THE REGULATION OF MISCONDUCT IN ADJUDICATION AND ARBITRATION

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A Introduction

One may consider the idea of a well-behaved disputes lawyer a contradiction in terms. It has been said that ‘about trials hang a suspicion of trickery and a sense of a result depending on cajolery or worse’. That may be a cynical outdated view, but the fact is that lawyers and experts are instructed and paid by their clients to achieve the best possible outcome in dispute resolution proceedings. A lawyer’s remuneration is sometimes partly or entirely linked to whether or not his client succeeds and for both lawyers and experts, the prospect of repeat business from the client is much more likely to follow on from success as opposed to failure.

This drive for success will invariably affect the manner in which the parties’ lawyers and experts lay arguments and evidence before an arbiter (meaning both an adjudicator and an arbitrator, whether sole or a member of a panel). This in turn will impact on the arbiter’s ability to administer justice. The maxim ‘truth is best discovered by powerful statements on both sides of the equation’ is right, but surely only to the extent that lawyers and experts act honestly, ethically and in accordance with the dispute and their professional body’s rules. Rules will always be tested to their limit; this is nothing more than human nature and one of the ways in which a participant in any regulated process attempts to gain an advantage. The success and failure of each test is also a necessary and inevitable journey towards determining precisely what the scope and meaning of a rule is.

New legislation provides us with no better example of this. For instance, the Housing Grants, Construction and Regeneration Act 1996 was brought into force in May 1998. Part II of the Act has since been tested in the Technology and Construction Court hundreds of times, as parties try all manner of inventive ways to persuade the court of a particular meaning with the aim of securing victory in their case. Slowly but surely, the TCC has drawn a judicial line around each of the provisions, so that their scope and meaning becomes considerably clearer.

1 Judge Learned Hand, Lectures on Legal Topics: ‘The Deficiencies Of Trials To Reach the Heart of the Matter’, 105 (The MacMillan Co 1926).
2 Whatever that might mean in the particular circumstances of the case.
3 In Ex p Lloyd (1822) Mont 70, page 72n.
4 In 2011 the clock was reset for much of the Act when sections were amended or replaced by the Local Democracy, Economic Development and Construction Act 2009. These new or amended sections have gone and will continue to go through the judicial mill, as
Where the rules and the consequences for breaking the rules are either absent or ill-defined, the opportunity for misadventure is created and very often irresistible. This is the problem with lawyer and party conduct in adjudication and arbitration. Vague parameters and lack of sanctions means that these methods of dispute resolution are wide open to abuse. The private nature of these proceedings ensures that the evidence of wrongdoing is exiguous, although more recently information has been made publicly available that shines some light on the extent of the problem. But why should this matter to any lawyer or expert? Provided the procedure facilitates a fair trade of punches and a more or less sensible decision then is that enough?

It matters because, in the construction and engineering industry at least, arbitration is now the most popular method for resolving big ticket domestic and international disputes; and adjudication, though something of a late starter by comparison, is very quickly gaining global recognition as the alternative to arbitration for small and medium sized disputes. Where these disputes cannot be resolved amicably, companies place reliance and trust on the adequacy of dispute resolution methods such as adjudication and arbitration to resolve them. Therefore it must be right, it is submitted, that these methods have and are seen to have in place the right rules and mechanisms to ensure that lawyers and experts conduct themselves in a manner that facilitates the fair resolution of a case; and that if they do not, consequences follow that not only admonish the wrongdoer in that dispute, but deter repeat offending.

The type of conduct that might be considered to be unacceptable ranges in severity from issues that a number of people will have experienced (such as delay tactics and frivolous challenges to an arbiter’s power, to misrepresenting positions on conflict, hiding documents, false witness testimony, witness coaching, intimidation and harassment) to more serious illustrations (such as fraud, actual or threatened violence and blatant abuse of state authority).

This paper focuses on two aspects of misconduct in particular: first, intimidation by lawyers of arbiters; and second, an improper approach to evidence by an expert, either self-directed or influenced by the instructing lawyer. The first part of this paper explores the rules in place to control the conduct of lawyers admitted in England & Wales in domestic and international arbitration and statutory adjudication. It outlines some of the tactics commonly used to intimidate arbiters, considers what sanctions or measures are available to an arbiter, and lastly highlights some case law on point. The second part of the paper follows the same structure, as applied to experts. The final part of the paper offers some suggestions for the ways in which the shortcomings of the existing rules might be addressed.

**B The opportunity for misconduct**

There is little doubt that over the past three decades arbitration has become the dominant method for resolving large scale disputes in the construction industry. International arbitration in particular is by far and away the most
common method used to resolve cross-border, multinational party disputes. Although nascent by comparison, the use and growth in popularity of adjudication is remarkable. In the UK “it has been generally regarded as a blessing by the construction industry” and the global proliferation of adjudication is hurtling forwards, such that before long it and arbitration will dominate the construction disputes landscape.

The reasons why these two processes are or are becoming so dominant overlap in some respects and are different in others. Both are for the most part autonomous in procedure and the decision of the arbiter has the perception of swift enforceability by the courts, except in limited circumstances. Thanks to the New York Convention, what international arbitration also offers is the ability to avoid ‘own town justice’ – thought to be a problem with state litigation in many countries. The ‘big sell’ for adjudication, and the reason for its unquestionable success in almost all jurisdictions where there is a statutory regime, is that it is quick and cheap as compared to arbitration or litigation and available to the parties to contracts caught by the legislation as an unimpeachable right.

But for all their success, these processes are pregnant with opportunity for misconduct, for three reasons. The first and primary reason is that arbitration and adjudication are private processes. Litigation, by contrast, is public: in principle anyone may obtain pleadings, they may attend interim hearings and the trial and the decision of the court is usually published. Misconduct by lawyers or experts in public proceedings will be exposed to public scrutiny and therefore it follows that the consequences for the wrongdoer immediately extend beyond the boundaries of the case itself, impacting on an individual’s reputation and possibly the ability to obtain further work. Conversely, in private proceedings, misconduct is rarely exposed, other than to the participants.

5 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) came into existence in 1958. However, the number of countries that signed and ratified the Convention at that time was limited: see www.newyorkconvention.org. Over half of the 156 present state parties only ratified the Convention in the last thirty years, a fact which undoubtedly is responsible for the dramatic rise of international arbitration as the dispute resolution method of choice.
7 Domestic adjudication and arbitration are underpinned by legislation. The legislation requires that certain procedural rules are contained within the procedure agreed by the parties, but beyond that the parties are free to agree what they want.
8 Australia is thought to be the only jurisdiction where statutory adjudication is faltering. It is suggested there are two main reasons for this. The first is that each of the six States and mainland Territories of the Commonwealth of Australia has its own legislative procedure and each one is markedly different (albeit that the east and west coast systems align to some extent), which means that any employer or contractor doing business in Australia as a whole has to grapple with different regimes. The second reason is that rather than opting for the simplicity of the UK system, many states in Australia enacted extremely lengthy legislation. Whereas the UK Act has basically nine core sections, the ACT has 43, Western Australia has 56 and Victoria has 119.
Private proceedings

The impact that publicity has on conduct is often stark. The author is aware of a recent London-seated *ad hoc* arbitration governed by the Arbitration Act 1996, the subject-matter of which did not relate to construction and engineering. Counsel for the other party was a well known senior QC with a reputation for robust advocacy. The president of the tribunal was a senior QC with significant experience of chairing large complex arbitral disputes. The behaviour of counsel for the opposing party was appalling. Even by the most aggressive standards of cross-examination he was unnecessarily antagonistic towards witnesses. He made a number of comments intended to insult the ethnicity and religion of the opposing party’s representatives. He even made repeated personal insults towards the opposing party’s appointed arbitrator, following any interjection by him. The tribunal felt it necessary to reprimand counsel a number of times and more than once walked out of the hearing to allow tempers to cool. That did not resolve the problem, however, and counsel’s scattergun ridicule of his opponent’s witnesses, representatives and appointed arbitrator continued to the close of oral proceedings. Indeed, after his own client had completed his oral testimony, the client apologised to the tribunal for counsel’s appalling behaviour which was allegedly not instructed.

The arbitral award was subsequently challenged before the Commercial Court. The same counsel appeared; however, before the Court he was professional and polite, but this (rightly) did not prevent him from presenting robust and persuasive argument. Undoubtedly one reason why counsel behaved differently in the arbitration proceedings was that no-one was able to expose the misbehaviour beyond the four walls of the arbitration. In contrast, the well regulated public area of litigation forced counsel to moderate his behaviour to acceptable standards.

The impact misconduct can have on a professional representing a party in public proceedings is well illustrated by *Van Oord UK v Allseas UK*. This was a case about disruption and prolongation claims against Allseas, arising out of the onshore laying of a 30-inch gas export pipeline in the Shetland Islands in Scotland. The parties instructed quantum experts to provide an opinion on the value of prolongation and disruption.

The court noted that the expert for Van Oord was facing some challenges outside the case. He had not previously prepared a written expert’s report or given evidence in the High Court. Furthermore, he was dealing with a serious family illness. Coulson J held his evidence ‘entirely worthless’. Rather than limiting the reasons why this was so, an approach that he might have taken given the challenges the expert was facing, the judge proceeded to assassinate the expert and his evidence in detail across twenty paragraphs of the judgment.

It was obvious that the expert’s failures were varied and serious, but the consequence of the judge’s approach meant that the case has received, and continues to receive, a great deal of publicity. As a result, it seems probable

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9 *Van Oord UK Ltd v Allseas UK Ltd* [2015] EWHC 3074 (TCC), para [80]ff.
that the expert will never get another expert appointment and his career as an
expert witness is finished.

This is hardly the first time an expert has been reprimanded in a court
judgment. There are dozens of examples similar to Van Oord, not only for
experts but also for solicitors and barristers. It is suggested that it is the fear of
the consequences that flow from publicly available adverse comment that is a
key reason why some experts and lawyers behave better in court than they do
in private proceedings.

**Relatively unregulated procedure**

The second reason flows from the paucity of procedure in both arbitration and
adjudication. The rules and guidelines for litigation in England & Wales, the
Civil Procedure Rules are incredibly prescriptive. At their core, there are over
200 rules and practice directions, most containing tens of sub-sections and
paragraphs, backed up by an incalculable amount of case law.\(^{10}\) Together, this
information describes in extraordinary detail what parties and the judge may
or may not do in litigation. Those that wish to fully understand the court
procedure must as a minimum conquer large chunks of the leading reference
work for civil litigation in England & Wales, *The White Book*,\(^ {11}\) presently a
two-volume behemoth of close to 7,000 pages.\(^ {12}\)

In contrast, the statutory procedure for domestic arbitration provided by the
Arbitration Act 1996 contains 110 sections; the institutional rules are between
30 and 40 articles;\(^ {13}\) and the statutory,\(^ {14}\) industry body and contract rules for
adjudication are between 25 and 35 paragraphs. As a consequence of the
brevity of the available rules for arbitration and adjudication, and the
comparative dearth of judicial precedent, there is far more scope for
interpretation of the rules than exists in litigation; it follows that there is a
considerably broader remit within which to operate.

**Greater risk of improper influence**

The final reason why the opportunity for misconduct presents itself in
adjudication and arbitration is the enhanced susceptibility of arbiters to
influence through improper means. Whether in writing or through advocacy,
the art of persuasion is the objective of any lawyer, as s/he attempts to tip the
scale of finely balanced arguments in favour of the client. But there are of

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10 Because the Civil Procedure Rules have developed so markedly since introduced by the
Woolf reforms in 1999, much of the case law before those reforms is likely to be of little
relevance.

11 Rt Hon Lord Justice Jackson (Editor in Chief), *Civil Procedure* (London, Sweet and
Maxwell, 2016).

12 It is interesting to note that the 1999 edition of *The White Book* was a mere 1,000 pages.
On this (crude) measure alone, the practice of litigation appears to have become
considerably more complex.

13 The LCIA’s 2014 Rules contains 32 articles, the operative provisions of the ICC’s 2012
Rules, note 41 articles and UNCITRAL’s 2013 Procedure 43 articles: see note 21.

14 Part 1 of the Scheme for Construction Contracts (England & Wales) Regulations 1998
(SI 1998/649) as amended by the Scheme for Construction Contracts (England & Wales)
course methods of persuasion that amount to misconduct. Intimidation is one such method. If a lawyer says to an adjudicator: ‘If you decide you have the jurisdiction to continue, we will take all necessary steps to ensure that you are expelled from your professional body’;\textsuperscript{15} or ‘If you decide that the respondent’s position is to be preferred, we will ensure that your decision and your negligent conduct is known within our firm and in the industry’, most would agree that these statements amount to improper influence by intimidation. It is submitted that arbiters are more susceptible to improper influence than judges for three reasons:

1. A judge’s salary and ability to receive further work is not, at least whilst he or she is a judge, impacted by the judge’s conduct or by the decision. Arbiters on the other hand rely to some significant degree on their reputation to improve the prospects of them being appointed, either directly or through a nominating body.\textsuperscript{16}

2. More often than not, arbiters have less experience of legal procedure and proceedings than judges, especially those without a legal background. Some lawyers will seek to exploit that inexperience in order to influence the adjudicator or arbitrator.

3. The TCC has a limited number of judges and the parties have no power of selection, with the inevitable result that if a lawyer or expert behaves improperly and the judge takes a dim view of that behaviour, in the event that a lawyer or expert appears before the judge again, there could be at least some residual negative feeling from the judge to the lawyer or expert. By contrast, arbitrators and adjudicators are chosen by the parties from a large pool of candidates, providing greater opportunity to avoid a particular arbitrator or adjudicator in future proceedings.

With that background in mind, the next section examines the standards that apply to lawyers in adjudication and domestic and international arbitration, what sort of conduct might amount to intimidation, how prevalent this conduct is, what sanctions are available to arbiters to prevent or admonish intimidation, and some key case law on this issue.

C Lawyers

National standards

The position in domestic litigation is reasonably clear. A lawyer’s duty to the court derives from considerations of public interest;\textsuperscript{17} the court, in enforcing it, is acting as a guardian of the due administration of justice.\textsuperscript{18} The courts have

\textsuperscript{15} This is an extract from a letter sent to an adjudicator in a recent adjudication in which the author represented an employer client.

\textsuperscript{16} Whilst the appointment through a nominating body ought not to preclude a particular individual, in practice it does because a party may make representations that it does not want a particular individual to be appointed, although the reasons given must be substantive, as opposed to ‘I do not particularly like this person’.

\textsuperscript{17} \textit{Rondel v Worsley} [1969] 1 AC 191, page 227 (Lord Morris of Borth-y-Gest).

\textsuperscript{18} \textit{Myers v Elman} [1940] AC 28, page 30 (Lord Atkin).
therefore assumed an inherent power to impose duties on lawyers. The principle is that ‘the court has a right and duty to supervise the conduct of those appearing before it, and to visit with penalties any conduct of a lawyer which is of such a nature as to defeat justice in the very cause in which he is engaged professionally’. The general duties are supplemented in England & Wales by the CPR, which give the court wide-ranging powers to deliver a whole range of procedural and even criminal sanctions, such as contempt of court or perjury.

In contrast, the position in adjudication and arbitration is far less well defined. This is ultimately because the parties have a high degree of autonomy over what rules will apply and also because the legislation that governs these procedures is conspicuously lacking in any reference to the standards that apply to lawyers. The Construction Act, the Scheme and all the standard form and industry body adjudication rules do not contain any rules or guidance whatsoever with regard to the standards to which lawyers must adhere during an adjudication.

Similarly, the Arbitration Act 1996 and most major institutional arbitration rules contain no specific requirements for lawyers representing parties in an arbitration. Indeed most rules stipulate only that parties have a right to be represented by an individual, whether legally qualified or not and subject to proof of authority, if required. The exception to this is the most recent version of the LCIA Rules which came into effect on 1st October 2014. Article 18.5 provides:

‘Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.’

Annex 1 comprises seven paragraphs which are ‘intended to promote the good and equal conduct of the parties’ legal representatives appearing by name within the arbitration’. These guidelines are expressly subservient to any rules in the arbitration agreement, mandatory laws, rules of law, professional rules or codes of conduct, if and to the extent that any are shown to apply to a legal representative appearing in the arbitration.

The Annex imposes various obligations on the legal representatives, intended to avoid their unfairly obstructing the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator’s appointment or to
the jurisdiction or authority of the tribunal, making false statements, preparing or relying on false evidence, concealment of documents and unilateral contact. These amendments are a welcome addition to the LCIA Rules, but it is staggering that this is the first and only institution to offer any prescriptiveness as to the conduct of lawyers, and equally staggering that this only happened in 2014. Furthermore, the control that these rules place on party representatives is limited. Not only are they expressed to be subservient to all other rules, but the consequences for failing to comply with them, as set out in article 18.6 and discussed below, are unlikely to cause the would-be wrongdoer much angst.

The lack of regulation in institutional rules is compensated in part, at least in domestic disputes, by the national regulating bodies for solicitors and barristers admitted in England & Wales. Solicitors are subject to the Handbook of the Solicitors Regulation Authority (SRA); barristers are governed by the equivalent from the Bar Standards Board (BSB). Both contain codes of conduct that impose broadly similar principles:

1. Upholding the rule of law and the proper administration of justice.
2. Acting with integrity.
3. Not allowing one’s independence to be compromised.
4. Acting in the best interests of each client.
5. Providing a proper standard of service to one’s clients.
6. Behaving in a way that maintains the trust the public places in you and in the provision of legal services.

The BSB and the SRA began publishing certain decisions of their disciplinary tribunals in 2002 and 2008 respectively. Although it is possible to search for particular individuals to identify whether that individual has been sanctioned and to read the annual reports for general information on disciplinary statistics, it is difficult, if not impossible, to identify whether any of those decisions relate to breaches of the Code in adjudication and arbitration, and to readily understand precisely how these principles apply to misconduct.

**Transnational standards**

A more interesting area concerns the standards that apply in transnational disputes, particularly international arbitrations involving lawyers from different jurisdictions where different national codes of practice apply. This is the subject of double deontology: the application of two or more sets of ethical

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23 Paragraph 2.  
24 Paragraph 3.  
26 Paragraph 5.  
27 The SRA Handbook: [www.sra.org.uk](http://www.sra.org.uk). Its overarching principles provide that they apply to all activities regulated by the SRA and ‘underpin all aspects of practice’. The SRA Handbook contains a code of conduct which is split into mandatory provisions and indicative behaviours, all of which flow from these overarching principles.  
standards to individual practitioners. In his 2001 Goff Lecture, ‘The lawyer’s duty to arbitrate in good faith’, VV (Johnny) Veeder QC observed: ‘Lawyers are 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’.  

In a 2002 paper Professor Catherine Rogers observed that international arbitration existed in an ‘ethical no-man’s land’. She said that ‘the extraterritorial effect of national ethics codes is usually murky … there is no supra-national authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far’. One can very well see that a party representative would behave in accordance with its own national rules of professional conduct, but could unknowingly depart from the standards of professional conduct for the jurisdiction providing the seat of the arbitration.

A paradigmatic example of conflicting national ethical rules in international arbitration is the question of pre-testimonial witness communication, whether expert or factual. In England & Wales, witness coaching is considered unlawful, but in the United States, for instance, it is common practice for attorneys to prepare witnesses intensively; indeed, a failure to do so can amount to negligence on the part of the lawyer. Where the institutional rules address this issue at all, they do so in a vague and contradictory way. The LCIA and SIAC Rules permit lawyers to interview witnesses, without prescribing precisely what that means; whereas the ICC rules are silent.

How do the SRA and BSB meet the challenge of transnational dispute resolution? The applicability of the SRA Code of conduct to international arbitration is unclear. Its chapter five deals specifically with duties in relation to the courts. The ‘court’ is defined in the glossary as ‘any court, tribunal or inquiry of England & Wales, or a British court martial, or any court of another jurisdiction’. It may be argued that a ‘tribunal or inquiry of England & Wales’ does not cover an arbitral tribunal where constituted by a foreign nominating body and/or where the seat of the arbitration is outside England & Wales. The SRA seemed to acknowledge that its rules were not fit for purpose on an international platform by in 2011 and 2012 conducting a survey aimed at determining how the SRA might regulate international practice.

In 2013 it published the SRA Overseas Rules, which now form part of the Code of Conduct: they provide a regulatory framework for authorised persons and bodies established overseas in order to take account of the regulatory risk they pose in England & Wales. They apply to those regulated individuals who are established in practice overseas and those authorised bodies or

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31 LCIA Rules, note 21, article 20.6; SIAC Rules, note 21, article 22.5.
32 Article 4.3 of the the IBA Rules of Evidence, note 84, expressly permits interaction between a party’s legal counsel and its actual or potential witnesses.
33 See note 27.
34 See note 27.
recognised sole practitioners with responsibility for or control over, bodies or branch offices overseas. The Overseas Principles are modified from the general SRA Principles, in order to take account of the different legal, regulatory and cultural context of practice in other jurisdictions, which may require different standards of conduct to those required in England & Wales.

The SRA Overseas Rules seek to avoid problems of double deontology by stipulating that ‘applicable law and local regulation should prevail in circumstances in which compliance with the Overseas Principles would create difficulties, with the exception of principle 6, which must be observed at all times, even if to do so would result in a breach of local law or regulation’. Principle 6 requires members to report systematic breaches of the Overseas Principles. However, as the SRA Overseas Rules do not apply to ‘those engaged in temporary practice overseas or authorised bodies established overseas to whom the Principles and relevant sections of the SRA Code of Conduct and the SRA Handbook apply’, their application to international arbitration is again unclear.

The applicability of the BSB rules to barristers acting in both domestic and international arbitration is straightforward. It states that the core duties apply to all ‘BSB regulated persons’, defined as ‘BSB authorised individuals’ in turn meaning all barristers admitted in England & Wales. The duties apply when providing ‘legal services’, a term which is defined as including ‘legal advice representation and drafting or settling any statement of case witness statement affidavit or other legal document’. This very broad definition must capture representation and documents produced in both domestic and international arbitration; and indeed rules C1.2a and C2.2 state that the BSB Handbook applies to all barristers when providing legal advice. Rule C1, ‘You and the Court’, imposes specific duties on barristers when acting in a court. ‘Court’ is defined as meaning ‘any court or tribunal or any other person or body whether sitting in public or in private before whom a barrister appears or may appear as an advocate’. Thus ‘tribunal… sitting in private’ must surely contemplate both domestic and international tribunals. However, unlike the SRA, the BSB appears to make no attempt to deal with the issue of ‘double deontology’.

Two further sets of rules should be mentioned. The first is Directive 98/5/EC, intended ‘to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained’. Its article 6(1) states:

‘Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country

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35 See note 27.
36 Rule C1.1.
37 Glossary.
38 Rule C2.1.
39 Glossary.
40 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77/36 (14 March 1998).
professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory.

In other words, an English lawyer practising in, say, France must adhere to both the English and French codes of conduct. However, there appears to be no guidance in the Directive as to how a conflict between two different codes is resolved. As with the SRA Overseas Rules, the EU Directive title refers to the practice of a professional lawyer on a ‘permanent basis’ which might suggest that it does not apply to a lawyer visiting another jurisdiction for a week-long hearing, although again there is no guidance on this point.

The second is the Code of Conduct for European Lawyers from the Council of Bars and Law Societies of Europe (the CCBE Code).41 This is intended to ‘mitigate the difficulties which result from the application of “double deontology”’, including arising from Article 6 of the EU Directive.42 Part 4 of the CCBE Code sets out rules relating to lawyers’ conduct:

‘4.1 A lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal.

4.2 A lawyer must always have due regard for the fair conduct of proceedings.

4.3 A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honourably and fearlessly without regard to the lawyer’s own interests or to any consequences to him- or herself or to any other person.

4.4 A lawyer shall never knowingly give false or misleading information to the court.

4.5 The rules governing a lawyer’s relations with the courts apply also to the lawyer’s relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.’

Although the CCBE Code does not prescribe any sanctions; presumably a breach of the code is to be dealt with by the law societies and bars of Member States in so far as they have adopted it.43 Until recently, article 4.1 had little effect because there were no widely accepted codes of conduct that were commonly applied in arbitration proceedings. However, that position changed

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41 The CCBE Code was adopted in 1998 and most recently amended in 2006: www.ccbe.eu.
42 CCBE Code, Article 1.3.1.
43 For a table of those EU Member States which have adopted the CCBE Code, see the CCBE website: note 41.
in 2013, when the International Bar Association published its Guidelines on Party Representation in International Arbitration.44

The 2013 IBA Guidelines are thought to be the first widely accepted attempt to implement a global code of conduct for lawyers. They may be imported into the rules governing arbitration in a number of ways. There may be reference to them in the arbitration agreement; the parties may agree ad hoc that they apply before a dispute is referred to arbitration; or the tribunal might seek the parties’ agreement in its first draft procedural order. The 2013 IBA Guidelines address conflict of party representatives,45 unilateral contact with the tribunal,46 knowingly false statements made by the representative or put forward on behalf of a witness or expert47 and information exchange and disclosure.48 Although they are increasingly being adopted by parties to arbitration, doing so is not mandatory and, as explained later in this paper, the sanctions are not severe.

D Intimidation

Intimidation may be defined as persuading or deterring someone from a particular course of action by threats or inappropriate conduct.49 It is one example within the panorama of misconduct that might be encountered during adjudication or arbitration, either as a lawyer or an arbiter, and is normally aimed at persuading the arbiter of a particular point of view or to take or not to take a particular course of action. It is trite that not all conduct aimed at securing an advantage over the opponent or persuading the arbiter is improper. So-called guerrilla tactics are routinely deployed by representatives from both parties in order to secure some sort of advantage. Quite often, the other side will cry foul, when in fact its complaint is nothing more than a mischaracterisation of entirely acceptable, if irritating, behaviour. Just because something is unexpected, or the other party does not like it, or it annoys the tribunal, does not mean it is illegitimate. Disputes are fought between parties whose relationship is invariably acrimonious and they and their representatives can be expected to engage in tactics to protect their client.

However, intimidation in this sense must amount to misconduct and can never be categorised as part of the game. There is a whole range of conduct that may fall within this definition, such as:

- Creation of conflicts so as to embarrass an arbitrator or adjudicator
- Abstract comments that certain behaviour might be harmful to a person’s career prospects or business interests
- A threat to ‘blacklist’ an arbiter from ever being appointed by a law firm

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45 Article 4.
46 Article 8.
47 Articles 9-11.
48 Articles 12-17.
- Meritless challenges of arbitrators for tactical reasons
- A lack of respect to the arbiter, including by means of frequent complaint about due process and threats of challenge to any award
- Insufficient formality and disrespectful aggressive behaviour;
- Baseless threats not to pay the arbiter’s fees
- Baseless threats to report the arbiter to his or her professional body.

Intimidation of adjudicators was recognised early into the life of statutory adjudication by the Construction Umbrella Bodies Adjudication Task Group, in a report issued in 2002 in which it defined intimidation to include many of the examples of ‘guerilla tactics’ highlighted above. It was suggested by the Scottish Executive as early as 2004 and an article from the Adjudication Society in 2005 that one solution to the problem would be improvements to the training of adjudicator, helping them to maintain control in the face of intimidation and misconduct. However, few if any improvements were made.

There is now renewed interest in understanding the exact nature and extent of intimidation. Construction Dispute Resolution Ltd, then the RICS and most recently TeCSA have all undertaken surveys to understand the problem. CDR’s research comprised data extracted from questionnaires completed by 172 individuals, randomly selected from ANBs’ lists of adjudicators and covering 16 years since the introduction of statutory adjudication. This revealed that 54% had been threatened with non-payment at least once. Similarly, 43% had been threatened with complaints to their professional body during the process and 55% following the issuing of their decision. Of those surveyed, 47% of adjudicators had received a complaint made against them, however, only one complaint was noted as being upheld. 23% of the adjudicators questioned agreed that intimidation may affect and influence their decision, raising concerns about the impact of intimidation on the independence and impartiality of the adjudicators.

In early 2015, the RICS surveyed 30 of its panel of adjudicators. That survey revealed that 90% had dealt with threats not to pay his or her fees and expenses, 90% had encountered actual refusal to pay his or her fees and expenses, 80% had suffered from bullying or deliberately disruptive behaviour, 73% had experienced threats to report him or her to the nominating body and/or professional body and 97% had come across groundless jurisdictional challenges. Whilst the results seem rather alarming, it would have been useful if the survey had asked respondents with what frequency these behaviours are being encountered.

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50 CUBATG, Guidance for Adjudicators (July 2002), section 3.
In November 2015 TeCSA published its own survey, prompted by concerns in part brought about by the CDR and RICS research.\textsuperscript{54} It asked 46 of its panel members whether they had encountered:

- Threats to report the adjudicator to the nominating body and/or professional body
- Actual complaints to the nominating body and/or professional body
- Threats not to pay the adjudicator’s fees and expenses
- Actual refusal to pay the adjudicator’s fees and expenses
- Unsuccessful jurisdictional challenges and allegations of breach of natural justice
- Repeated refusal to comply with directions without a satisfactory explanation
- Oppressive and deliberately disruptive behaviour
- Repeated criticism of the adjudicator.

From the responses, all these behaviours had been encountered by at least some of the respondents. Threats to the adjudicator and unsuccessful jurisdictional and natural justice challenges seem to be the most prevalent.\textsuperscript{55} However, some of the questions do not seem to align with the purpose of the survey, which purports to concern ‘unacceptable behaviour’. Surely a threat to report or actually reporting the adjudicator to his professional body is only unacceptable if the threat is spurious. Just because an allegation of breach of natural justice or wrongful exercise of jurisdiction is unsuccessful does not make it unacceptable. The questions concerning repeated refusal to comply with directions without a satisfactory explanation, bullying or deliberately disruptive conduct and repeated criticism of the adjudicator do align with the purpose of the survey, but interestingly the prevalence of that conduct was low, with only 25% responding in the affirmative.

Those surveyed were then asked whether they had experienced such behaviours never, rarely, quite often or frequently. In the main, the behaviours were experienced rarely. 40% of respondents said that they had never experienced actual complaints to the adjudicator’s nominating body and around one half said they had never experienced bullying or deliberately disruptive conduct or repeated criticism of the adjudicator, whilst around one third of respondents said they experienced unsuccessful natural justice or jurisdictional challenges quite often. The respondents were asked whether the conduct encountered was designed to influence the proceedings or the decision. Around two-thirds agreed that the objective was to influence. It

\textsuperscript{54} Presented at the TeCSA annual adjudication seminar on 26 November 2015 by Andrew Hibbert of Pinsent Masons. Contact the author for a copy of the questionnaire results and slides.

\textsuperscript{55} Presumably an unsuccessful challenge is one which does not result in the adjudicator standing down or the procedure being declared invalid, but the survey report does not make this clear.
might have been interesting to know whether the conduct actually influenced the proceedings or the decision, but the survey did not raise this.

In 2010 Edna Sussman conducted a survey on the subject of misconduct in arbitration. She posed two questions: (i) ‘As counsel in an arbitration or as an arbitrator, do you ever feel as if one or both parties is engaged in what you would call guerrilla tactics, whether technically unethical or not?’ and (ii) ‘If your answer is yes, please describe a tactic you regard as a guerrilla tactic’.

The responses to the survey revealed that 66% had encountered some form of guerrilla tactic. Although the responses seemed to indicate, like in adjudication, that the encounters were reasonably rare, she concluded that the prevalence of unethical guerrilla tactics was serious enough to merit action.

E  Sanctions for misconduct: adjudication

It is obvious that if there are no rules expressly regulating conduct, there will be no rules sanctioning misconduct. Nevertheless, there are three main ways in which misconduct is controlled in adjudication; but the problem with all of them is that (i) there is no specificity as to what standard of conduct is to be followed; and (ii) the sanctions are all levied on the parties and not on the offending lawyer.

Adverse inferences

The first is the power to draw an adverse inference if a party does not do something it has been asked to do. This is contained in most standard form and industry body rules, as well as paragraph 15 of the current text of the Scheme for Construction Contracts:

‘If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to adjudication, the adjudicator may –

(a) continue the adjudication in the absence of that party or of the document or written statement requested,

(b) draw such inferences from that failure to comply as the circumstances may, in the adjudicator’s opinion justify, and

(c) make a decision on the basis of the information before him attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed.’

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57 For the Scheme, see note 14.
**Costs awards**

The second means of controlling misconduct is that all the statutory and contractual adjudication rules allow the adjudicator discretion to apportion his costs and the party’s costs between the parties as he sees fit. If one party has acted inappropriately during the adjudication, there is nothing to stop the adjudicator admonishing this poor conduct in his award on costs.

**The impact on the decision**

The third tool at the adjudicator’s disposal is the decision. The courts have repeatedly held that, provided the adjudicator’s decision is responsive to the question asked of him or her, whether the decision s/he arrives at is right or wrong, the courts will enforce that decision. Whilst there is unsurprisingly no hard evidence of this, an adjudicator must sometimes arrive at a decision that is adverse, or more adverse, to a party solely because s/he took umbrage at that party’s attempt to influence him through intimidation. It is this last tool, it is submitted, that is to a large extent responsible for controlling the behaviour of party representatives in adjudication.

**F Sanctions for misconduct: arbitration**

What can an arbitral tribunal do about misconduct? Since the tribunal derives its powers entirely from the rules of the arbitration, any sanctions it can levy will be determined by reference to those rules, or by reference to rules incorporated into the arbitration by agreement. As with adjudication, one of the problems with the existing rules and procedures is that there is no direct nexus between arbitrators and representatives. The effect of this is that a tribunal has no jurisdiction to admonish a lawyer if it determines that direct action should be taken against him or her. The second problem is that where there are sanctions, they have no bite. Of all of the institutional rules, the 2014 LCIA Rules go the furthest. Article 18.6 provides:

‘In the event of a complaint by one party against another party’s legal representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii).’

Whilst this gives the tribunal some ammunition, the sanctions at clause 18.6 arguably amount to nothing more than a slap on the wrist and are therefore

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unlikely to control the conduct of lawyers. The ICC,\(^{59}\) UNCITRAL\(^{60}\) and SIAC Rules\(^{61}\) give the tribunal discretion to adopt whatever measures it sees fit to ensure the fair, expeditious and economical conduct of the arbitration and to award costs, taking into account circumstances it considers relevant. Whilst such wide-ranging powers have frequently been deployed to control the conduct of lawyers, the absence of specific sanctions is hardly satisfactory. Of all the sanctions that are applied, the most common and transparent one is a costs order. But again this is unsatisfactory, because the sanction is aimed at the party, not the representative.

The 2013 IBA Guidelines, though not necessarily mandatory, are marginally more prescriptive. Article 26 suggests four remedies that should be available to the tribunal:

1. Admonish the lawyer;
2. Draw appropriate inferences from evidence or legal arguments;
3. Consider the misconduct in apportioning costs; and
4. Any other measure in order to preserve the fairness and integrity of the proceedings.\(^{62}\)

However, only the first of these sanctions has its effect on the lawyer, and even then it is unclear quite what admonishing a lawyer entails. Is it limited to a stern finger-wag, or do the Guidelines allow the tribunal to expel the lawyer? And what consequence is there for the admonished lawyer beyond the arbitration?

**Case law**

**Adjudication**

Case law addressing intimidating behaviour by lawyers to adjudicators is relatively thin on the ground. The most common example is the non-payment of adjudicators’ fees. In *Linnett v Halliwell*, the court held that where a party had participated in an adjudication process and thereby requested the adjudicator to adjudicate on the dispute, albeit without prejudice to its contention that the adjudicator did not have jurisdiction, that gave rise to a contract formed by conduct: this imposed an obligation on the party to pay the adjudicator’s reasonable fees and expenses.\(^{63}\) Similarly in *Gary Kitt v The Laundry Building Ltd*, the claimant adjudicator was entitled to claim his fees under a tripartite agreement.\(^{64}\) The TCC held that he had not exceeded his jurisdiction nor acted in breach of the rules of natural justice. However, in *PC*

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59 ICC Rules, note 21, articles 22(2) and 37(5). In *Liberian Eastern Timber Corporation v Liberia* (ICSID Case No. ARB/83/2), the tribunal ordered the respondent to bear the costs of the proceedings because of the ‘guerrilla tactics’ it deployed: [www.icsid.worldbank.org](http://www.icsid.worldbank.org).

60 UNCITRAL Rules, note 21, articles 17(1) and 26.

61 SIAC Rules, note 21, article 16(1).

62 For the IBA Guidelines, see note 44 and its linked main text.


64 *Gary Kitt v The Laundry Building Ltd* [2014] EWHC 4250 (TCC).
Harrington Contractors Ltd v Systech International Ltd the Court of Appeal held that an adjudicator was not entitled to recover fees which he had incurred in an adjudication governed by the Scheme, because he had breached the rules of natural justice in reaching his decision. That decision provided a gateway for a party to troll an adjudicator, demanding that he do or refrain from doing something; if he refused, then that party would challenge the enforceability of his award on the basis that it breached the rules of natural justice – and he would not get paid.

Can intimidation of the adjudicator amount to an abuse of process that would render the adjudicator’s decision invalid? The case law seems to suggest not. Abuse of process has been explained as ‘using [a] process for a purpose or in a way significantly different from its ordinary and proper use’. Abuse of process is a concept that is well understood in the context of litigation. It applies in various contexts, such as the commencement of vexatious proceedings, attempts to re-litigate decided issues (res judicata) and pursuing a claim for an improper purpose. In circumstances where it can be shown that there is abuse of process, the court has power to strike out the claim. Whilst numerous attempts have been made to apply abuse of process to adjudication, none have been successful. Neither the Act nor Scheme gives the adjudicator power to strike out a claim for abuse of process, although it has been suggested that such power could be bestowed on an adjudicator if the adjudication rules so dictated. In Connex South Eastern Ltd v MJ Building Services Group Plc, the Court of Appeal held that the referring party’s delay in referring a dispute to adjudication 15 months after a cause of action arose did not amount to an abuse of process because no such concept existed in adjudication. Nor was it an abuse of process to have adjudication and litigation proceedings in relation to the same claim, run concurrently. In Dalkia Energy and Technical Services v Bell Group UK, the court found that the taking of points before the adjudicator which were palpably wrong, if not misleading, and the delays concerning the commencement of Part 8 proceedings whilst an adjudication was ongoing did not amount to an abuse of process.

Arbitration

Although the majority of arbitration awards are confidential, some are made public. In particular, ICSID has for some time published certain types of awards. These give us some insight into how a tribunal has dealt with

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65 PC Harrington Contractors Ltd v Systech International Ltd [2012] EWCA Civ 1371.
67 CPR 3.4.
68 Benfield Construction Ltd v Trudson (Hatton) Ltd [2008] EWHC 2333 (TCC), para [56] (Coulson J).
71 See note 59.
lawyer misconduct. Two areas of interest are the power to disqualify a lawyer from proceedings and sanctions applied to lawyers.

With regard to the first, there are conflicting authorities on the extent to which this is something that falls within the remit of the arbitral tribunal’s jurisdiction as opposed to a matter reserved for the national courts. In *Hrvatska Elektroprivida v Republic of Slovenia*, the tribunal considered that as it was governed by public international law it has, under article 44 of the ICSID Convention, an ‘inherent power to take measures to preserve the integrity of the proceedings’.  

It therefore disqualified a lawyer from the proceedings, in this case due to a perceived lack of independence. However, *Hrvatska* was exceptional. Normally it is the tribunal that is the target of any application in this scenario and if a problem is identified, it is the arbitrator that must be removed. All arbitration rules – and the Arbitration Act 1996 – contain provisions on the removal of arbitrators and the circumstances that may give rise to such removal; there are no provisions for the removal of lawyers, whether because of a conflict with a tribunal member, or for any misconduct.

In contrast to *Hrvatska*, the tribunal in *The Rompetrol Group NV v The Republic of Romania* refused to disqualify counsel from proceedings on the basis of potential bias of the tribunal. In this case the respondent tried to have the claimant’s counsel removed on the basis that he had previously been an employee of the law firm at which one of the tribunal members was a partner. The tribunal noted that a claim to remove a party’s counsel should not be used as an alternative to a claim against the tribunal itself and that it was reluctant to encourage any practice which would hold counsel to a standard higher than accepted rules of professional conduct and ethics. *Hrvatska Elektroprivida* was distinguished on the grounds that there had been late disclosure of the conflict.

The case of *Pope and Talbot Inc v Government of Canada* is an example of an arbitral tribunal demonstrating a willingness to exercise its procedural powers to sanction a party because of the conduct of its lawyers. The respondent’s counsel inadvertently transmitted legal advice given to her client, commenting on the award of the tribunal, to the claimant’s counsel and the tribunal. The claimant’s counsel showed this document of advice (including the tribunal’s order) to a journalist at the Canadian National Post, who referred to it in an article. The arbitral tribunal found this disclosure of confidential material reprehensible; it fined the claimant $10,000 and stated that it expected counsel to ‘voluntarily and personally assume’ responsibility for paying the fine. It also went on to state that it expected that claimant’s counsel would make public this order, as he had done with all previous orders, awards and decisions of the tribunal.

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72  *Hrvatska Elektroprivida v Republic of Slovenia* (ICSID Case No. ARB/05/24), para 33 of the award: www.icsid.worldbank.org.
73  *The Rompetrol Group NV v The Republic of Romania* (ICSID Case No. ARB/06/3).
GStandards – Experts

The critical difference between misconduct by an expert and a lawyer is that an expert’s output always forms part of, and directly influences, the interpretation of evidence in the case. What is more, the expert’s view is normally put forward on the basis that it is (a) independent; and (b) based on experience. So an arbiter hopes to be able to rely on it as one of the pillars of his decision-making process. For these reasons, the conduct of experts, whether in public or private proceedings, is subject to greater scrutiny and regulation than that of lawyers.

The consequences for an expert’s evidence if they breach the rules is usually draconian and the consequences for an expert, whose career success is founded to some significant degree on a bedrock of integrity and credibility, will be damaged or destroyed if the breaches are made public. This section analyses the standards that apply to expert witnesses, the sort of things that experts do of their own volition and lawyers do to influence experts that may be classed as misconduct, the available sanctions for experts and some select case law where examples of misconduct have been highlighted.

Standards

Domestic litigation and the associated case law provide the high water mark in terms of prescriptive rules for experts. CPR35 and its linked Practice Direction75 and the Guidance for the Instruction of Experts in Civil Claims76 will be familiar to most UK practitioners. Whilst the rules are only compulsory in litigation, they are sometimes incorporated (or partly incorporated) in domestic adjudication and arbitration through bespoke rules or pursuant to an ad hoc agreement.

Those rules were influenced to a significant degree by the Ikarian Reefer case.77 There, the judge summarised the duty of an expert as ‘impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party.’ There is a bank of case law decided after Ikarian Reefer which together offers a great deal of useful guidance. Even if CPR35 does not apply in the arbitration, the principles set out in Ikarian Reefer and subsequent cases78 is generally considered to be persuasive authority in adjudication and arbitration seated in England & Wales when faced with challenges to the expert’s conduct.79

75 CPR35 and PD35 are contained with commentary in The White Book, note 11; the text is also available at www.justice.gov.uk/courts/procedure-rules.
76 Civil Justice Council, Guidance for the Instruction of Experts in Civil Claims (August 2014); it is contained with commentary in The White Book, note 11, but also available at www.judiciary.gov.uk. It replaces the Protocol for the Instruction of Experts in Civil Claims, originally annexed to PD 35.
77 National Justice Compania Naviera SA v Prudential Assurance Co Ltd (’The Ikarian Reefer’) (No 1) [1993] 2 Lloyd’s Rep 68 (QBD).
Codes of practice for experts

These are by and large well developed. The Academy of Experts produces one such code, setting standards for experts which requires the prevention of anything which impairs the expert’s independence, objectivity and integrity, impartiality and which causes a conflict of interest.

1. Experts shall not do anything in the course of practising as an expert, in any manner which compromises or impairs or is likely to compromise or impair any of the following:
   a. the expert’s independence, impartiality, objectivity and integrity;
   b. the expert’s duty to the court or tribunal;
   c. the good repute of the expert or of experts generally;
   d. the expert’s proper standard of work; and
   e. the expert’s duty to maintain confidentiality.

2. An expert who is retained or employed in any contentious proceeding shall not enter into any arrangement which could compromise his impartiality or make his fee dependent on the outcome of the case nor should he accept any benefits other than his fee and expenses.

3. An expert should not accept instructions in any matter where there is an actual or potential conflict of interests. Notwithstanding this rule, if full disclosure is made to the judge or to those appointing him, the expert may in appropriate cases accept instructions when those concerned specifically acknowledge the disclosure. Should an actual or potential conflict occur after instructions have been accepted, the expert shall immediately notify all concerned and in appropriate cases resign his appointment.

4. An expert shall for the protection of his client maintain with a reputable insurer proper insurance for an adequate indemnity.

5. Experts shall not publicise their practices in any manner which may reasonably be regarded as being in bad taste. Publicity must not be inaccurate or misleading in any way.

6. An expert shall comply with all appropriate Codes of Practice and Guidelines.

The Chartered Institute of Arbitrators has also produced a Protocol for Party-Appointed Expert Witnesses in International Arbitration. In Peter J Rees’s words in the Foreword:

‘It provides a complete regime for the giving of such evidence and provides a procedure for identifying the issues to be dealt with by way of expert evidence, the number of experts, their identity, what tests or analyses are required, the independence of the experts, the contents of

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the experts’ opinions, privilege, meetings of experts and the manner of expert testimony.\textsuperscript{81}

Whilst these codes of practice are not binding on an arbitral tribunal, they may be made so if the parties agree. Generally, they are more commonly incorporated into adjudication and arbitration proceedings than the CPR Rules.

The Royal Institution of Chartered Surveyors published the fourth edition of its Practice Statement and Guidance Note entitled ‘Surveyors Acting as Expert Witnesses’ in April 2014, coming into effect on 2nd July 2014.\textsuperscript{82} Practice Statements are mandatory for RICS members, whereas Guidance Notes are recommended good practice. Whilst enforcement of the rules in the Practice Statement is only likely to be available to the Institution (unless the parties agree to adopt it as part of the rules applicable to their arbitration), the fact that a breach of the rules in the Statement may lead to expulsion from the professional body is likely to focus the mind of the potential wrongdoer.

**Institutional rules**

Specific duties, in the way contained in CPR35, are light on the ground. An area of some interest is the requirement for independence, which one would think a cornerstone of an expert’s duty. Yet, in the major institutional rules, any express requirement for expert independence seems to be limited to tribunal-appointed experts and not party-appointed experts.\textsuperscript{83} Indeed, UNCITRAL goes further, article 27(2) providing that ‘expert witnesses… may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party’. The lack of guidance in the institutional rules on this issue, and others, perhaps reflects the differing practices in different jurisdictions. In civil law jurisdictions, in particular, less emphasis is placed on expert witnesses.

In the late 1990s, the IBA recognised that institutional rules did not offer the level of prescriptiveness that parties to arbitration and arbiters sought. It introduced the IBA Rules on the Taking of Evidence in International Commercial Arbitration.\textsuperscript{84} These became recognised as the international standard for effective, pragmatic and regulated evidence collection and presentation, although the frequency with which they were adopted into arbitrations was sparse. It is now increasingly common practice for the tribunal to ask the parties to adopt the revised Rules, either in their terms of reference or in an early procedural order. They address a number of matters in detail, including the requirements that an expert report must meet, independence of opinion, conflicts of interest and so on.

\textsuperscript{82} RICS, Practice Statement and Guidance Note, Surveyors Acting as Expert Witnesses (2014): www.rics.org (download available only to members).
\textsuperscript{83} LCIA Rules, note 21, article 21.1(a); UNCITRAL Rules, note 21, article 29.
5(2) The Expert Report shall contain … a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal … a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal … an affirmation of his or her genuine belief in the opinions expressed in the Expert Report.

8(4) … in the case of an expert witness [the witness shall affirm] his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted an Expert Report, the witness shall confirm it.’

The 2013 Guidelines regulate how party representatives may interact with experts. Articles 20 to 24 are particularly relevant in this regard.

‘20 A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.

21 A Party Representative should seek to ensure that a Witness Statement reflects the Witness’s own account of relevant facts, events and circumstances.

22 A Party Representative should seek to ensure that an Expert Report reflects the Expert’s own analysis and opinion.

23 A Party Representative should not invite or encourage a Witness to give false evidence.

24 A Party Representative may, 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, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.’

Some argue that, by adopting these rules, tribunals take the arbitration process closer to litigation, which is a step too far. However, this is now the minority view, it is submitted. These rules give a clear, effective, unbiased and reasonably economical approach to evidence and for that reason it is thought they will increasingly form part of the agreed procedure in international arbitration.

H Misconduct by experts

The rules just discussed concern the standards to which experts must adhere, but what sorts of actions or inaction is commonly encountered that contravenes these standards? As lawyers find numerous ways in which to misbehave, so it would seem do experts. Examples include:

- Experts as advocates for their client’s case/lack of independence85

85 See also Munkenbeck and Marshall v Kensington Hotel [1999] 15(3) Const LJ 231; also Pearce v. Ove Arup Partnership Ltd [2001] EWHC (Ch) 455; London Underground v Kenchington Ford Plc (1998) 63 Con LR 1 (TCC); Royal and Sun Alliance Trust Co Ltd
Incentive-based fees\textsuperscript{86}  
Reports written and opinions formed by assistants instead of the expert\textsuperscript{87}  
Lack of objectivity  
Selective use of evidence  
Lack of requisite expertise\textsuperscript{88}  
Failure to test the veracity of materials presented to them  
Following instructions from instructing lawyers when it is clear on the face of it that what the expert is being asked to do will not result in a report that will survive scrutiny.

In the context of lawyers’ interaction with experts, it includes things like:

- Coaching the expert
- Outside influence: lawyers directing the expert’s opinion or asking for a section of the report to be removed\textsuperscript{89}
- Interference with joint expert\textsuperscript{90}
- Lawyers withholding information, either from their own expert or from the other party’s expert
- Lawyers or their clients undertaking analysis of the facts and providing this as the only basis for the expert to form his opinion from (often the reason for this is said to be a saving on costs)
- Lawyers providing a restrictive brief to their expert which ultimately impinges on his credibility.

Sanctions against experts

Adjudication

The statutory, industry body and standard form adjudication rules provide no sanctions specifically directed against experts or lawyers and their interaction with experts. That said, an adjudicator’s role is to adopt an inquisitorial approach to ascertain the relevant facts and as part of this he may interview the expert, hold a hearing at which the expert is cross-examined and appoint his own expert to interrogate the opinion of the party appointed experts. If he has a concern that the expert’s opinion has somehow been arrived at improperly,

\textit{v Healey & Baker, Chancery Division, 13 October 2000; Great Eastern Hotel Ltd v John Laing Construction Ltd [2005] EWHC 181 (TCC), 99 Con LR 45.}

\textit{Factortame Ltd v Secretary of State for the Environment (No 2) [2002] EWCA Civ 932, [2002] 4 All ER 97, [2003] BLR 1.}

\textit{Skanska Construction UK Ltd v Egger (Barony) Ltd (Quantum) [2004] EWHC 1748 (TCC); Great Eastern Hotel Co Ltd v John Laing Construction Ltd: note 85.}


\textit{See for example Robin Ellis Ltd v Malwright Ltd [1999] BLR 81 (TCC).}

\textit{See for example Edwards v Bruce and Hyslop (Brucast) Ltd [2009] EWHC 2970 (QB).}
he may question the expert or the party and form a view as to whether that concern is valid or not. If the expert or party does not respond, then he may draw inference from that refusal and reflect his inference in his decision and in the way he awards his own, the expert’s and the party’s costs. But again these indirect sanctions are aimed at sanctioning the party. The adjudicator has no jurisdiction at all to admonish the expert or the lawyer directly.

The adjudicator nominating bodies who administer the appointment of over 70% of all adjudicators, also have no locus or power to admonish experts or lawyers in any way. Most of them have disciplinary procedures which allow them to expel misbehaving adjudicators from their panel, but those procedures do not regulate lawyer and expert misconduct. The reasons might be because the administrative and cost burden of extending their remit to lawyers and experts is not worth the effort, they do not think that there is a problem or that the problem is not sufficiently serious to merit action, and/or they consider that the job of reprimanding lawyers and experts lies with their respective professional bodies.

**Arbitration**

The Arbitration Act 1996 and the major institutional rules all contain provisions which give the tribunal the discretion to decide the admissibility, relevance or weight given to evidence, including expert evidence. The tribunal also has discretion to award costs, although it is unusual to impose costs sanctions following from misconduct by an expert. As with adjudication, there is nothing that gives the tribunal or the institutions the power to direct their discontent at the lawyer or the expert.

The IBA Rules on the Taking of Evidence specifically address the tribunal’s express power to exclude evidence based on a legal impediment in relation to ethical rules; they address cases where it is necessary to maintain fairness and equality resulting from the application of different ethical rules. For example, under these rules a tribunal would be able in theory to exclude the testimony given by a witness in direct or cross-examination when it can be demonstrated that counsel has rehearsed the question with the witness or otherwise prepared the witness for the hearing in circumstances where the counsel is subject to national ethical rules prohibiting it from engaging in similar conduct. In this case, the IBA Rules allow the arbitrator to declare the inadmissibility of that testimony in order to preserve the parties’ equality of arms in the proceedings, which is threatened by the application of divergent rules of professional conduct.

**Contract and insurance**

Outside the remedies available to the tribunal, if an expert has acted improperly, the terms of the expert engagement may not protect the expert witness against a claim for breach of contract or negligence, if the expert fails

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91 LCIA Rules, note 21, article 21.1(f); UNCITRAL Rules, note 21, article 27.4; SIAC Rules, note 21, article 16.4; Arbitration Act 1996 s 34(2)(f).
92 IBA Rules: note 84.
to fulfil his duties in accordance with the applicable rules or guidelines. The terms of engagement that a law firm enters into with experts it appoints on behalf of its clients will normally contain wording that requires the expert to meet certain standards.

Furthermore, where the expert has failed to meet the test of reasonable skill and care or is found to have breached the rules of his professional body, professional indemnity insurance may not provide any, or only limited, cover. However, generally speaking the professional indemnity insurance will cover the individual in all but the most serious instances of misconduct.

**Case law**

Given that arbiters in adjudication and arbitration subject to English law are often influenced by the English courts’ views on the conduct of experts, it is perhaps useful to consider some of those cases now. First, the matter of the expert as a ‘hired gun’. In a claim challenging the expert’s independence in *Norbrook Laboratories Ltd v Tank*, the court was reluctant to interfere with the discretionary power of the arbitrator to strike out the expert’s evidence.93 Indeed, the court was of the opinion that any issue of objectivity and independence could be dealt with adequately through the powers already available to the arbitrator. However, in *Munkenbeck and Marshall v Kensington Hotel* an expert was criticised by the court for losing sight of the proper role of an expert, to the assist the court, instead adopting the stance of advocating his client’s case.94 The court decided that on this basis the value of the expert’s evidence had been greatly diminished. The ‘hired gun’ cases extend further. In *Royal and Sun Alliance Trust Co Ltd v Healy and Baker* a valuation expert was held to be extremely selective in his consideration of evidence, again reducing the value of the evidence.95

Any public comments can be used to undermine the expert’s credibility in future, regardless of who made them. In *Cala Homes v Alfred McAlpine Homes* the judge decided to dedicate the final part of his judgment to criticising the defendant’s expert.96 The expert in question was an ‘eminent architect’ with a wealth of experience as an expert witness. Some years earlier he had written an article on his perception of the duties of an expert witness, which advocated a somewhat adversarial approach. This article was summed up by the judge when he described the expert’s use of the term ‘pragmatic flexibility’ as a euphemism for ‘misleading selectivity’. In light of this he decided to attach very little significance to the particular expert witness.

Experts should ensure they have sufficient expertise in the subject matter on which they are asked to give an opinion. The recent Privy Council case of *Caribbean Steel Company Ltd v Price Waterhouse (a Firm)* confirmed that the

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94 *Munkenbeck and Marshall v Kensington Hotel*: note 85.
95 *Royal & Sun Alliance Trust Co Ltd v Healy & Baker*: note 85.
96 *Cala Homes (South) Ltd and others v Alfred McAlpine Homes East Ltd* [1995] EWHC 7 (Ch), [1995] FSR 818.
court may attach less weight, or reject an expert’s evidence entirely, once it has properly considered it.\textsuperscript{97}

Lastly, one frequently cited case, an example of a shopping list of what not to do as an expert, is Great Eastern Hotel Co v John Laing Construction.\textsuperscript{98} Here, programming experts were appointed by both sides to analyse the critical path of a construction project. The judge was less than impressed by the defendant’s expert, concluding that little weight could be attached to his evidence. The judge criticised the expert for being naïve, making fanciful statements, having a lack of knowledge of the facts, conducting insufficient research, submitting incomplete analyses, uncritically accepting statements made by the defendant, omitting relevant evidence from his analysis and discussion, being unreliable and under cross-examination denying statements he previously made.

I Conclusions and possible ways forward

The level of autonomy that parties to adjudication and arbitration enjoy is one of the driving reasons why those forms of dispute resolution are so successful, but it is also one of the reasons why misconduct enjoys more prevalence and less consequence. One of the great and unavoidable weaknesses of private ADR is that the control and exposure of misconduct is far more difficult. There is a considerable gulf, with regard to the prescription and regulation of expert and lawyer conduct, between UK litigation and both domestic and international adjudication and arbitration. The problem is at its greatest in the international sphere, where there is a real challenge to find common ground amidst a wide spectrum of cultural views as to what is and is not acceptable.

Some have argued that to prescribe regulation in arbitration and adjudication destroys its key benefit, which is to provide a flexible, easy-to-understand procedure that the parties can mould to their liking. In the international context, is it right that a lawyer domiciled in England & Wales who is found liable for misconduct whilst representing a party in an international arbitration with its seat in Paris should be subjected to sanctions that impact on his practice in his own jurisdiction, or indeed any jurisdiction other than France? As one commentator observed, ‘it is fairly rare that misconduct “abroad” results in any serious consequences “at home”’;\textsuperscript{99} another has pointed out that ‘there is no supranational authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far’.\textsuperscript{100} On the one hand, is this right, because a jurisdiction other than the one in which an individual is domiciled or an umbrella body should not have such far-reaching effect? On the other hand, perhaps that should be accepted as a consequence of participating in international proceedings. It would surely act as a more effective deterrent. The whole point is that adjudication and arbitration are not as prescriptive and cumbersome as litigation. But it cannot be right that the

\textsuperscript{97} Caribbean Steel Co Ltd v Price Waterhouse (a Firm) [2013] UKPC 18.
\textsuperscript{98} Great Eastern Hotel Co Ltd v John Laing Construction Ltd: note 85.
\textsuperscript{99} Ivo G Caytas, Transnational Legal Practice: Conflicts in Professional Responsibility (Commonwealth Press, 1992), page 3.
\textsuperscript{100} Catherine A Rogers, note 30, page 342.
level of autonomy is so broad that it includes the ability to act improperly. Adjudication and arbitration are now so well used that it is imperative they are, and are seen to be, methods of resolving disputes that are trusted and are not open to abuse.

Even if there were detailed rules, the lack of publicly available precedents in arbitration makes it difficult for there to be true transparency about the effectiveness of arbitration rules and the conduct of those participating. That said, it would be naïve to assert that the cloak of privacy in private proceedings is absolute. For those lawyers and experts who practice adjudication and arbitration regularly, the gossip wheel often propagates a black market view of lawyers or experts, though this is nowhere near as effective or as damaging as publicly available material.

Perhaps the concerns about misconduct are much ado about nothing. Is there really a problem, either with lawyers intimidating arbiters or with experts providing opinions based on the improper collection or examination of evidence? Of course there is. It is a matter of common sense and a consequence of human nature: if there are no or vague rules in place to regulate misconduct, no effective sanctions to punish either the lawyer or the expert and a clear incentive to win for the client, then if the lawyer or expert believes an action or inaction will create an advantage, opportunistic hands venture into the cookie jar.

The available data examining misconduct supports this. In adjudication, both RICS and TeCSA identify that there is a problem with intimidation, even though the problem does not appear to occur regularly. In a sense this is a little surprising. The author rarely, if ever, engages in conversation with other lawyers or experts on the subject of adjudication without hearing about some egregious misconduct that he or she recently experienced from the other party’s representative or expert deployed. However, the truth is these protestations are often exaggerated; what is reported is better characterised as sharp tactics than as misconduct. Such stories flow from our ingrained desire to fill conversation with complaints.101 Nevertheless, it would be a most useful exercise to carry out a detailed survey which aims to understand the nature and prevalence of all types of misconduct, not just intimidation.

The arbitration community also seem to agree, albeit belatedly, that something needs to be done and indeed something has been done. After a string of failed attempts, the IBA succeeded in taking positive steps towards finding a common ground, but its published documents have been achieved through a series of compromises that for some has resulted in a watering down of what might otherwise have been well defined rules and imposing and penal sanctions.102 In particular, the 2013 Guidelines make clear that there is no concept of overriding duty to the tribunal; they apply only to the extent that they are not inconsistent with obligations to the client and his case.

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101 Research company OnePoll carried out a survey of 500 people in 2008 to understand what makes us British. Moaning was high on the list of responses: www.onepoll.com.

102 For the IBA Guidelines, see note 44 and its linked main text; for the IBA Rules on the Taking of Evidence, see note 84 and its linked main text.
It seems we are near the start of a journey that may or may not end with regulations that set clear boundaries as to what lawyers and experts can and cannot do; and impose sanctions with teeth. Here are a few suggestions what the next steps might be:

- More training for arbiters, with mock proceedings allowing arbiters to experience intimidation tactics and learn how best to respond. For example, one of the most common tactics is the threat of a complaint to the arbiter’s professional body. Arbiters should also be educated by the institutions and by professional bodies as to the correct complaints procedure, and specifically the complaints that will and will not be investigated. As so few complaints against arbiters have been upheld, arbiters might be less susceptible to intimidation threats of complaint if they were better informed as to the realities.

- Where an expert or lawyer’s conduct is particularly severe, the individual should be suspended or expelled from practicing as a lawyer or an expert. In so far as this is done by the individual’s professional body, there needs to be clear guidance on what the procedures are for reporting misconduct and where the results of those investigations conclude there has been misconduct, those results and the sanction should be published and readily accessible, preferably online. Whilst misconduct is already dealt with regularly by the SRA and BSB for instance, greater transparency of the sort described would be very welcome.

- In the case of experts, one solution that is often mooted is to do away with party appointed experts and to only permit tribunal appointed joint experts. The expert would need to be provided with a joint brief and to be paid by the parties jointly. However, although all the main institutional rules provide for it, there has been a paucity of popularity for that type of expert in the UK, perhaps because of the reduced control a party has in appointing an individual and providing him or her with instructions, together with a view that there is less opportunity to test or challenge a joint expert’s opinion.

- Revise the 2013 Guidelines and the 2010 Rules on the Taking of Evidence so that they are far more prescriptive as to what conduct is unacceptable. Rewrite and specify the consequences for misconduct and ensure that the sanctions are severe enough to deter lawyers or experts from breaching the rules.

- A solution is unlikely to be to give adjudicators and arbitrators the power to impose sanctions beyond the boundaries of the case. They are usually appointed by the parties or by members of the part-constituted panel for their particular skills in resolving disputes via arbitration within a certain area of expertise. Their focus is not intended nor should it be to determine what sanctions should be imposed beyond the case. In that regard, the 2014 LCIA rules and the IBA 2013 may be misconceived in that they
vest the power to decide whether counsel have not complied with the guidelines in the tribunal.

- An approach which seems reasonably well supported is to make the institutions and adjudicator nominating bodies (or more particularly a designated ‘ethics unit’ within the institutions) the regulators, rather than individual tribunals. It would assign the regulation of misconduct to an independent (or more independent) decision maker. A designated unit would have the remit to have an expert understanding of the ethical rules and regulations that apply and would be able to apply them more consistently and in ways that extend beyond the confines of the arbitration. For instance, a lawyer could be banned from appearing in any ICC arbitration for a year, the lawyer or law firm could be fined and whatever sanctions are agreed could be published. In the same way that arbitral awards can be enforced in different jurisdictions, an ICC sanction could be applied automatically or upon application by different institutions.

- Empowering the institutions is certainly not without its difficulty. How is the cost of the ethics unit met? Who refers misconduct to the institution – the arbiter or the parties? Should there be yet another set of rules which dictates what sorts of misconduct may be referred to the unit? There would certainly need to be rules for how such applications would be run. Is there a right of appeal and to whom or what? Many arbitrations and adjudications do not take place under the auspices of an institution and so one could very well find that there is a policing regime in place for institution led adjudications and arbitrations and the wild west for ad hoc proceedings. Furthermore, it is difficult to see how any single institution is going to implement the sort of sea change in regulation that may be required without a significant stick or carrot to do so. After all, the arbitration institutions are businesses and though tighter sanctions on lawyers and experts may be seen as attractive to some, there will be a significant portion of individuals who do not think so and so turn to another institution. What business would risk self-harm of this sort?

- The institutions could publish instances of misconduct. There is certainly form for the publication of decisions – the LCIA do it for arbitrator challenges and UNCITRAL do it for certain types of decisions. There is no particular reason why the decision given by the professional body cannot be sanitised, so that the details of the parties and the particular details of the dispute are withheld, leaving only the name of the experts and lawyers, the tribunal and the details of the act or acts of misconduct. By lifting the veil of privacy in part, lawyers and experts run the risk that any misconduct would be exposed in the same way as it is in litigation.

- Part of the problem flows from the confusion that is brought about by the issue of double deontology. This has long been recognised in Europe and legislative attempts have been made to address it.
There should be a global and mandatory code of ethics for international adjudication and arbitration that sets clear rules of how experts and party representatives in arbitration should conduct themselves and a spectrum of sanctions available when that code is breached. The rules in question could be policed by the relevant domestic professional body of the lawyer or expert, alternatively, by a new international regulator. The latter is attractive because it would facilitate a more consistent application of the rules. However, given the range of cultural differences and the number of jurisdictions to contend with, one can only ever imagine that getting agreement to a code such as this would be challenging and would require compromises within the drafting which may mean the end result would lack the specificity and consequences for breach that was originally intended to offer. That is not to say such widespread consensus cannot be achieved. The New York Convention is one example of that.

The opportunity for misconduct in adjudication and arbitration is considerable. The regulation is either non-existent or non-prescriptive and the sanctions are ineffective, localised and focused on punishing the party, not the lawyer or expert. Although there are innumerable obstacles, there are several ways to implement a more tightly controlled regime with a system that can deliver serious consequences for wrongdoers. One wonders whether the tide of momentum that seems to have swelled in the last few years is strong or long lasting enough to effect any significant change.

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