the current forums for enforcing ethical standards are not always particularly attractive or effective. The reasons for this may vary, depending on which participant and forum are concerned, but the crux of the problem remains the same: these forums generally lack, in one respect or another, a piece of the puzzle. In other words, they rarely possess the knowledge of both the applicable ethical rules and the specific facts related to a participant’s conduct in arbitral proceedings. In addition, a few forums now bring together all core tenets of international arbitration, namely party autonomy, neutrality and procedural flexibility.

In examining these forums, this section proceeds in four parts. Before all else, it introduces (A) participants’ immunity from legal process. This section then considers the role of (B) arbitral tribunals, and (C) arbitral institutions in sanctioning participants, as these are the main enforcement forums on the ground. It finally presents (D) national institutions, including their courts, bar authorities and professional associations, which are mechanisms of last resort. In each case, arbitrators, representatives and experts are again analysed in turn.

Third-party funders do not receive the same treatment because their obligations generally lack enforcement mechanisms. The ALF Code, for example, does not establish a forum to implement its rules. Yet, funders’ ethical standard may be applied indirectly in certain circumstances. As an illustration, there is a discussion in the literature about whether a tribunal can force a party to bring to light it has a third-party funder using its inherent powers.³⁷¹ Moreover, funding agreements often themselves stipulate – a bit paradoxically – that disputes related to them should be resolved through recourse to international arbitration.³⁷²

³⁶⁷ See generally Born, *International Commercial Arbitration* (2009), 1875-939.

³⁶⁸ See Rogers, ‘Ethics in International Arbitration’ (2013); G. Horvath, ‘Guerrilla Tactics in Arbitration, An Ethical Battle: Is There Need for a Universal Code of Ethics?’, in C. Klausegger *et al.* (eds.), *Austrian Yearbook on International Arbitration 2011* (Beck, Stämpfli & Manz, 2011); S. Wilske, ‘Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings When the Going Gets (Extremely) Tough’, in Klausegger *et al.* (eds.), *Austrian Yearbook on International Arbitration 2011* (2011).

³⁶⁹ Cristani, ‘Challenge and Disqualification of Arbitrators’ (2014), 175.

³⁷⁰ ‘Penalty Recommended for Lawyer Accused of Bribery in ICSID Case’, *Global Arbitration Review* (2010), available at <https://globalarbitrationreview.com/article/1029260/penalty-recommended-for-lawyer-accused-of-bribery-in-icsid-case> (last accessed 12 January 2020). See also Council of Bars and Law Societies of Europe, Code of Conduct for European Lawyers (2013), Article 5.9.3. (‘A lawyer shall not commence any form of proceedings against a colleague ... without first informing the Bars or Law Societies to which they both belong for the purpose of allowing both Bars or Law Societies concerned an opportunity to assist in reaching a settlement.’). Further, according to Rule 8.3 of the ABA’s Model Rules of Professional Conduct, effective in most of the USA, requires members of the bar to report unprivileged knowledge that raises a substantial question about another lawyer’s honesty or trustworthiness.

³⁷¹ L. Shore, ‘Inherent Powers to Order the Disclosure of Third Party Funders’, in F. Ferrari and S. Kröll (eds.), *Inherent Powers in International Adjudication* (Juris, 2018).

³⁷² Rogers, *Ethics in Arbitration* (2014), para. 5.116.

A. Legal Immunity

Civil liability and professional discipline have overlapping functions, as both can respond to affected parties' complaints regarding participants' conduct. However, liability is only concerned with remedying the harm caused to the party directly involved and not in protecting stakeholders in the system more largely.³⁷³ Further, societal goals may outweigh the value of imposing liability in some situations. In arbitral proceedings, participants are occasionally immune from legal processes, although this immunity applies differently to each of them.

In the case of arbitrators, qualified immunity is almost universal and entirely necessary in international arbitration.³⁷⁴ This view is supported by a historical and comparative overview of arbitrators' immunity from legal process (including lawsuits, criminal prosecution, administrative proceedings) in various national laws and institutional arbitration rules.³⁷⁵ Arbitrator immunity is important for protecting arbitrators' impartiality and the finality of the arbitral award. It also allows arbitrators to issue awards without fear of potential liability. Accordingly, parties cannot seek an alternative form of appeal by suing arbitrators.³⁷⁶

This immunity, however, varies across jurisdictions.³⁷⁷ Internationally, the IBA Ethics Rules call for arbitrator immunity against civil lawsuits, other than in the most serious cases.³⁷⁸ Institutional arbitration rules generally heed this call. ICSID goes further than most rules in this regard. Article 21 of the ICSID Convention grants arbitrators, 'immunity from legal process with respect to acts performed by them in the exercise of their functions.'³⁷⁹ This immunity is absolute and applies to all national courts.³⁸⁰ ICSID, however, may waive this immunity.³⁸¹

The ICSID Convention extends immunity beyond arbitrators and includes 'persons appearing in proceedings [...] as parties, agents, counsel, advocates, witnesses or experts.'³⁸² The wide array of participants covered by this immunity is significant given that parties can, and indeed often are, represented by non-lawyers.³⁸³

The issue of representatives' immunity under the Convention was raised in *Libananco v. Turkey*. In an investigation separate from the case, Turkey had gained access to privileged communications between Libananco, their representatives, and their witnesses. While the

³⁷³ Rogers, *Ethics in Arbitration* (2014), para. 2.96.

³⁷⁴ Born, *International Commercial Arbitration* (2014), 2080 ('Most national arbitration regimes provide arbitrators with statutory or common law immunities from civil claims against them based on the performance of their adjudicative functions.').

³⁷⁵ For a particularly interesting policy discussion on the arguments in favour and disfavour of immunity, see N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015), Ch. 5: 'Powers, Duties, and Jurisdiction of an Arbitral Tribunal'.

³⁷⁶ Rogers, *Ethics in Arbitration* (2014), para. 2.99.

³⁷⁷ S. D. Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity', *New York Law School Journal of International & Comparative Law*, 20 (2000), 1, 18-24.

³⁷⁸ IBA Ethics Rules, Introduction ('The International Bar Association takes the position that [whatever may be the case in domestic arbitration] international arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of wilful or reckless disregard of their legal obligations.').

³⁷⁹ ICSID Convention, Article 21(a).

³⁸⁰ Parra, 'The Rights and Duties of ICSID Arbitrators' (1995).

³⁸¹ ICSID Convention, Article 21(a).

³⁸² ICSID Convention, Article 22.

³⁸³ O'Hara O'Connor *et al.*, 'Who Should Regulate the Advocates and What Should Be Regulated?' (2016), 352.

investigation was judicially authorized, Libananco argued that Turkey unfairly leveraged its sovereign power to advantage itself in the arbitration.³⁸⁴ It noted that, [t]he ICSID Convention provides immunity from legal process for legal counsel in the exercise of their functions, including their correspondence in the course of the arbitration.’³⁸⁵ Since Libananco’s objections touched upon the immunities conferred by the Convention, the tribunal asked Libananco to give Turkey a list of the people to whom, in its assessment, the immunity applied.³⁸⁶

Unlike arbitrators and persons appearing in ICSID proceedings, participants do not benefit from legal immunity. Quite the contrary, they are typically required to subscribe to a professional liability insurance to cover for potential suits filed against them and damages awarded for acts or omissions in the performance of their functions.

B. Arbitral Tribunals

Despite these immunities, a variety of forums can enforce participants’ standard of conduct, including arbitral tribunals. Views on the propriety of tribunals’ role in this regard have evolved over time. One concern relates to the sometimes absent textual sources supporting these enforcement powers. As an award cannot pass muster if the tribunal exceeded its power,³⁸⁷ reliance on non-enumerated powers to discipline participants can be uncertain.³⁸⁸ Another concern derives from the nature of international arbitration. With self-regulation comes the danger of regulating in self-interest,³⁸⁹ and first-hand knowledge can entail the very delicate task of regulating its own conduct or that of his or her peers.³⁹⁰

This principle is driven to the extreme in proceedings under the auspices of the ICSID Convention, where unchallenged arbitrators on the panel decide, in certain circumstances, whether one of their colleagues is fit to decide the case.³⁹¹ Indeed, Article 58 of the Convention provides, ‘[t]he decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be.’³⁹² The reason why this process was retained by the drafters of the Convention is not well documented, although it was noted that having coarbitrators deciding challenges was always accepted,³⁹³ and that the Statute of the ICJ

³⁸⁴ A. Ross, ‘Libananco Tribunal Rules on Intercepted E-Mails’, *Global Arbitration Review* (11 July 2008).

³⁸⁵ *Libananco v. Turkey*, ICSID Case no. ARB/06/8, para. 44(i).

³⁸⁶ *Libananco v. Turkey*, ICSID Case no. ARB/06/8, para. 82. See also Schreuer *et al.*, *The ICSID Convention* (2009), 66.

³⁸⁷ This situation arises mostly from ‘due process paranoia’ in international arbitration, which refers to ‘a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully.’ See Queen Mary University of London School of International Arbitration and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 10, available at www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (last accessed 12 January 2020).

³⁸⁸ De Ly *et al.*, ‘Report for the Biennial Conference in Johannesburg’ (2016), 6-7.

³⁸⁹ Rogers, *Ethics in Arbitration* (2014), Chs. 6-7.

³⁹⁰ Menon and Paulsson, ‘Is Self-Regulation of International Arbitration an Illusion?’ (2013).

³⁹¹ Sheppard, ‘Arbitrator Independence’ (2009), 138.

³⁹² ICSID Convention, Article 58. As was discussed above, Article 58 also provides that the Chairman of the Administrative Council should take decisions when ‘those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators.’

³⁹³ Schreuer *et al.*, *The ICSID Convention* (2009), 1210.

was a source of inspiration.³⁹⁴ The basis on which unchallenged arbitrators have jurisdiction to decide on disqualification proposals is the principle of *Kompetenz-Kompetenz*, the well-entrenched doctrine in international arbitration enabling tribunals to decide matters concerning their own competence.³⁹⁵

This procedure for disqualifying arbitrators has been almost unanimously criticized by practitioners, academics, and stakeholders in investment arbitration.³⁹⁶ In response to these criticisms, a few academic contributions have addressed alternatives to the current process. For instance, some commentators have suggested, ‘exclud[ing] fellow arbitrators from deciding challenges against their colleagues and leav[ing] such decisions to the Administrative Council of ICSID.’³⁹⁷ This would be similar to the UNCITRAL Rules, which provide challenges are heard by an appointing authority. Others have preferred the option of delegating this responsibility to the Secretary-General by an Administrative Council resolution,³⁹⁸ to independent *ad hoc* committees,³⁹⁹ and to a neutral ‘Challenge Facility.’⁴⁰⁰ Virtually all commentators agree, however, that the legitimacy of the challenge process under the ICSID Convention would be enhanced if the body deciding on a disqualification proposal were detached from the tribunal.⁴⁰¹ Implementing this reform, however, is impracticable given the difficulty of amending the ICSID Convention.⁴⁰²

Tribunals’ powers to enforce ethical obligations are less controversial as it relates to party representatives, especially as this practice has incrementally developed in international arbitration. For some, this option is ‘obvious,’ especially given tribunals ‘are charged with controlling the proceedings before them.’⁴⁰³ Yet, and despite their proximity to representatives’ conduct, it was not always clear that they were actually empowered to regulate it. In the 1990s, Paulsson noted,

³⁹⁴ Obadia, ‘Challenge Decisions’ (2008), 376.

³⁹⁵ Daele, *Challenge and Disqualification of Arbitrators* (2012), 170.

³⁹⁶ G. Bottini, ‘Should Arbitrators Live On Mars? Challenge of Arbitrators In Investment Arbitration’, *Suffolk Transnational Law Review*, 32 (2009), 341 (arguing that ‘States should seriously consider the actual arrangements under which challenges generally will be decided by the other two unchallenged arbitrators, who are certainly not in the best position to decide upon a challenge against somebody that might have worked with them for years and that, depending on the result of the challenge, might have to continue working with them for a considerable amount of time.’); A. Ross, ‘BIICL Takes Investment Treaty Forum to Paris’, *Global Arbitration Review*, 5(4) (2010) (quoting Stern for her view that challenge decisions should be taken by a neutral party); A. Ross, ‘Rise in Challenges a Headache for Lawyers’, *Global Arbitration Review*, 5(1) (2010) (noting that Gaillard believes the requirement in Article 58 of the ICSID Convention to have unchallenged arbitrators decide on disqualification proposal ‘is not particularly desirable since it amounts to peer review’).

³⁹⁷ B. S. Vasani and S. A. Palmer, ‘Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?’, *ICSID Review*, 30 (2015), 194, 212 (footnote omitted). See also C. Giorgetti, ‘Challenges of International Investment Arbitrators: How Does It Work and Does It Work?’, *World Arbitration & Mediation Review*, 7 (2013), 303, 317 (arguing that ICSID should follow in UNCITRAL’s steps).

³⁹⁸ A. R. Parra, *The History of ICSID*, 1st ed. (Oxford University Press, 2012), 328-9.

³⁹⁹ Sheppard, ‘Arbitrator Independence’ (2009), 138.

⁴⁰⁰ L. Malintoppi, ‘Independence, Impartiality and Duty of Disclosure of Arbitrators’, in P. Muchlinski *et al.* (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008).

⁴⁰¹ L. Markert, ‘Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines’, *Contemporary Asia Arbitration Journal*, 3 (2010), 246 recognizing that ‘it might be favorable for the legitimacy of the challenge process if the body deciding on a challenge were entirely detached from the arbitral tribunal.’

⁴⁰² Giorgetti, ‘Challenges of International Investment Arbitrators’ (2013), 317.

⁴⁰³ C. Rogers, ‘Guerrilla Tactics and Ethical Regulation’, in G. J. Horvath and S. Wilske (eds.), *Guerrilla Tactics in International Arbitration* (Kluwer, 2013), 335.

‘[a]rbitrators are named to resolve disputes between parties, not to police the conduct of their representatives, and therefore do not rule on complaints of violations of codes of conduct.’⁴⁰⁴

Attitudes have certainly changed in this regard, perhaps in response to increased costs and delays resulting from representative misconduct. ‘[The] previously unthinkable prospect of tribunal-imposed sanctions for counsel is gaining traction.’⁴⁰⁵ Arbitrators that take ethical matters into their own hands have an increasingly large array of options for sanctioning party representatives. Among the possibility, there is public admonishment, suspension from proceedings, fines and personal costs orders, as well as reporting to national bar authorities.⁴⁰⁶ They are examined in turn.

Public admonishment engages representatives’ reputation, which is vital to their business in a competitive marketplace for legal services.⁴⁰⁷ The tribunal in *Pope & Talbot* grappled with this issue, ultimately deciding to outline its criticism of the representative’s conduct in its written decision. While the tribunal did not consider itself entitled to regulate the representative directly, assuming that the decision would be released publicly, the tribunal decidedly to include its criticism in the written reasons for everyone to see.⁴⁰⁸ This kind of embarrassment puts representatives’ professionalism in doubt, potentially affecting their ability to retain and attract clients.

While the tribunal in *Pope & Talbot* did not consider itself authorized to sanction representatives, others have interpreted their residual power over the proceedings as conferring an ability to regulate representatives, including removing them from the proceedings.⁴⁰⁹ This recourse, however, may lie at the edges of its legitimate jurisdictional authority. The tribunal in *Hrvatska v. Slovenia* determined that its inherent power to preserve the proceedings’ integrity gave it this ability, despite the ICSID Convention and Rules’ silence on the matter.⁴¹⁰ It found that the continued participation of a representative from the same barristers’ chambers as one of the arbitrators in the arbitration could lead a reasonable observer to form a justifiable doubt about the impartiality and independence of that arbitrator.⁴¹¹

Other tribunals have simply understood their powers more broadly than the tribunal in *Pope & Talbot*. In *HEP v. Slovenia*, the tribunal was more comfortable determining that it had jurisdiction to take measures against representatives. As Rogers has reflected, ‘the remedy sought

⁴⁰⁴ J. Paulsson, ‘Standards of Conduct for Counsel in International Arbitration’, *American Review of International Arbitration*, 3 (1992), 214.

⁴⁰⁵ Paulsson, ‘Standards of Conduct for Counsel’ (1992), 214.

⁴⁰⁶ Sarvarian, *Professional Ethics* (2013), 182. See also Lim, ‘Ethical Issues in International Law Practice’ (2015) (listing disciplinary measures that could be taken against misbehaving lawyers, including sanctions such as ‘contempt holdings, fee denials, warnings, and suspensions,’ and noting ‘defense lawyers for former Congolese Vice-President Jean-Pierre Bemba were arrested for interfering with witnesses and presenting forged documents, and they face imprisonment and fines.’).

⁴⁰⁷ J. Werner, ‘Editorial: Competition within the Arbitration Industry’, *Journal of International Arbitration*, 2 (1985), 5.

⁴⁰⁸ Rogers, *Ethics in Arbitration* (2014), 336.

⁴⁰⁹ M. Sasson, ‘Inherent Powers to Exclude Counsel’, in Ferrari and Kröll (eds.), *Inherent Powers in Adjudication* (2018).

⁴¹⁰ *Hrvatska Elektroprivreda v. Slovenia*, para. 23, 33-4.

⁴¹¹ *Hrvatska Elektroprivreda v. Slovenia*, para. 30.

in *HEP v. Slovenia* seems much more closely tied to traditional notions of tribunals controlling proceedings, and their related obligation to produce an enforceable award.⁴¹²

Similarly, the *ad hoc* committee in *Fraport v. Philippines I* came to its decision on a representative's disqualification relying on concerns about the proceedings' fairness. In the proceedings' annulment stage, the Philippines opposed that the claimant be represented by a member of a law firm which had previously acted as a representative for it in a parallel arbitration under the ICC-ICA Rules. In its decision, the *ad hoc* committee evoked its powers, pursuant to Article 44 of the ICSID Convention, to decide any procedural question arising and not directly covered by the Convention and Rules. It opined: '[w]here the allegation relates to the representation of a former client, the issue for the Committee is whether there is a real risk that the representative could have received confidential information from that client, which may be of significance in the subsequent proceedings, and which may accordingly prejudice the fair trial of the second proceedings.'⁴¹³ In this case, the *ad hoc* committee opined that no real risk was present that the representative could have received confidential information upsetting the annulment proceeding. The law firm's retainer in the earlier ICC-ICA case, it held, was effectively 'still-born.'⁴¹⁴

A less disruptive measure that tribunals have taken to reprimand party representatives is awarding costs against the party they represented in the arbitration. Even the tribunal in *Pope & Talbot*, who was unwilling to directly sanction representatives, imposed costs on their party with the hope that representatives would take responsibility and pay the extra costs themselves.⁴¹⁵ In a recent ICSID case involving Uzbekistan, after the state's representative violated participants' confidentiality, the tribunal ordered Uzbekistan to pay costs.⁴¹⁶

This approach to sanctioning representatives has received praise, but concerns remain with respect to its fairness. On the one hand, cost-shifting mechanisms might be 'the most transparent and express means of providing a remedy for counsel misconduct.'⁴¹⁷ For instance, the threat of a personal cost order could dissuade representatives from pursuing delay tactics.⁴¹⁸ On the other hand, it may unfairly punish parties who simply fell victim to their representatives' misbehaviour. In such cases, 'it would be more just for representatives to bear the consequences of their own inefficiency or incompetence.'⁴¹⁹ These considerations should inform future practices regarding when this type of regulation is advisable.

Tribunals that would prefer to avoid these issues could refer matters to representatives' home regulatory authority. This recourse should be exercised cautiously, however. On its face,

⁴¹² Rogers, 'Guerrilla Tactics' (2013), 337.

⁴¹³ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case no. ARB/03/25, Decision on Application for Disqualification of Counsel, 18 September 2008, para. 42.

⁴¹⁴ L. E. Peterson, 'Newly Unearthed Decision Records Reasons for Rejection of Bid to Disqualify Counsel in *Fraport v. Philippines Arbitration*', *Investment Arbitration Reporter* (3 April 2013).

⁴¹⁵ Rogers, *Ethics in Arbitration* (2014), 336.

⁴¹⁶ T. Jones, 'Central Asian ICSID Case to Go Ahead as Counsel Criticised', *Global Arbitration Review* (10 March 2017).

⁴¹⁷ Rogers, 'Guerrilla Tactics' (2013), 338.

⁴¹⁸ Sarvarian, *Professional Ethics* (2013), Ch. 7.

⁴¹⁹ Sarvarian, *Professional Ethics* (2013), 183.

arbitrators' contractually agreed confidentiality commitment⁴²⁰ and the mandatory state-regulatory rules applicable to them as bar members may clash. Upon careful examination, however, these obligations materialise in different circumstances.

The parties cannot agree to brush aside their representatives' *deontological* obligations under national law and these professionals must abide by them. But *substantive* issues pertaining to the dispute itself are indeed private.⁴²¹ Still, numerous cases may lie in a grey zone. Involving bar associations should be reserved for the clearest and most serious infractions given that representatives can face disbarment.⁴²² In the end, arbitral tribunals must weigh several considerations when deciding how to address representative misconduct.

As mentioned, the LCIA has undertaken to clarify tribunals' authority over representatives' conduct by directly addressing the issue in its arbitration institutional rules. The 2014 LCIA Rules describe behaviour that may be subject to admonishment, while giving arbitrators wide discretion regarding sanctions.⁴²³ Notably, the tribunal's powers under the LCIA Rules are discretionary, allowing arbitrators to consider when their authority is best exercised.⁴²⁴

As for experts, it would be expected that tribunals' vast array of options for sanctioning representatives should extend to them as well. In practice, however, arbitrators are more reluctant to interfere with parties' experts,⁴²⁵ especially based on their inherent powers. Arbitrators may be less likely to face challenges if instead they regulate experts' participation based on rules invoked in the parties' agreement to arbitrate like, for example, the US Federal Rules of Evidence.⁴²⁶

Without such a textual authority to rely on, arbitrators generally allow parties to introduce experts at their own discretion. Remarkably, the tribunal in *Teinver v. Argentina* found that neither the criminal and civil liability of witnesses nor the existence of pending criminal and civil suits against witnesses under national law might constitute a bar on a witness's ability to testify in these arbitral proceedings.⁴²⁷

Rather than grapple with challenges to expert appointments or admissibility questions during the hearing, arbitrators may find it easier to simply discard the expert opinions when making their final decision.⁴²⁸ In *Flughafen Zurich v. Venezuela*, the tribunal rightly concluded it had

⁴²⁰ S. Wilske, 'Arbitration Guerrillas at the Gate – Preserving the Civility of Arbitral Proceedings When the Going Gets (Extremely) Tough', in Klausegger *et al.* (eds.), *Austrian Yearbook on International Arbitration 2011* (2011), 331-2.

⁴²¹ Menon, 'Keynote Address' (2012), 25.

⁴²² Sarvarian, *Professional Ethics* (2013), 183.

⁴²³ M. Scherer, 'Conduct of Legal Representatives under the 2014 LCIA Arbitration Rules: How to Apply the New Provisions', *Kluwer Arbitration Blog* (23 March 2015), available at <http://arbitrationblog.kluwerarbitration.com/2015/03/23/conduct-of-legal-representatives-under-the-2014-lcia-arbitration-rules-how-to-apply-the-new-provisions/> (last accessed 12 January 2020).

⁴²⁴ Scherer, 'Conduct of Legal Representatives under the 2014 LCIA Arbitration Rules' (2015).

⁴²⁵ Born, *International Commercial Arbitration* (2014), 2279 ('Tribunals are wary of denying parties an opportunity to be heard, while ordinary "international" practice is to permit both party-nominated and tribunal-nominated experts. For similar reasons, tribunals rarely uphold challenges to the admissibility of expert reports or opinions that are presented by the parties.')

⁴²⁶ De Ly *et al.*, 'Report for the Biennial Conference in Johannesburg' (2016), 15.

⁴²⁷ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case no. ARB/09/01, Award, 21 July 2017, para. 192.

⁴²⁸ Born, *International Commercial Arbitration* (2014), 2279.

jurisdiction to determine the probative value of any evidence submitted by the parties.⁴²⁹ Further, arbitrators may opt to appoint themselves an independent expert to assist them in assessing the evidence.⁴³⁰

In short, tribunal powers in enforcing ethical obligations against arbitrators, representatives, and experts are shifting today. More than any other sources, institutional arbitration rules have been revised and amended to reflect the growing practice and trends related to views about these powers' propriety. Participants can be regulated and sanctioned in other forums, including arbitral institutions.

C. Arbitral Institutions

In the last two decades, recourse to arbitral institutions' services has steadily increased to the point where it has become the norm rather than the exception. Along with this trend, the general expertise and involvement of these institutions in proceedings have expanded accordingly,⁴³¹ including on ethics and regulatory issues.

Arbitral institutions now act as the primary enforcers of arbitrators' ethical standard, backed up only by national courts. These institutions exercise their powers mainly with respect to arbitrator selection and challenge. Under most rules, institutions themselves deal with these procedures through the rules governing the tribunal constitution.⁴³² Once arbitrators make the required disclosure, any party alleging a conflict needs to provide notice to the arbitral institution, or, in *ad hoc* proceedings, to the appointing authority. The opposing party or the arbitrator can accept the notice, and, if not, they generally submit responses.⁴³³ The arbitral institution or appointing authority will subsequently rule on the challenge.

Arbitral institutions' decisions are generally rendered 'in a letter that purports to be *final and binding* on the issue.'⁴³⁴ These decisions used to be issued without reasons. For many years, these institutions were reluctant to explain to the parties the *rationale* for their rulings on challenge proposals. While the arguments supporting this practice were varied, users' appetite for changes once again tipped the scales. The ICC-ICA and LCIA represent notable examples of institutions having revised their rules to provide that challenge decisions should be made in writing, with reasons.⁴³⁵

⁴²⁹ *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB/10/19, Decision on Claimants' Proposal for Disqualification of One of Respondent's Expert Witnesses, and Request for Inadmissibility of Evidence, 29 August 2012 [Spanish], para. 34. Ethical issues thus go to credibility and weight rather than to the matter of being allowed to testify at all.

⁴³⁰ *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case no. ARB/07/5, Procedural Order no. 15, 20 November 2012, para. 12.

⁴³¹ P. Leaver, 'Reciprocal Duties of Institutions and Arbitrators', in B. Hanotiau and A. Mourre (eds.), *Players' Interaction in International Arbitration* (ICC, 2012), 107.

⁴³² Rogers, *Ethics in Arbitration* (2014), 249.

⁴³³ See, e.g., ICC-ICA Rules, Article 14(3).

⁴³⁴ Rogers, *Ethics in Arbitration* (2014), 77 (emphasis added). See, e.g., ICC-ICA Rules, Article 11(4) ('The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final.');

LCIA Arbitration Rules, Article 29(1) ('The decisions of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. Such decisions are to be treated as administrative in nature and the LCIA Court shall not be required to give any reasons.').

⁴³⁵ ICC-ICA Rules, Article 11(4); LCIA Arbitration Rules, Article 10.6.

ICSID's challenge practice stands out in comparison to other institutions. Article 58 of the ICSID Convention provides, 'where [unchallenged] members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision.'⁴³⁶ In the first draughts of the ICSID Convention, Chairman decisions were envisaged only in single arbitrators' cases, but their power was subsequently extended, first, to cases where the unchallenged arbitrators are equally divided, and, later, to cases where the disqualification proposal concerns the majority of tribunal's arbitrators.⁴³⁷ The possibility for a tribunal's majority to be challenged is not as remote as it appears at first sight.⁴³⁸ In fact, this scenario occurred on five occasions leading up to 2012.⁴³⁹ Even though it is not provided in the ICSID Convention and Rules, it has become common practice for the Chairman to seek the recommendation of the Secretary General.⁴⁴⁰

In addition to their powers on tribunal constitution, a few institutions have recently introduced innovative measures for regulating arbitrators. For example, ICC-ICA has decided to hit them in their wallets. Arbitrators who submit awards late may be subject to fee reductions at the Court's discretion. Exceptional circumstances may justify delayed submissions, but arbitrators will be penalized for delays within their control.⁴⁴¹

Regarding party representatives, institutional arbitration rules generally do not provide regulations for their conduct, and potential reforms carry uncertain prospects. As it stands, institutions are not directly vested with any authority over representatives on deontological issues, only as a form of institutional controls in ensuring the proceedings' integrity.⁴⁴² Empowering to regulate true deontological and disciplinary matters would not only require significant changes to the black-letter rules, but also to the broader philosophy underpinning these rules. For instance, these institutions would have to create, in addition to the framework and procedure to handle complaints, inquiry committees and disciplinary tribunals meeting due process standard.⁴⁴³ Moreover, new regulations on representatives could potentially conflict with existing obligations under national rules. To avoid this issue, Born has recommended that instead of regulating conduct themselves, institutions refer matters to 'the appropriate bar association, legal regulatory authority,

⁴³⁶ ICSID Convention, Article 58.

⁴³⁷ Schreuer *et al.*, *The ICSID Convention* (2009), 1210.

⁴³⁸ Schreuer *et al.*, *The ICSID Convention* (2009), 1211.

⁴³⁹ Daele, *Challenge and Disqualification of Arbitrators* (2012), 177.

⁴⁴⁰ *Sempra Energy International v. The Argentine Republic*, ICSID Case no. ARB/02/16, Challenge Decision, 5 June 2007 ('Pursuant to Article 58 [...], the proposal is to be decided by the Chairman of ICSID's Administrative Council. In accordance with the established practice of the Centre, the decision is to be made on the recommendation of the Secretary-General of ICSID... The Secretary-General's recommendation in this regard has accordingly been to reject the proposal... [The] recommendation has been accepted.').

⁴⁴¹ International Chamber of Commerce, 'ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency', *International Chamber of Commerce* (5 January 2016), available at <https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/> (last accessed 12 January 2020).

⁴⁴² Born, *International Commercial Arbitration* (2014), 2888, n. 270 ('None of the leading institutional arbitration rules provide institutions with authority to disqualify counsel or to otherwise regulate the professional conduct of counsel. That includes the AAA/ICDR, HKIAC, ICC-ICA, ICSID, [...] PCA, SCC, SIAC, VIAC, WIPO and other rules.').

⁴⁴³ For one of the rare voices advocating for this revolution, see S. Menon, 'Some Cautionary Notes for an Age of Opportunity', *Arbitration*, 79 (2013), 393, paras. 51-2.

or local law enforcement officers.⁴⁴⁴ Parties, perhaps more conventionally, could also make these referrals or even full-fledged complaints. Professional ramifications at home for conduct in arbitral proceedings could serve as a deterrent on misbehaviour.

Considering the lack of institutional arbitration rules that address party representatives, it is perhaps unsurprising that experts are similarly unregulated. Rather, national authorities are the main forum where the obligations of both participants can be enforced.

D. National Authorities

National authorities bring about an interesting paradox: their rules and practices are often more developed than the other forums, but at the same time they are probably less suited than any of these to enforce obligations in international proceedings. This situation is reflected in the divide between what these authorities are entitled to do *and* what they actually do, which similarly affects all participants.

National courts rarely find a breach of arbitrators' independence standard when conducting their review of arbitral decisions on challenges, or when enforcing awards rendered by tribunals.⁴⁴⁵ Since decisions on challenges are considered final, national courts cannot re-evaluate them under the institutional arbitration rules – only under their national laws.⁴⁴⁶ In applying their own independence standards, national courts have shown some deference towards institutions applying their own rules, or, in the case of ICSID, other arbitrators applying the ICSID Convention and Rules.⁴⁴⁷ Given this deference, and because national laws provide quite narrow grounds for challenges,⁴⁴⁸ national courts have only rarely repealed arbitral decisions on alleged conflicts on the basis that the arbitrator should have been disqualified.⁴⁴⁹

National courts can also review arbitrators' conflicts in the set-aside or enforcement stages of non-ICSID arbitral awards. Almost all states that are engaged in international commerce and trade are parties to the New York Convention,⁴⁵⁰ which allows its courts to review awards under certain limited grounds. Consistent with the New York Convention's overriding goal of facilitating international arbitration, national courts' role in this process is minor. Although national courts essentially review the same arbitrator actions as arbitral institutions, they can only refuse to enforce awards if the alleged misconduct fundamentally affects the fairness and integrity of the final

⁴⁴⁴ Born, *International Commercial Arbitration* (2014), 2888. This measure does not fit within the traditional functions of institutions, and may be hampered by confidentiality obligations today, but it draws the attention of the right actors to alleged wrongdoing.

⁴⁴⁵ See generally UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012).

⁴⁴⁶ An English court well explained this point when discussing the finality provision in Article 7(4) of the 1998 ICC-ICA Rules: *AT&T Corp v. Saudi Cable Co* [2000] EWCA (Civ) 154.

⁴⁴⁷ *AT&T Corp v. Saudi Cable Co*, para. 49 ('[T]he court, if required to interpret the ICC Rules, would naturally pay the closest attention to any interpretation of the ICC Rules adopted by the ICC Court, but the English courts retain their jurisdiction to determine whether the ICC Rules have been breached when entertaining an application to remove for alleged misconduct.')

⁴⁴⁸ Born, *International Commercial Arbitration* (2014), 1904 ('In general, these [arbitral] rules require somewhat broader disclosure than national law standards, although this varies somewhat from jurisdiction to jurisdiction and institution to institution.')

⁴⁴⁹ Rogers, *Ethics in Arbitration* (2014), 251.

⁴⁵⁰ 'Contracting States', *New York Arbitration Convention* (2018), available at www.newyorkconvention.org/countries (last accessed 12 January 2020).

award.⁴⁵¹ States can also enact national arbitration laws that set the grounds for setting aside awards rendered in their jurisdiction. Courts' function in this context has been described as striking 'an exceedingly fine balance between arbitral autonomy and a minimum competence for national judicial review.'⁴⁵²

As mentioned, the professional conduct rules of representatives' home jurisdiction may extend to conduct in foreign-seated arbitrations, and, in turn, the arbitral seat's rules might equally apply to them in an international arbitration. Survey results indicate that most party representatives in international arbitration anticipate being subject to the latter rules in addition to those of their home jurisdiction.⁴⁵³

While this situation has fuelled policy and doctrinal debates, most national courts and bar associations, both from the representatives' home jurisdiction and from the arbitral seat, have in practice rarely attempted to impose their professional conduct standards on representatives engaged in international arbitration.⁴⁵⁴ One may presume that this restraint comes from lack of relevant information these authorities have about representatives' specific conduct in an arbitral proceedings. More often than not, representatives' ethical standard is enforced when their clients are seeking fee refunds or damages for malpractice in national courts and bar associations.⁴⁵⁵

While national laws also arguably govern experts' conduct, enforcing such standards for experts is impractical. As Rogers notes, 'national prosecutors have little interest in chasing down errant witnesses who made alleged misstatements in exotic proceedings that are detached from their national legal system.'⁴⁵⁶ Hence, '[p]rosecutions based on conduct in international arbitrations, however sensational, are exceedingly rare and improbable.'⁴⁵⁷ Nevertheless, the threat of disciplinary sanctions against experts – for instance, for providing false or misleading information to tribunals – should remain. It can actively act as a deterrent against potentially deceitful individuals. With experts, a 'level playing field' is less crucial than it is for representatives, except for the obvious need that all experts make sincere contributions to tribunals.

In this section's introduction, reference was made to interrelated issues with ethical forums. These issues deal with the two meanings of *competence*: namely, 'the legal authority of a body'

⁴⁵¹ Rogers, 'Ethics in International Arbitration' (2013), 7 ('National courts review challenges to awards [and sometimes arbitrators] under the standards in the New York Convention and national statutory law. They may evaluate the same arbitrator conduct as arbitral institutions, but they do so as a last resort. In reviewing awards, they generally only refuse enforcement when the alleged misconduct undermines the fundamental fairness of the award.'). The same could be said of ICSID annulment under Article 52(1)(a) or (c) of the Convention.

⁴⁵² Reisman, *Systems of Control in International Adjudication and Arbitration* (1992), 113.

⁴⁵³ IBA Representation Guidelines, 1-2. For instance, the Pretoria and Johannesburg Bar Councils disbarred the lawyer who solicited a bribe in an international arbitration: K. van Dijkhorst *et al.*, 'Report of the Disciplinary Committee Appointed to Inquire into the Conduct of Advocate Seth Nthai SC', *Constitutionally Speaking* (16 April 2010), available at <https://constitutionallyspeaking.co.za/report-of-the-disciplinary-committee-in-adv-seth-nthai-case/> (last accessed 12 January 2020).

⁴⁵⁴ Swiss Arbitration Association, 'ASA Working Group on Counsel Ethics Releases Latest Findings' (2016) (*cf.* note 32), Conclusion 1 ('On the basis of the research efforts conducted so far efforts to collect empirical data on the frequency and nature of complaints addressed to national bar councils or supervisory bodies, it appears that there are extremely few complaints being lodged in relation to international arbitration.').

⁴⁵⁵ See generally J. C. P. Goldberg, 'What Clients Are Owed: Cautionary Observations on Lawyers and Loss-of-a-Chance', *Emory Law Journal*, 52 (2003), 1201-5.

⁴⁵⁶ Rogers, *Ethics in Arbitration* (2014), para. 4.73.

⁴⁵⁷ Rogers, *Ethics in Arbitration* (2014), para. 4.73.

and ‘the effective ability to carry a task.’ Analysing tribunals, arbitral institutions and national authorities has substantiated these assertions: it is indeed sometimes uncertain which forum has jurisdiction *and* is capable on the ground to enforce a professional conduct standard. This appraisal has also highlighted the overlapping authority of these fora, and, relatedly, how coordination between them is not adequately addressed today. By the same token, it has validated the general claim⁴⁵⁸ that rules of professional conduct applicable to a specialized regime are best enforced when contextualized. With these insights in mind, international arbitration may be reformed as an inherently organic system.

IV. ALTERNATIVES: POLICY PERSPECTIVES ON ETHICS

Countless proposals have been set forth to reform the complex arrangements governing participants’ ethical regulation in international arbitration.⁴⁵⁹ In an insightful issue, UNCTAD has delineated ‘[f]our paths of action’ available to revise investment arbitration generally.⁴⁶⁰ These paths serve as a compelling conceptual framework for policy reforms, one which is being used here to assess future directions in ethics. Instead of focussing on specific proposals, these directions are analysed as a whole to depict larger ethical trends.

At both ends of the spectrum, one finds *status quo* and *disengagement*. The first seems like an ill-advised path for enhancing ethics. As this chapter has shown, considerable issues remain with participants’ sources, obligations and fora. Participants overwhelmingly endeavour to uphold their obligations. But international arbitration has an adjudicatory function, the era of simplified ethical regulation is gone, and the system needs heightened ethical standards to maintain its legitimacy.⁴⁶¹ Leaving the current state of affairs unchanged also does nothing to protect arbitration from potential scandals that could later bring it into disrepute.⁴⁶²

The second path – disengagement – refers to calls to return to national court litigation based on criticism of arbitration’s integrity.⁴⁶³ These criticisms fall beyond this chapter’s scope, as they relate to the ethics *of* (and not *in*) international arbitration.⁴⁶⁴ Considered, on the other hand, is potentially withdrawing from certain arbitral institutions and organizations within the transnational and international order as a means of resolving ethical issues.

For their part, *selective adjustments* and *systematic reforms* are at the centre of the reform spectrum. Stakeholders have assessed these two action paths with greater interest in examining concerns about participants’ real and perceived ethical issues.⁴⁶⁵ Reforms pertaining to arbitrators

⁴⁵⁸ D. B. Wilkins, ‘Who Should Regulate Lawyers’ (1992), 843-4.

⁴⁵⁹ See, e.g., ‘Bibliography: Ethics in Arbitration’ (2011), 527.

⁴⁶⁰ UNCTAD, ‘Reform of the IIA Regime’ (2014).

⁴⁶¹ Rogers, *Ethics in Arbitration* (2014).

⁴⁶² Sarvarian, *Professional Ethics* (2013), 187.

⁴⁶³ Van Harten, *Investment Treaty Arbitration and Public Law* (2007), 175-80. See also Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 11 (‘[S]tates have freely chosen to recognize arbitral authority in treaties, some of which [the New York and ICSID Conventions] are of quasi-constitutional importance. If powerful trading and capital-rich states jointly chose to destroy the arbitral regime, they could do so.’).

⁴⁶⁴ On the distinction, see generally Glenn, ‘The Ethic of International Law’ (2012), 246.

⁴⁶⁵ A. Roberts, ‘UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court’, *EJIL: Talk!* (12 December 2017), available at www.ejiltalk.org/uncitral-and-isds-reform-pluralism-and-the-plurilateral-investment-court/ (last accessed 12 January 2020) (exploring multiple, potentially overlapping reform options available for states).

and arbitrator behaviour, among others, illustrate both these paths. The laudable efforts to expand the scope, and change the nature, of arbitrators' disclosure standard represent one of many selective adjustments.⁴⁶⁶ The IBA Conflicts Guidelines, notably, have reduced arbitrators' guesswork in disclosing relevant information prior to appointments.⁴⁶⁷

As a systematic reform, the EU has proposed to establish an Investment Court System ('ICS') in its new IIAs. The Comprehensive Economic and Trade Agreement ('CETA') and the Free Trade Agreement between the EU and Singapore have now included this ICS.⁴⁶⁸ This proposal departs from the institution of party-appointed arbitrators in international arbitration.⁴⁶⁹ It replaces these decision-makers with part-time but permanent members appointed to cases using a system of random selection.

In evaluating these paths, the fundamental questions raised by the moderator in a recent panel discussion on ethics are worth noting. She asked: 'who should set expectations for [participants'] conduct in international arbitration? Does it depend on the particular issue involved? Does it depend on the aims of regulatory effort?'⁴⁷⁰ Again, examining what the New York and ICSID Conventions both address and omit helps answering these tough policy questions.

Before all else, (A) presenting how these sources came about illustrates central dynamics within the international arbitration tradition and the ethical regulation of its participants. Further, close study of the system demonstrates that, both by design and in practice, the answer to 'who' should regulate depends on 'what' is regulated. This specialization, or issue-based regulation, is already unfolding naturally today, but it should also inform future reforms.

For one, (B) parties, arbitral institutions, and tribunals have concentrated their efforts on institutional controls; that is, they have successfully ensured the integrity of proceedings in which they were directly involved. (C) National authorities, for their part, have been less effective in implementing deontological controls and coping with system-level issues, but ensuring a better coordination between these authorities and arbitration participants on party representatives' regulation constitutes a promising solution. Lastly, (D) the epistemic community within the

⁴⁶⁶ F.-Z. Slaoui, 'The Rising Issue of "Repeat Arbitrators": A Call for Clarification', *Arbitration International*, 25 (2009), 103 (discussing the 5Ws of disclosure).

⁴⁶⁷ By clarifying disclosure standards, the IBA Conflicts Guidelines make it less probable that an arbitrator will not disclose information that he or she should have made available to the parties, and they reduce opportunities for parties to initiate doubtful challenges. They assist reviewing authorities to detect 'bad faith' challenges since claims based on green-listed situations, or at least not orange or red-listed ones, will be seen at first sight with suspicion. See Rogers, *Ethics in Arbitration* (2014), para. 2.108 *et seq.*

⁴⁶⁸ European Commission, Transatlantic Trade and Investment Partnership ('T-TIP') (November 2016). See also CETA, Ch. 8.

⁴⁶⁹ See Schneider, 'President's Message' (2013), 499 ('The basic paradigm in arbitration as we know it is for each party to appoint its arbitrator and for the two then to appoint a chairperson. The model has worked seemingly well for decades if not centuries...'); Gélinas, 'The Independence of International Arbitrators and Judges' (2011), 28 ('The party appointment system has emerged out of long-established and widely shared practices across the whole spectrum of adjudicative configurations.');

D. J. Branson, 'American Party-Appointed Arbitrators – Not the Three Monkeys', *University of Dayton Law Review*, 30 (2004), 1 (explaining that party-appointment in the USA dates back to the nineteenth century).

⁴⁷⁰ E. O'Hara O'Connor, 'Can Arbitral Institutions Be Expected to Promulgate Effective Rules of Ethics?', *Kluwer Arbitration Blog* (18 May 2016), 335, available at <http://arbitrationblog.kluwerarbitration.com/2016/05/18/can-arbitral-institutions-be-expected-to-promulgate-effective-rules-of-ethics/> (last accessed 12 January 2020).

international arbitration tradition must self-regulate, embracing broad social interests both within and beyond its borders.

A. Ethical Dynamics

The driving force behind ethical regulation has been, and will continue to be for the foreseeable future, the system's own community members. From the very beginning of modern international arbitration, notable individuals have played a central role in drafting and enacting its coordinating instruments, which have expressly *and* implicitly determined the nature and content of participants' ethical rules.

Remarkably, the ICC-ICA universalized arbitration by designing significant features of the New York Convention, thus setting the stage for awards' easy enforcement.⁴⁷¹ In a like fashion, UNCITRAL officials conceived the Model Law in response to what they viewed as national laws' 'disparity' and 'inadequacy.'⁴⁷² Notable individuals have subsequently promoted the Model Law's adoption as their respective state's national arbitration law.⁴⁷³ These are a few among many instances where elite individuals have managed to overcome the traditional monopoly and hostility of their national legal systems against international arbitration by co-opting local figures in fields such as politics and the law.⁴⁷⁴

The epistemic community of arbitration professionals has indeed influenced the rules and values underlying the system's ethical governance.⁴⁷⁵ In a leading article on international relations, Haas described an epistemic community as a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy knowledge within that domain.⁴⁷⁶ Many scholars have recognized the presence and contribution of an epistemic community within international arbitration, including Kaufmann-Kohler,⁴⁷⁷ Salacuse⁴⁷⁸ and Michaels.⁴⁷⁹ This recognition is far from a value-based judgement or a politically-charged

⁴⁷¹ Dezalay and Garth, *Dealing in Virtue* (1996), 43; Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 57 ('As important, ICC officials were instrumental in proposing, drafting, and overseeing the signing and ratification of the 1958 New York Convention, which created a quasi-constitutional framework for the recognition of arbitral authority by national courts.').

⁴⁷² UNCITRAL Model Law, 24-5.

⁴⁷³ In Canada, *see, e.g.*, J. Brosseau, 'From Canadian Minister to International Arbitrator: The Oral History of Marc Lalonde', *Journal of Arbitration and Mediation*, 6 (2016), 73, 93.

⁴⁷⁴ Dezalay and Garth, 'Transnational "Judges" and Global "Experts"' (2010), 120; Dezalay and Garth, *Lawyers and the Rule of Law* (2011), 260.

⁴⁷⁵ K. L. Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer, 2003), 94.

⁴⁷⁶ P. M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization*, 46 (1992), 1, 3.

⁴⁷⁷ G. Kaufmann-Kohler, 'Global Implications of the U.S. Federal Arbitration Act: The Role of Legislation in International Arbitration', *ICSID Review*, 20 (2005), 339, 356; G. Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity', *Journal of International Dispute Settlement*, 1 (2010), 283, 294-9.

⁴⁷⁸ J. W. Salacuse, 'The Emerging Global Regime for Investment', *Harvard International Law Journal*, 51 (2010), 427, 465.

⁴⁷⁹ R. Michaels, 'Roles and Role Perceptions of International Arbitrators', in W. Mattli and T. Dietz (eds.), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014), 52-6.

statement.⁴⁸⁰ Rather, it simply notes the community's leadership in shaping the debate and policies on ethics and other subjects.

An example of this community's role in defining its ethical regulations is how the primary sources of arbitrators' obligations in the early days of modern international arbitration used to be their 'internal and shared sense of duty.'⁴⁸¹ As the pool of arbitration professionals grew, the field has diversified and shifted away from simply assuming participants knew what constituted proper professional conduct.⁴⁸²

The major international conventions at the core of the arbitral regime arguably play a 'constitutional' role within it.⁴⁸³ A hierarchical judicial bureaucracy like those found in national settings has generally proven to be impracticable in an international system composed of sovereign states.⁴⁸⁴ Yet, arbitration's effectiveness depends on state cooperation and reciprocity. The widespread signing of the New York and ICSID Conventions has satisfied these imperatives.⁴⁸⁵

As a matter of positive law, these international conventions create a global but decentralized regime coordinating a multi-level network of ethical fora: the international (the conventions themselves), the arbitral (party agreements and its derivatives, such as arbitrator contracts and institutional arbitration rules) and the transnational (control mechanisms under national arbitration laws and the ICSID Convention).⁴⁸⁶ This regime derives from the common interest of arbitrating parties, national legal systems and the international legal system in promoting party autonomy, due process, ethical conduct, etc., and establishes a 'partnership' between national and international authorities.⁴⁸⁷

As these conventions only coordinate a 'piecemeal' regime,⁴⁸⁸ they lay the ground for the international arbitration tradition to develop organically.⁴⁸⁹ In international law, both national and international courts fill (intentional) gaps left in agreements by settling issues contracting parties

⁴⁸⁰ This is different, for instance, from claiming that arbitration professionals are a 'mafia,' as some have: A. Barker, 'Taking on the "Inner Mafia"', *Global Arbitration Review*, 7(6) (2012); D. Kapeliuk, 'The Repeat Appointment Factor – Exploring Decision Patterns of Elite Investment Arbitrators', *Cornell Law Review*, 96 (2010), 47, 77-9. This community is not 'run' in any way; it is instead 'the result of different actors behaving rationally and independently in a convenient and constantly evolving environment.' See Puig, 'Social Capital in the Arbitration Market' (2014), 387, 423.

⁴⁸¹ Rogers, *Ethics in Arbitration* (2014), para. 2.49.

⁴⁸² Rogers, *Ethics in Arbitration* (2014), para. 2.49.

⁴⁸³ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 30-31.

⁴⁸⁴ Reisman, *Systems of Control in International Adjudication and Arbitration* (1992), 3-5.

⁴⁸⁵ This result is also brought about, by inference, through the outspread enactment of national arbitration laws based on the UNCITRAL Model Law: Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 43-4 (states 'enact[ing] statutes based, at least in part, on the Model Law [...] has had the effect of harmonizing state law in support of arbitration.' [citation omitted]).

⁴⁸⁶ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 30-31. The ICSID Convention coordinates the relationship between these various jurisdictions, although it accords no power of review to national courts: 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State' (ICSID Convention, Article 54(1)).

⁴⁸⁷ Blackaby *et al.*, *Redfern and Hunter* (2015), para. 7.01 ('The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership.')

⁴⁸⁸ Lynch, *The Forces of Economic Globalization* (2003), 85.

⁴⁸⁹ O. R. Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Cornell University Press, 1989), 95.

themselves could not agree on.⁴⁹⁰ In the same way, national and arbitral practice addresses issues unresolved by the conventions, including ethical obligations.⁴⁹¹ As mentioned, this division of labour may create tensions between different forums, especially on the delicate subject matter of ethics and its regulation.

Because the New York and ICSID Conventions' building block is consent, they continuously evolve through endogenous or exogenous shocks.⁴⁹² From the early work of Paulsson in the 1990s⁴⁹³ to the keynote speech of Menon at an International Council for Commercial Arbitration ('ICCA') Congress twenty years later,⁴⁹⁴ dozens of publications and projects have assessed the ways forward with ethics in international arbitration and have made concrete contributions to improving participants' conduct.

These international conventions also enable self-regulation in the arbitral regime. As Rogers argues, arbitral institutions and tribunals should primarily develop ethical standards and enforcement, leaving national courts, legislatures, bars and law societies to occupy a back-up role.⁴⁹⁵ She supports her claim by relying on the system's ongoing regulation of its participants, as well as on theories associating a profession's identity with self-regulation in national jurisdictions.⁴⁹⁶ Moving from words to deeds, Rogers herself has exercised leadership in setting up the platform *Arbitrator Intelligence* to 'cure existing inefficiencies and inequities in how information about arbitrators is developed in the arbitrator selection process.'⁴⁹⁷

National self-regulation certainly offers a fertile ground for analogy, as the concept highlights saliently the benefits of regulation by specialists.⁴⁹⁸ As arbitration's key coordinating instruments, the New York and ICSID Conventions represent the formal sources of international law encouraging this ethical self-regulation and the thriving of epistemic communities in this task. Nevertheless, this analogy is limited because arbitration, in contrast to national legal systems, does not govern a narrow professional group in the public interest in exchange for a monopoly over legal services.

Moreover, what these conventions specifically provide, along with the gaps they have intentionally left, has created an environment in which different regulators have thrived on different types of ethical issues.

⁴⁹⁰ L. L. Fuller, 'The Forms and Limits of Adjudication', *Harvard Law Review*, 92 (1978), 353, 373 ('International treaties are often filled with purposeful ambiguities; some issues are simply too touchy to be resolved by agreement. When a dispute later develops around such issues, the agreement offers no guidance. To demand of a court that it simply resolve such issues "fairly" is to ask the court to decide something about which the parties themselves could not agree and for the determination of which no standard exists.').

⁴⁹¹ Lynch, *The Forces of Economic Globalization* (2003), 85.

⁴⁹² Young, *International Cooperation* (1989), 95.

⁴⁹³ Paulsson, 'Standards of Conduct for Counsel' (1992), 214.

⁴⁹⁴ Menon, 'Keynote Address' (2012).

⁴⁹⁵ Rogers, *Ethics in Arbitration* (2014), Ch. 6. See also Rogers, 'Fit and Function in Legal Ethics' (2002), 319.

⁴⁹⁶ Sociologists view self-regulation as defining professions: M. J. Powell, 'Professional Divestiture: The Cession of Responsibility for Lawyer Discipline', *American Bar Foundation Research Journal*, 11 (1986), 31.

⁴⁹⁷ 'About AI' (2018) (n. 275).

⁴⁹⁸ This could also be referred to as 'internal regulation,' as Menon does: Menon and Paulsson, 'Is Self-Regulation of International Arbitration an Illusion?' (2013).

B. Institutional Regulators

In international arbitration, the parties and – through their delegation of powers – arbitral institutions and tribunals represent a significant form of institutional controls. Together, they strived towards preserving the fairness and integrity of arbitral proceedings in which they directly took part.

First, both private and public parties are instrumental in setting up the ethical obligations applicable in disputes contemplated by contracts, IIAs, and domestic laws,⁴⁹⁹ and even in enforcing these obligations.⁵⁰⁰ This power is often understated and underexploited.⁵⁰¹ But disputing parties are certainly permitted to endorse heightened ethical standards for the various participants in arbitral proceedings. Evidently, they are more likely to agree on the applicable standard under the ‘veil of ignorance,’ that is, before the dispute has arisen or the proceedings have begun.

A few examples related to party representatives show how parties can utilize resources available to them to solve ethical issues. For one, Bishop and Steven devised a compelling code of ethics for representatives in international arbitration.⁵⁰² Similarly, Benson proposed a flexible, ‘Checklist of Ethical Standards for Counsel in International Arbitration.’⁵⁰³ A procedural order embodying party agreement could introduce these instruments into the proceedings to ensure that even if representatives come from various jurisdictions they abide by common ethical rules.⁵⁰⁴ To the same effect, representatives in an investment case can sign and deposit a copy of the ILA Hague Principles or a variation of them at the start of the proceedings.⁵⁰⁵

While information about how parties have attempted to regulate participants is relatively limited in commercial arbitration, increased transparency in treaty negotiation and litigation in investment arbitration has shown efforts to ‘reclaim’ IIAs.⁵⁰⁶ The CETA illustrates, again, a recent bilateral endeavour. Remarkably, it clarifies whether third party funding needs to be disclosed, explicitly requiring it should.⁵⁰⁷ This IIA also adopts a strict approach towards conflicts of interest. Tribunal Members are prohibited from acting as representatives and experts in pending and new cases. The CETA integrates these rules into a binding code of conduct (currently based on the IBA Conflicts Guidelines), which stipulates contravening members must be replaced. To ensure

⁴⁹⁹ See especially New York Convention, Articles I, III, V.

⁵⁰⁰ Lim, ‘Ethical Issues in International Law Practice’ (2015) (noting lawyers have been sued for malpractice in certain cases).

⁵⁰¹ Rigaud, for instance, believes that relying on the party for ethical regulation is ‘unrealistic,’ while Sahani thinks ‘parties themselves have a great deal of control over what counsel can do,’ see O’Hara O’Connor, ‘Can Arbitral Institutions Be Expected to Promulgate Effective Rules of Ethics?’ (2016), 345, 352.

⁵⁰² D. Bishop and M. Stevens, ‘The Compelling Need of Ethics for Lawyers Practicing Before International Arbitral Tribunals’, in A. J. van den Berg (ed.), *Arbitration Advocacy in Changing Times (ICCA Congress Series, no. 15)* (Kluwer, 2011), 408.

⁵⁰³ Benson, ‘Can Professional Ethics Wait?’ (2009), 88-94.

⁵⁰⁴ Lim, ‘Ethical Issues in International Law Practice’ (2015) (‘Dr. Kaufman asked if an international professional body should be created to consider and enforce ethics rules.... One panelist suggested that it would be more pragmatic for the tribunal and parties to discuss and agree to the ethics standards that would apply in the proceedings.’).

⁵⁰⁵ Sarvarian, *Professional Ethics* (2013), 183 (‘By putting representatives on notice of the standards of conduct expected of them, this would not only act as a deterrent upon flagrant misconduct and a clarification of the finer issues but would also provide tribunals with a textual basis for sanctions.’).

⁵⁰⁶ See S. Lalani and R. P. Lazo (eds.), *The Role of the State in Investor-State Arbitration* (Brill Nijhoff, 2015).

⁵⁰⁷ CETA, Article 8.26.

independence, the ICJ President takes decisions on replacement, thus enforcing rules through independent oversight.⁵⁰⁸

Further, the parties can delegate,⁵⁰⁹ and indeed have effectively delegated,⁵¹⁰ the primary function of regulating participants to arbitral institutions and, to a lesser extent, to arbitral organizations. Regularly incorporating institutions' procedural rules⁵¹¹ and organizations' soft law instruments into proceedings⁵¹² has made this delegation of power complete. Fuelled by a division of labour,⁵¹³ party autonomy is indeed redistributed among functionally specialized participants.⁵¹⁴ For example, the Third-Party Funding Taskforce has drawn on the expertise of ICCA members (including practitioners, funders, government representatives and academics) to provide legal and policy analysis on funding in the system.⁵¹⁵

No hierarchical judicial bureaucracy exercises a control function in international arbitration like that in national legal systems.⁵¹⁶ However, influential institutions illustrate how a transnational bureaucracy has effectively developed *within arbitral institutions*.⁵¹⁷ For instance, enlisting new arbitrators and observing their performance has induced the growth of the ICC-ICA bureaucracy, namely the Secretariat and Court of Arbitration.⁵¹⁸ According to Article 34 of the ICC-ICA Rules, the Court of Arbitration must review and approve the award before it can be issued,⁵¹⁹ even 'draw[ing] the [tribunal's] attention to points of substance'.⁵²⁰ These tasks and various others exemplify how arbitration has undergone in recent decades an endogenous process of marked evolution through successive 'institutionalization'⁵²¹ and 'judicialization' reforms.⁵²²

To draw an informative but imperfect analogy with national legal systems, arbitral institutions are now playing legislative, executive and – to a lesser extent – judicial roles in the arbitral order,⁵²³ including on certain ethical issues. These institutions serve as *de facto* legislators

⁵⁰⁸ CETA, Article 8.30.

⁵⁰⁹ See New York Convention, Article V(1)(d) ('The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties...').

⁵¹⁰ Rogers, *Ethics in Arbitration* (2014), Ch. 6.

⁵¹¹ Lynch, *The Forces of Economic Globalization* (2003), 110.

⁵¹² Smit, 'A-National Arbitration' (1989), 631 (suggesting text to include ethical codes into the arbitration agreement by reference to some national body of law); Dillenz, 'Drafting Arbitration Clauses' (1998), 221 (recommending contractual text to include the IBA's Rules of Ethics for International Arbitrators in parties' agreements).

⁵¹³ Dezalay and Garth, *Dealing in Virtue* (1996), 46. See also Queen Mary University of London School of International Arbitration and White & Case, *2015 International Arbitration Survey* (2015), 17 (seventy-nine per cent of respondents arbitrations were institutional rather than *ad hoc*).

⁵¹⁴ Lynch, *The Forces of Economic Globalization* (2003), 121.

⁵¹⁵ Brekoulakis *et al.*, *Report of the ICCA-Queen Mary Task Force* (2018).

⁵¹⁶ Reisman, *Systems of Control in International Adjudication and Arbitration* (1992), 3-5.

⁵¹⁷ Dezalay and Garth, *Dealing in Virtue* (1996), 47.

⁵¹⁸ Dezalay and Garth, *Dealing in Virtue* (1996), 47.

⁵¹⁹ ICC-ICA Rules, Article 34.

⁵²⁰ ICC-ICA Rules, Article 34.

⁵²¹ J. Wouters and N. Hachez, 'The Institutionalization of Investment Arbitration and Sustainable Development', in M.-C. Cordonier Segger *et al.* (eds.), *Sustainable Development in World Trade Law* (Kluwer, 2011).

⁵²² Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 57 ('Judicialization then proceeded in earnest, so much so that, today, arbitration functions as a parallel form of adjudication in all but name.').

⁵²³ D. Gaukrodger, *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview* (OCDE Investment Committee, 2018), 12 (opining appointing authorities are at the 'apex' of the ISDS system).

by codifying best practices in constantly reviewing and updating their procedural rules on matters such as independence requirements, disclosure obligations and others.⁵²⁴ In addition, they also act in practice as the main enforcer of ethical standards they themselves establish.⁵²⁵ One example of these institutions' powers consists in arbitrators' selection and challenge. Institutions themselves conduct these procedures through the rules governing the constitution of the tribunal.⁵²⁶

As institutional controls, arbitral institutions have been chiefly concerned with preserving proceedings' integrity and fairness, which matches both their mandate and skills as providers of administrative (and sometimes quasi-judicial) services.⁵²⁷ Reforms with welcomed but limited teeth to these institutions' rules – such as the LCIA's relatively narrow powers granted to tribunals in regulating party representatives⁵²⁸ – fit well within arbitration's legal and policy framework. Focussing mainly on arbitral procedure, institutional arbitration rules represent arguably an extension of party autonomy. In contrast, arbitral institutions engaging in disciplinary sanctions to protect interests beyond those of disputing parties would not only distort their true nature, but also contribute to the fragmentation of participants' regulation.⁵²⁹

Given the ever-increasing role of arbitral institutions in ensuring ethical conduct, both formal and informal mechanisms ensure these institutions' responsibility and accountability,⁵³⁰ even if opportunities for enhancement remain.⁵³¹ Market forces are at the forefront of these mechanisms.⁵³² As a service industry, arbitration is notoriously a field of intense competition.⁵³³ The competitive atmosphere within the system and vis-à-vis both national and international fora⁵³⁴ incentivizes institutions to guarantee the product they are selling.⁵³⁵ Institutions are indeed generally keen on implementing reforms that clients want. In the last few years, they have made impressive strides in penalizing arbitrators for increasing the costs and delays of arbitrations,

⁵²⁴ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 21, 28.

⁵²⁵ A. Carlevaris and R. Digon, 'Arbitrator Challenges under the ICC Rules and Practice', *ICC Dispute Resolution Bulletin*, 1 (2016), 25 ('Most arbitral institutions are empowered to make decisions on challenges against arbitrators. Only rarely in institutional arbitration is it left to arbitral tribunals or state courts to decide on challenges.' [emphasis omitted]).

⁵²⁶ Rogers, *Ethics in Arbitration* (2014), 249. Paulsson has even gone as far as suggesting that appointment powers in the future should lie entirely in the hands of arbitral institutions instead of relying on the parties. See Paulsson, *Idea of Arbitration* (2014), 163.

⁵²⁷ Wilske, 'The Duty of Arbitral Institutions' (2017), 201.

⁵²⁸ LCIA Arbitration Rules, Article 18.6.

⁵²⁹ O'Hara O'Connor *et al.*, 'Who Should Regulate the Advocates and What Should Be Regulated?' (2016), 350.

⁵³⁰ T. Jones and A. Ross, 'Mourre Calls for Institutions to Join Forces', *Global Arbitration Review* (9 March 2018) (Mourre suggests further institutional cooperation within existing bodies, such as the International Federation of Commercial Arbitration Institutions ('IFCAI')).

⁵³¹ Gaukrodger, *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement* (2018), 16 (arguing there are 'limited mechanisms for public or internal accountability' of arbitral institutions).

⁵³² Lynch, *The Forces of Economic Globalization* (2003), 89.

⁵³³ Werner, 'Competition within the Arbitration Industry' (1985), 5. See also M. Hodgson, 'Counting the Costs of Investment Treaty Arbitration', *Global Arbitration Review*, 9(2) (2014).

⁵³⁴ For the new court in Singapore, see, e.g., L. Reed, 'International Dispute Resolution Courts: Retreat or Advance? (10th John E.C. Brierley Memorial Lecture)', *McGill Journal of Dispute Resolution*, 4 (2017-8), 129.

⁵³⁵ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 28.

persuaded by mainstream demands.⁵³⁶ Yet market forces are likely to foster a ‘race to the middle,’ whereby difficult ethical issues lacking clear consensus are largely left unregulated.⁵³⁷

Civil liability claims are another mechanism to ensure the accountability of institutions’ ethical governance.⁵³⁸ Arbitral institutions have numerous obligations in connection with their mandate.⁵³⁹ Still, national authorities do little to comprehensively regulate them,⁵⁴⁰ and they have found them liable only in a minority of civil cases.⁵⁴¹ American courts, notably, have taken the view that if institutions were not immune for legal processes, arbitrators’ liability ‘would merely shift [...] to the sponsoring organization.’⁵⁴²

As with other arbitration participants, institutions’ ethical obligations should also be appropriately defined and enforced. For Warwas, institutions’ current liability regime is inadequate given their contractual obligations and their increasingly public function.⁵⁴³ She argues, ‘[a]rbitral institutions could, and should, eventually become proactive and reform the scope of their liability from the bottom, by means of the changes to arbitration rules under which civil liability should be a norm.’⁵⁴⁴ While arbitrator immunity crucially protects their impartiality and the award’s finality, does the same *rationale* equally applies to arbitral institutions? The answer is less obvious. The reform option proposed by Warwas and others is interesting since it would further encourage their ethical conduct.

A final mechanism to increase arbitral institutions’ accountability is to resort to ‘public’ or ‘intergouvernemental’ entities, especially when states are involved.⁵⁴⁵ The competence and legitimacy of private institutions in regulating participants’ ethical conduct have been questioned in investment arbitration. Schill, for one, has written:

administering institutions that are in essence organs of the international business community face limitations in terms of the legitimacy they can confer on the regulation of the international bar. Regulation by such bodies may be seen in the eyes of the general public as self-serving instruments

⁵³⁶ For example, a survey finds that arbitrators with a proactive case management style are preferred (43 per cent of respondents) to those with a reactive style (21 per cent of respondents): Queen Mary University of London School of International Arbitration and White & Case, *2015 International Arbitration Survey* (2015), 25.

⁵³⁷ O’Hara O’Connor, ‘Can Arbitral Institutions Be Expected to Promulgate Effective Rules of Ethics?’ (2016). For instance, recent developments demonstrate that institutions are hesitant to follow in the footsteps of the LCIA with regards to lawyer regulation, as the arbitral community is still divided on the benefit of this reform.

⁵³⁸ See *supra* Section III.A.

⁵³⁹ Leaver, ‘Reciprocal Duties’ (2012), 107 (‘If the arbitrator’s overarching duty is to decide the dispute in a fair, timely and cost-effective manner, the reciprocal overarching duty of the institutions is to provide efficient and cost-effective administrative services to support the arbitrator and the parties in the achievement of this end.’).

⁵⁴⁰ Mourre notes that ‘any person can establish an arbitration institution, with no requirement of registration or public control,’ Jones and Ross, ‘Mourre Calls for Institutions to Join Forces’ (2018).

⁵⁴¹ Franck, ‘The Liability of International Arbitrators’ (2000), 25-8 (citation omitted).

⁵⁴² Franck, ‘The Liability of International Arbitrators’ (2000), 25-8.

⁵⁴³ B. A. Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (TMC Asser Press, 2017).

⁵⁴⁴ B. A. Warwas, ‘Let Us Settle the Liability Issue: Can Civil Liability Restore the Legitimacy of Arbitration?’, *Kluwer Arbitration Blog* (2 November 2016), available at <http://arbitrationblog.kluwerarbitration.com/2016/11/02/let-us-settle-the-liability-issue-can-civil-liability-restore-the-legitimacy-of-arbitration/> (last accessed 12 January 2020). She advocates for the inclusion of liability clauses into institutional contracts.

⁵⁴⁵ See *supra* Introduction. See also Böckstiegel, ‘The Role of the Arbitrators’ (2003), 373-4; Sharpe, ‘Representing a Respondent State’ (2014).

promoting the ‘private’ interest of international lawyers, and not the ‘public’ interest of the international community in the administration of justice.⁵⁴⁶

States could choose to move away from routinely using these institutions’ services and rules.⁵⁴⁷ They could revert to institutions in which they can have greater input and influence, such as the Permanent Court of Arbitration (‘PCA’), ICSID or UNCITRAL.⁵⁴⁸ These institutions have large state membership and can represent public and social interests in the peaceful settlement of international disputes. For instance, many of the priorities in revising ICSID’s rules and regulations relate to ethics. These priorities include the adoption of a conduct code for arbitrators, an updated challenge procedure, and a new rule governing funding disclosure.⁵⁴⁹

Besides arbitral institutions and organizations, parties have also delegated participants’ primary ethical regulation to tribunals,⁵⁵⁰ notably as part of their duty to control proceedings and to produce enforceable awards.⁵⁵¹ Indeed, ‘[e]nsuring the integrity and efficiency of international proceedings by upholding basic procedural principles is an objective that seems best pursued by regulation through international courts [and] tribunals.’⁵⁵² Arbitral tribunals can arguably exercise inherent powers as they consider ‘necessary’⁵⁵³ for resolving the dispute at hand, as well as for ensuring that justice is administered properly and that public interests are considered in appropriate circumstances.⁵⁵⁴ As mentioned, arbitrators have effectively sanctioned party representatives by means of public admonishment, suspension from proceedings, reporting to national bar authorities, etc.⁵⁵⁵ Arbitrators can observe and evaluate participants’ conduct in context in the course of arbitral proceedings.⁵⁵⁶

Some have objected, however, to tribunals enforcing ethics directly against participants based on tribunals’ nature and jurisdiction.⁵⁵⁷ Seeing arbitrators as service or justice providers should certainly affect the broad or narrow scope of their inherent powers.⁵⁵⁸ But all international tribunals have in reality both private and public aspects to a certain degree. States and private parties consent – and even expect – to set up functioning judicial processes, where tribunals exercise their delegated authority to manage and decide a dispute within the (sometimes broad)

⁵⁴⁶ S. Schill, ‘The Case for Public Regulation of Professional Ethics for Counsel in International Arbitration’, *Kluwer Arbitration Blog* (7 July 2017), available at <http://arbitrationblog.kluwerarbitration.com/2017/07/07/case-public-regulation-professional-ethics-counsel-international-arbitration/> (last accessed 12 January 2020).

⁵⁴⁷ Lynch, *The Forces of Economic Globalization* (2003), 121.

⁵⁴⁸ Gaukrodger, *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement* (2018), 24.

⁵⁴⁹ Jones, ‘Kinnear Sheds Light’ (2018).

⁵⁵⁰ New York Convention, Article II(1).

⁵⁵¹ Rogers, ‘Guerrilla Tactics’ (2013), 337.

⁵⁵² Schill, ‘The Case for Public Regulation of Professional Ethics’ (2017).

⁵⁵³ Bjorklund and Brosseau, ‘Sources of Inherent Powers’ (2018), 14-8. See also Park, ‘A Fair Fight’ (2014), 417-8.

⁵⁵⁴ C. Brown, ‘The Inherent Powers of International Courts and Tribunals’, *British Yearbook of International Law*, vol. 76 (Oxford University Press, 2006), 195, 237.

⁵⁵⁵ Sarvarian, *Professional Ethics* (2013), 182.

⁵⁵⁶ Rogers, *Ethics in Arbitration* (2014), para. 6.144.

⁵⁵⁷ Rogers, *Ethics in Arbitration* (2014), para. 6.147 (summarizing the debate).

⁵⁵⁸ See M. Paporinskis *et al.*, ‘The Inherent Authority of an ICSID Tribunal: What Is the Limit?’, in Laird and Weiler (eds.), *Investment Treaty Arbitration*, vol. 5 (2012). See generally Rogers, *Ethics in Arbitration* (2014), Ch. 9 (‘Duck-Rabbits, a Panel of Monkeys and the Status of International Arbitrators’).

parameters provided.⁵⁵⁹ This power delegation must extend to regulating certain ethical obligations.⁵⁶⁰

To clearly enunciate institutions' and tribunals' powers on ethics may alleviate concerns related to the use of their important procedural powers.⁵⁶¹ But even if these reforms were engineered, tribunals – like parties and institutions – face by nature limitations in developing and enforcing ethical obligations that do not directly relate to these international proceedings. Deontological regulators have addressed, and could better address, these other issues.

C. Deontological Regulators

Although largely successful in protecting proceedings from unethical conduct, the parties and their delegates cannot be expected to govern truly deontological and disciplinary matters. '[W]hen [institutions and] tribunals are dragged into the disciplinary process, it burdens the parties, delays the proceeding, and becomes a weapon in the arsenal of dispute resolution tactics.'⁵⁶² To address these issues more compellingly, the establishment of international oversight bodies has been discussed at great length but remains embryonic to this day. In national jurisdictions, courts have provided laudable last resort supervision of arbitral proceedings, while bar and professional associations have faced coordination problems in coping with system-level, deontological issues.

In contrast to the ICSID Convention, the New York Convention mandates national courts to review awards in both set-aside and enforcement proceedings,⁵⁶³ thus controlling participants' conduct as a last expedient. National judges must enforce awards subject to a few exceptions.⁵⁶⁴ In practice, 'most national courts have exercised admirable restraint, providing an effective backstop [on ethical issues], but not disrupting or interfering with arbitral processes'.⁵⁶⁵ This restraint is warranted since national institutions may provide diverse answers to ethical issues in the conduct of arbitral proceedings.⁵⁶⁶ Despite these variations, national courts have generally applied the New York Convention 'in ways that have gradually institutionalized a pluralist legal order,'⁵⁶⁷ even without any overarching authority settling ethical conflicts with finality.⁵⁶⁸

National bar and professional associations have shown less deference to arbitral proceedings or, at least, have cast a concerning shadow over them. This situation occurs partly because arbitration's coordinating instruments do not address these associations at all. As mentioned, national laws provide a rich source of ethical obligations, which can sometimes lead

⁵⁵⁹ De Ly *et al.*, 'Report for the Biennial Conference in Johannesburg' (2016), 3.

⁵⁶⁰ Park, 'A Fair Fight' (2014), 417-8; H. Middleditch, 'The Use of Inherent Powers by Arbitrators to Protect the Public at Large', *European International Arbitration Review*, 6 (2018), 95, 114-24.

⁵⁶¹ Schill, 'The Case for Public Regulation of Professional Ethics' (2017); Park, 'A Fair Fight' (2014), 419-20 ('Unlike recourse to the inherent powers of a tribunal [*ad hoc* rulings], or guidelines elaborated by a professional association, the rules-based approach proves consistent with the contractual underpinnings of arbitration, where the two sides in essence define the equality of arms expected through adoption of an institutional code.').

⁵⁶² O'Hara O'Connor *et al.*, 'Who Should Regulate the Advocates and What Should Be Regulated?' (2016), 349.

⁵⁶³ New York Convention, Article V(1).

⁵⁶⁴ New York Convention, Article V(2).

⁵⁶⁵ Rogers, *Ethics in Arbitration* (2014), para. 6.112.

⁵⁶⁶ Schill, 'The Case for Public Regulation of Professional Ethics' (2017) ('National institutions may establish different rules, administer identical rules differently, and differ in their enforcement and sanctioning practices.').

⁵⁶⁷ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 30.

⁵⁶⁸ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 30.

to conflicts at the international level. Unsurprisingly, practical difficulties have emerged from authorities providing overlapping and potentially conflicting rules to govern a business they do not practice. This involvement has created significant coordination issues as well as an ‘unlevelled playing field’ in the arbitral process, including on pre-appointment interview, witness preparation and funding regulation.⁵⁶⁹

Yet, national associations should impose their standards of professional conduct on certain ethical issues.⁵⁷⁰ By and of themselves, some issues indeed lie beyond the effective reach of the parties, arbitral institutions and organizations, and arbitral tribunals. These issues often possess systemic aspects and thus require system-level measures. Arbitral institutions and tribunals would struggle to regulate, for instance, the right to practise, professional liability insurance and advertisements. These matters all involve societal and public interests that the parties and their delegates have neither the capacity nor the interest to comprehensively regulate. Thus, additional international instruments should complement the regime promoted by the New York and ICSID Conventions.⁵⁷¹

For example, in the case of legal services regulation, a supreme body could potentially ensure equal and fair competition among all party representatives involved in the field and protect clients’ interests against malpractice.⁵⁷² This alleged benefit has led Sarvarian to argue, ‘the creation of an external regulatory authority over counsel before international courts and tribunals (including ICSID tribunals) is both necessary and desirable.’⁵⁷³ The Swiss Arbitration Association has in fact exercised leadership in attempting to create a Global Arbitration Ethics Council formed of delegates from the major arbitration institutions and organizations. After careful consideration, however, the association rightly concluded this was ‘an idea whose time has not yet come.’⁵⁷⁴

As a similar type of international body, a neutral challenge facility could be established to review challenges in international arbitration. Such an oversight body could ‘be composed of *super partes*, highly qualified members, and be charged with deciding upon conflicts of interests and requests of arbitrator disqualifications.’⁵⁷⁵ By reviewing all challenges, it would, the argument goes, ensure greater consistency in the quality, expertise and independence of arbitrators. It would bring international public oversight to arbitrators’ regulation without affecting the predictability of outcomes like national legislators and courts potentially would.⁵⁷⁶

However, considering the increased complexity and difficulty of (multilateral) treaty negotiation today,⁵⁷⁷ these proposals will likely get caught up in the power dynamics between

⁵⁶⁹ Schill, ‘The Case for Public Regulation of Professional Ethics’ (2017).

⁵⁷⁰ Born, *International Commercial Arbitration* (2014), 2887.

⁵⁷¹ See, e.g., New York Convention (Final Act, para. 2).

⁵⁷² Schill, ‘The Case for Public Regulation of Professional Ethics’ (2017).

⁵⁷³ Sarvarian, *Professional Ethics* (2013), 183.

⁵⁷⁴ Swiss Arbitration Association, ‘ASA Working Group on Counsel Ethics Releases Latest Findings’ (2016) (*cf.* note 32).

⁵⁷⁵ Malintoppi, ‘Independence, Impartiality and Duty of Disclosure’ (2008), 828.

⁵⁷⁶ D. M. Gruner, ‘Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform’, *Columbia Journal of Transnational Law*, 41 (2003), 923, 960-63.

⁵⁷⁷ Z. Eduardo, ‘The Challenges of Creating a Standing International Investment Court’, *Transnational Dispute Management*, 11 (2014) (‘It is no secret that the complexity of treaty negotiations has increased. First, because of the number of parties generally involved. Second, because of the sensitivities, political and otherwise, of the issues at

states and private parties. Consequently, they are destined to fail, at least for now.⁵⁷⁸ Even if these regulatory oversight bodies were set up, would they lead to more consistency in interpreting a wide array of ethical rules? This is far from clear. Moreover, replacing all these national and international rules by a single set of rules would further entrench and institutionalize the system of international arbitration. Most states and private parties do desire to go down this road at the moment.

A more politically viable option, and one perhaps more coherent with the *ethos* of international arbitration, would be to use the New York and ICSID Conventions as a blueprint for future reforms. Addressing important coordination issues with participants' regulation should be tackled going forward. While problems related to the interaction between differing rules do affect arbitrators,⁵⁷⁹ they impede most significantly representatives, who should thus be addressed as a priority. States, for instance, could complement the New York and ICSID Conventions by drafting international 'model' choice-of-law rules pertaining to representatives' standard of conduct. Being widely adopted by national bar authorities, these new model rules could stipulate, 'when and how international ethics [would] displace, as opposed to merely supplement, national ethical rules.'⁵⁸⁰

The arrangement that fits the most within international arbitration's structure is for institutions and tribunals to address institutional issues, while national authorities handle deontological issues. As Park writes, '[t]here is nothing odd about the co-existence of these two kingdoms, international and local, with some conduct allowed at one level but not the other.'⁵⁸¹ Enforcing ethical issues contextually in specialized institutions would accelerate and legitimize these procedures.⁵⁸²

Improvements should thus be pursued on both fronts. As mentioned, arbitral institutions and tribunals have slowly but increasingly recognized and exercised their powers to regulate participants to preserve the fairness and integrity of arbitral proceedings. In the years to come, further clarifying these powers in procedural rules (including national laws, institutional arbitration laws, and soft law instruments) would put to rest traditional concerns related to them. The arbitral

stake. Third and last, because experience has made States more mindful of the implications of international agreements and more cautious as to the consequences of their application.')

⁵⁷⁸ Only seventeen per cent of respondents opined that the best approach to regulate lawyers was 'through a new transnational body to deal with ethical complaints, as suggested by the Swiss Arbitration Association.' See Queen Mary University of London School of International Arbitration and White & Case, *2015 International Arbitration Survey* (2015).

⁵⁷⁹ UNCITRAL Secretariat, *Ethics in International Arbitration* (2017), para. 37 ('[D]ifferent ethical norms and standards might be applicable [to arbitrators], and there was currently no clear guideline for determining how they interrelated or which would prevail in a given situation... [O]ne possible form of work could be to address the interrelationship of multiple norms and standards providing guidance on which ethical standards would be applicable.')

⁵⁸⁰ Rogers, *Ethics in Arbitration* (2014), para. 6.160 (footnotes omitted).

⁵⁸¹ Park, 'A Fair Fight' (2014), 425.

⁵⁸² O'Hara O'Connor *et al.*, 'Who Should Regulate the Advocates and What Should Be Regulated?' (2016), 356 ('I think that there should be consensus or we should be moving toward a consensus that you do need to comply with specific rules that are prepared for international arbitration specifically because they deal with that subject nicely. Hopefully this will come to represent a consensus internationally.')

framework has all the tools necessary to carry on these selective adjustments. In fact, steps have already been made in this direction.⁵⁸³

Negotiating the relationship between representatives' national and international ethical rules has proven more laborious, but reform paths are in sight. Instead of applying indiscriminately to representatives engaged in international arbitration, national codes should stipulate that arbitral ethical rules supersede them on specific matters pertaining to these international proceedings (such as conflicts of interest, confidentiality obligations, etc.). On the other hand, disciplinary matters (such as professional certification, advertisements, etc.) should remain in the helm of national authorities.⁵⁸⁴ Where national bar associations may lack knowledge of wrongful conduct, parties, tribunals and institutions could refer to them these disciplinary matters.⁵⁸⁵

National bar associations may welcome this type of reform. The Code of Conduct for Italian lawyers, for example, sets forth that its rules may be displaced by those of a foreign jurisdiction where an Italian lawyer is practicing, except when this would clash with the national public interest.⁵⁸⁶ In the USA, Rule 8.5 of the ABA Model Rules of Professional Conduct similarly authorizes international courts and tribunals to have their own rules, and State bars permit attorneys to respect those rules instead of their home jurisdiction's rules.⁵⁸⁷ As both *objects* and *subjects* in international law,⁵⁸⁸ states can go forward with these reforms in international arbitration. Private parties could similarly agree to implement these reforms in commercial arbitration.

With this last point on disputing parties' role and the ways forward with ethics, the discussion on arbitration's ethical regulation has come full circle. From *status quo* and disengagement, to selective adjustments and systematic reforms, the New York and ICSID Conventions have promoted a regime in which parties largely shape their own destiny and where various participants each play a vital part in setting up and in enforcing distinct ethical obligations.

D. Concluding Thoughts

Analysing the sources, obligations, fora and alternatives related to participants' regulation, this chapter highlighted the slow but steady improvements of ethical governance in international arbitration. While the New York and ICSID Conventions provide only a few explicit ethical duties, they set the foundation of institutional controls in the system. By demanding that proceedings and resulting awards meet basic requirements of justice in international law, they compel participants to uphold certain standards of conduct. In enforcing participants' obligations, these international conventions coordinate a multi-level network of fora. Despite breakthroughs, however, certain ethical rules and sanctions remain ill-defined and impractical. The continuous growth, diversification and complexity of arbitration around the globe have only exacerbated these problems over the past decade.

⁵⁸³ For instance, tribunals have increasingly relied on their inherent powers to sanction lawyers, and institutions have revised their rules in the last few years to deter improper behaviour, *see, e.g.*, Section I. C and II. B.

⁵⁸⁴ Park, 'A Fair Fight' (2014), 425 ('The arbitral tribunal and the state regulatory authorities apply different sets of standards, emanating from different sources of authority, carrying different sanctions.').

⁵⁸⁵ Born, *International Commercial Arbitration* (2014), 2888.

⁵⁸⁶ Italian Codice Deontologico Forense (2014), Article 3(2).

⁵⁸⁷ Rogers, *Ethics in Arbitration* (2014), para. 6.160.

⁵⁸⁸ T. Gazzini, 'States and Foreign Investment: A Law of the Treaties Perspective', in Lalani and Lazo (eds.), *Role of the State in Investor-State Arbitration* (2015), 48.

For the most part, arbitral institutions have efficiently filled the gaps on ethical matters left by the New York and ICSID Conventions. These institutions now represent a force to be reckoned with in the field, as they act as the *de facto* legislators and enforcers of core ethical obligations. Any serious reform proposal must acknowledge this reality forging ahead. But arbitral institutions cannot cure all ills. Coordinating, through a model ‘choice-of-law’ or other similar solution, when and how international rules displace national standards would best address institutional issues. Implemented properly, these strategies have the most potential to address the tectonic shifts shaping modern-day arbitration.

Against this backdrop, Rogers explains, ‘self-regulation of the professional conduct of participants in international arbitration is not a question that is open for debate. It is inevitable. The question is only how well it will be managed.’⁵⁸⁹ She is no doubt justified in saying that the system is moving towards self-regulation and will continue to do so. But how should participants ‘manage’ this regime exactly: primarily through private institutions and the market, as Rogers argues?⁵⁹⁰ Or rather through public authorities and heavy state involvement, as Schill would prefer?⁵⁹¹ Seeing ethics through the lens of the private vs. public divide is not always helpful,⁵⁹² but self-regulation must embrace broader social interests both *within* and *beyond* the arbitral community going forward, particularly when states themselves potentially face liability under international law.⁵⁹³

The fair-minded and knowledgeable members of the epistemic community operating within arbitration should undoubtedly develop this complex and specialized international regime, including on complex issues related to ethics. But these members should exercise care and restraint, thus preventing self-regulation and self-interest from converging. The line between these impulses is often fine. As the dictum goes, it ‘is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.’⁵⁹⁴ Avoiding the appearance and suspicion of bias in ethical governance is essential to maintain the public’s confidence in the system, especially in light of the anti-globalization movements,⁵⁹⁵ the Western world’s populist surge,⁵⁹⁶ and the related backlash against experts.⁵⁹⁷ This chapter has distinguished the ethics *of*, and the ethics *in*, international arbitration. However, the general public should not realistically be expected to assess these issues in such a nuanced way.⁵⁹⁸

⁵⁸⁹ Rogers, *Ethics in Arbitration* (2014), para. 10.30.

⁵⁹⁰ Rogers, *Ethics in Arbitration* (2014), Chs. 6-7.

⁵⁹¹ Schill, ‘The Case for Public Regulation of Professional Ethics’ (2017).

⁵⁹² Contra S. W. Schill, ‘Public or Private Dispute Settlement? The Culture Clash in Investment Treaty Arbitration and Its Impact on the Role of the Arbitrator’, in T. Weiler and F. Baetens (eds.), *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Martinus Nijhoff, 2011).

⁵⁹³ See *supra* Introduction. See also Böckstiegel, ‘The Role of the Arbitrators’ (2003), 373-4; Sharpe, ‘Representing a Respondent State’ (2014).

⁵⁹⁴ *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259 (UK). See also D. Zimmermann, *The Independence of International Courts: The Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice* (Nomos, 2014), 47-88.

⁵⁹⁵ Sornarajah, *International Law on Foreign Investment* (2017), 286-7 (examining the signing of the NAFTA and the [failed] negotiations of multilateral agreements that have created additional tensions).

⁵⁹⁶ C. Mudde, ‘Europe’s Populist Surge’, *Foreign Affairs*, November/December (2016).

⁵⁹⁷ T. M. Nichols, *The Death of Expertise: The Campaign Against Established Knowledge and Why It Matters* (Oxford University Press, 2017).

⁵⁹⁸ See, e.g., Gaukrodger, *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement* (2018), 12.

In pursuing these reforms, the arbitral regime will likely draw on, and retain elements from, the already well-developed courts and tribunals at both the national and international levels. In fact, it already has. International arbitration has developed organically through successive judicialization and institutionalization reforms.⁵⁹⁹ Yet, specialists have wondered whether the international trade regime has become ‘overlegalized,’ thus provoking a hostile reaction from certain states.⁶⁰⁰ They have raised similar concerns about international human rights law.⁶⁰¹ Furthermore, arbitral tribunals, as international judicial bodies, are confronted with a ‘judicial trilemma.’ They face an interlocking tradeoff among pursuit of three core judicial values, namely independence, accountability and transparency.⁶⁰²

At the dawn of a new era of ethics, a daunting task awaits the epistemic community within the international arbitration tradition – as parties, arbitral institutions, tribunals, etc. This community must establish the optimal level of judicialization in the system and prioritize certain fundamental values over other equally important ones. While recent efforts to bolster ethics have admittedly been far from perfect, they nevertheless prove the arbitral community is up for the challenge, as the shadow always guides the way to the light.

⁵⁹⁹ Stone Sweet and Grisel, *The Evolution of International Arbitration* (2017), 57 (‘Judicialization then proceeded in earnest, so much so that, today, arbitration functions as a parallel form of adjudication in all but name.’).

⁶⁰⁰ See, e.g., J. Goldstein and L. L. Martin, ‘Legalization, Trade Liberalization, and Domestic Constituents: A Cautionary Note’, *International Organization*, 54 (2000), 603; J. Pauwelyn, ‘The Transformation of World Trade’, *Michigan Law Review*, 104 (2005), 1.

⁶⁰¹ L. R. Helfer, ‘Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes’, *Columbia Law Review*, 102 (2002), 1832.

⁶⁰² J. L. Dunoff and M. A. Pollack, ‘The Judicial Trilemma’, *American Journal of International Law*, 111 (2017), 225.