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International Arbitration needs more Ethical Regulation

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ABSTRACT

In this article an attempt has been made to put forth the argument that there exists a pressing need to set up ethical standards of practice for counsel in International Arbitration along with a supra national regulatory body to enforce said standards in order to facilitate the establishment of a uniform and certain regulatory regime in International Arbitration.

I. INTRODUCTION

With the passing of The Arbitration and Conciliation (Amendment) Act, 2019, the Arbitration Council of India has been set up in order to, among other functions, regulate and standardise the professional and ethical conduct of arbitral institutions, counsel, and arbitrators during international commercial arbitration in India. However, regulation of the conduct of arbitrators worldwide remains remarkably unconsolidated.

International arbitration is a private form of dispute resolution which is employed by individuals or companies of different States to resolve disputes between them.[2] Universal recognition is accorded to the enforceability of international arbitral decisions by the New York Convention.[3] In spite of there being significant benefits to international arbitration like neutrality, confidentiality and speed[4], perhaps the biggest impediment to international arbitration is the lack of a universally accepted regulatory authority.

Several countries have their own set of laws which provide for a legal framework within which arbitral proceedings are conducted, however, the parties to a dispute are free to choose the procedural rules that are to apply to their proceedings.

In spite of the existence of various rules of procedure like The International Chamber of

[1] Author is a student at The National University of Advanced Legal Studies (NUALS), India.
[2] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 187, 197, 217 (2014).
[3] Article 1, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York,1958).
[4] Maurice Kenton, *Advantages of International Commercial Arbitration*, MONDAQ (May 31, 2020, 06:16 PM), https://www.mondaq.com/uk/international-trade-investment/416416/advantages-of-international-commercial-arbitration.

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Commerce, The International Centre for Dispute Resolution and The London Centre of International Arbitration Rules, a need for the adoption of a universally accepted regulatory standard and the establishment of a supra – national regulatory authority to regulate the conduct of counsel of the parties to an arbitration proceeding and the arbitrators has become imperative with an increased number of prominent experts growing dissatisfied with the *status quo.*[5]

The regulatory framework that presently governs the professional conduct of counsel and arbitrators consist of several arbitration rules that are potentially conflicting.[6] Further, as there in no commonly accepted enforcement authority, the consequences for the contravention of these rules are ambiguous.[7]

II. ETHICAL BREACHES BY COUNSEL

There are several characteristics that are inherent in international arbitration which has made it the go to mode of dispute resolution for international disputes. However, these very characteristics open the door for flagrant breaches of ethical and professional conduct.

The primary reason is that international arbitration is a private process. It is said that "sunlight is the best disinfectant".[8] The scrutiny of the public's eyes often serves as a check on the indiscretions of counsel in public litigation. Well documented court records and in some cases, video recordings of Court proceedings serve as documents of record where infractions of counsel are recorded. This however is not the case in international arbitration. These proceedings are confidential and are almost never made public. This removes the accountability of counsel to play by the rules which encourages the utilisation of guerrilla tactics such as threats of non- payment of arbitrator fees, blacklisting of arbitrators, reporting of arbitrators to their professional bodies, etc.[9]

Another opportunity for improper conduct in international arbitration arises from the fact that there is a great risk of arbitrators being susceptible to improper influence. Unlike a judge, an arbitrator's workload is dependent on their decisions and conduct. If they acquire an unfavourable reputation, the prospects of them being reappointed either by a nominating

[5] D. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Attorney Conduct for International Arbitration*, 23 MICH INT'L L J 341 (2002).
[6] Preamble, IBA Guidelines on Party Representation in International Arbitration (London, 25 May 2013).
[7] D. Bishop & M. Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, 16 ICCA Congress Series 391, 405 (2011).
[8] Newsroom, *Sunlight is The Best Disinfectant: SC Allows Live Streaming Of Constitutionally Important Cases*, HUFFINGTON POST (MAY 31, 2020, 06:20 PM), https://www.huffingtonpost.in/2018/09/26/sunlight-is-the-best-disinfectant-sc-allows-live-streaming-of-constitutionally-important-cases_a_23542141/.
[9] *Infra*.

body or directly, take a hit.[10]

III. ETHICAL BREACHES BY ARBITRATORS

The major reasons for arbitrators being inclined to commit ethical indiscretions are due to the fact that the guarantees that assure judicial impartiality are either absent or voluntarily disregarded in arbitral proceedings. The *first* reason is that, unlike judges, being required to possess minimum qualifications for election, arbitrators are not even required to have any legal training[11] as they are usually selected from among active professionals in the field that the dispute pertains to.[12]

Secondly, judges are randomly assigned to judicial cases, this prevents parties from "forum shopping". This mechanism acts as a safeguard against conflict of interests. However, in arbitral proceedings, parties individually and deliberately select arbitrators who are biased towards a particular case.

Thirdly, judges are not allowed to draw compensation or indirect remuneration for the cases that they preside over. This is however not the case with international arbitration. The arbitrator's remuneration depends on the outcome of his/her own decisions.[13] With the existence of the abovementioned factors, professional ethical indiscretions by arbitrators are inevitable.

IV. NEED FOR A UNIVERSALLY ACCEPTED REGULATORY STANDARD AND ENFORCEMENT BODY

Counsel that represent parties in international arbitration are uncertain as to which rule or rules of conduct they are governed by. The rules of professional conduct in arbitral proceedings in the home jurisdictions of the counsel differ from the rules of conduct of the arbitral seat and the counsel may need to take both into account.[14] This lack of clarity also raises the question as to whether the rules are applicable to foreign counsel who appear at the arbitral seat or whether they apply to counsel who are qualified/registered in the arbitral seat when they appear in other jurisdictions.[15]

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[10] James Pickavance, The Regulation and Misconduct in Adjudication and Arbitration, D188 Society of Construction Law 6, (2016).
[11] Christina L. Whittinghill, *The Role and Regulation of International Commercial Arbitration in Argentina,* 38 TEX. INT'L L.J. 801, 801 (2003).
[12] Jonathan R. Macey, *Judicial Preferences, Public Choices, and the Rules of Procedure,* 23 J. LEGAL STUD. 627, 630 (1994).
[13] William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection,* 8 TRANSNAT'L L. & CONTEMP. PROBS. 19, 50 (1999).
[14] *Supra* note 1, at 2871-79.
[15] C. Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration,* 3 DISP.

There is also the risk that an uneven playing field is created when counsel who are resident or qualified in different jurisdiction represent parties in an arbitral proceeding. This would entail that the counsel would have to adhere to different standards of professional conduct.[16] Counsel being accredited to more than one bar association would mean that they are subject to more than one set of rules for professional conduct.[17]

Finally, there are several issues that arise due to the lack of a regulatory body that is entrusted with the enforcement of these rules. Neither the bar authorities that the counsel belong to nor the domestic courts of their jurisdictions are in a position to detect breaches of conduct. There is also a distinct possibility that domestic courts are not familiar with the nuances that are associated with international arbitration.[18] Even if a breach is detected, arbitral tribunals lack the requisite investigative mechanisms to inspect an alleged breach.

V. RECENT DEVELOPMENTS AND THEIR SHORTCOMINGS

There have been several initiatives that have been taken by several arbitral institutions and arbitral tribunals in order to surmount the challenges pertaining to the professional conduct of professionals in international arbitration.

The International Bar Association (IBA) Guidelines were the first endeavour that pertained to the regulation of professional conduct in international arbitration. This step was touted to be a significant step in the direction of uniform regulation. The problem with the Guidelines however, is that it leaves certain important questions like the scope of its applicability in the absence of an agreement between the parties and questions on the applicable standards in case of conflict, unanswered.[19]

The amended London Centre for International Arbitration (LCIA) Rules, lay down seven standards for the professional conduct of representatives. It is also the first instrument which provides for the enforcement of sanctions against party representatives through an enforcement mechanism by the arbitral tribunal.[20]The Guidelines however, are accused of being drafted at a high level of abstraction and leave unanswered issues of divergence in standards in certain critical areas like document production and witness preparation.

The International Centre for Dispute Resolution (ICDR) Regulations also lay down standards

RESOL. INT'L 78, 79 (2009).
[16] V.V. Veeder, *The Lawyer's Duty to Arbitrate in Good Faith,* 18 (4) ARB. INT'L 431, 433 (2002).
[17] *Supra* note 6, at 398.
[18] C. ROGERS, GUERRILLA TACTICS AND ETHICAL REGULATION, IN GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 316 (eds. G. Horvath and S. Wilske eds., Kluwer Law International 2013).
[19] Comments to Guidelines 1-3, IBA Guidelines on Party Representation, (2013).
[20] Annex, pp 7, London Centre for International Arbitration Rules, (2014).

for professional conduct.[21] These Regulations however do not provide for a penalty for the breach of these standards except for enabling the tribunal to refrain from further hearing in that particular case.[22] The deterrent effect that this would have is debatable.

VI. THE WAY FORWARD

With the growth and expansion of international arbitration over the recent years, the informal social controls which have regulated professional conduct have come under numerous pressures and are no longer adequate to serve as a mechanism of professional regulation. The increase in the number of arbitral proceedings has led to a marked increase in the number of arbitral professionals from various parts of the world, with different views on what conduct is acceptable and what is not.[23]

Increased globalisation and competitiveness between international businesses has challenged the erstwhile version of international arbitration which was seen as an informal and equitable means of resolving disputes.[24] With this in mind, perhaps the best way achieve a truly globalised professional standard is to establish a supra – national body to act as a common regulator of international arbitral proceedings.

This regulatory body could comprise of members who belong to all the major arbitral institutions/ associations in the international arena.[25] A panel of experts within this body should be entrusted with hearing complaints that come to it by referrals in accordance with a set of universal standards and the facts and circumstances of each case.[26]

VII. CONCLUSION

Arguments suggesting that the establishment of such a body would create additional rigidity and would create a potential for abuse are unfounded. There is a possibility for abuse in every endeavour of mankind. This fact should not chain him down and preclude him from seeking change as this would be an impediment to progress.

Many developing nations agree to resort to referring disputes to international arbitration as

[21] Article 16, International Centre for Dispute Resolution Rules, (2014).
[22] American Arbitration Association, *Standards of Conduct for Parties and Representatives,* AAA – ICDR (May 31, 2020, 06:23 PM), https://www.icdr.org/sites/default/files/document_repository/AAA_ICDR_Standards_of_Conduct_Parties_and_Representatives_1.pdf.
[23] Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity,* 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, 31-49 (2000).
[24] Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in Professional Competition,* 21 LAW & SOC. INQUIRY 285, 295 (1996).
[25] E. Geisinger, *Soft Law and Hard Questions: ASA's Initiative in the Debate on Counsel Ethics in International Arbitration,* 37 ASA Special Series 17, 18-26 (2019).
[26] *Ibid, at* 29 – 30.

they have no other choice if they wish to encourage an increase in foreign direct investment.[27] The establishment of such a body would not be an impediment but would rather promote equity in dispute resolution and is a necessity. It would ensure that at the end of arbitral proceedings, losing parties walk away with a sense that they did not obtain the sought-after outcome not because of a fault in the system but because of a lack of merit in their case. The establishment of a supra – national regulatory body would be a boon and increase the legitimacy of international arbitration as opposed to acting as an impediment on its functioning.

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[27] Sir Michael **J.** Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43, *53-54* (1989).