"Regulation of Counsel's Conduct in International Arbitration: Should Tribunals have the teeth to bite?" -Isaac Aburam Lartey

In recent times, the concept of ethics has gained prominence in the deliberations of topical issues in international arbitration. This marks a tremendous development in the regulation of international arbitration as historically, arbitrators only had commonly shared beliefs and tacit understanding of what constituted ethical conduct in arbitral proceedings.[1]

The development of ethics in international arbitration has led to considerations of the various conduct and players in the process who ought to be subjected to regulation. Of all the issues considered for ethical regulation, the behaviour of counsel in international arbitration and possible sanctioning by arbitrators has been the most debated.[2] This is not surprising, the advent of untoward practices which have come to be known as "guerrilla tactics"[3] have left so much to be desired in international arbitration. Even though there appears to be a consensus that counsel's conduct should be regulated or sanctioned in international arbitration[4], the debate as to who should assume this duty has been an endless one. At the heart of this debate has been the thorny question of whether arbitrators or tribunals have the mandate to sanction counsel or attorney. Could such sanctions also include disqualifications of counsel from appearing before tribunals?

This paper argues that tribunals or arbitrators have an inherent power to sanction counsel in international arbitration in so far as this seeks to preserve the integrity of the arbitral process. Comparatively, arbitrators are better placed to regulate the conduct of counsel in international arbitration for various considerations such as proximity to information on the reprehensible conduct of counsel, time, and convenience. It is therefore submitted that self-regulation of the process by tribunals or arbitrators is the reasonable solution to safeguarding the process.

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[1] Rogers, C., Ethics in International Arbitration, 2014, Oxford University Press, at para 1.03, pg. 18

[2] Wilske, S., "Sanctions Against Counsel in International Arbitration – Possible, Desirable Or Conceptual Confusion?" Contemporary Asia Arbitration Journal, Vol. 8, No. 2, pp. 141-184, November 2015

[3] "Arbitration Guerrillas" was a term introduced by Michael Hwang to described parties that "try and exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so that it becomes abortive or ineffective." See, Niyati Karia, Ethical Warfare: Guerrilla Tactics in International Arbitration, accessed at https://nliu-cril.weebly.com/blog/ethical-warfare-guerrilla-tactics-in-international-arbitration

[4] Rogers, C., supra, at para. 6.128, pg. 261

In making this argument, the paper shall trace the potential challenges which state courts, bar associations, and arbitral institutions are likely to encounter in the sanctioning of counsel in international arbitration thereby making them an undesirable resort. The paper then focuses on the inherent powers entrusted to arbitral tribunals/arbitrators to safeguard the arbitral process. It is suggested that these powers extend to the sanctioning of counsel where the behaviour or conduct of counsel violates the integrity of the arbitral process. The various sanctions arbitrators could utilize in this regard are also considered. The paper shall argue that apart from instances where issues of conflicts of interest arise, disqualification of counsel should be sparingly exercised as it poses a threat to challenges of arbitrators on grounds of bias.

The limitations and disadvantages of the sanctioning of counsel by arbitrators will be looked at. Despite the various limitations and disadvantages which will be identified, the paper shall conclude that the need for the sanctioning of counsel by arbitrators to preserve the integrity and legitimacy of the arbitral process supersedes the disadvantages of sanctioning of arbitrators.

PART A

THE NEED FOR SANCTIONING OF COUNSEL IN INTERNATIONAL ARBITRATION

International arbitration has gained global recognition as the most desirous means for the resolution of complex international commercial and investment disputes.[5] Compared to litigation in national courts, international arbitration is usually selected as the preferred form of dispute resolution due to the expertise of the tribunal, privacy, neutrality, and speedy resolution.[6]

Despite the relative advantages of international arbitration, there have been growing concerns about the legitimacy of international arbitration as a dispute resolution mechanism for international disputes.[7] The legitimacy concerns about international arbitration cuts across several aspects of the process. One

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[5] See, Queen Mary University of London, White & Case 2021 International Arbitration Survey: Adapting Arbitration to a Changing World. Accessed at 90% of Respondents in this survey indicated international arbitration as the preferred method for resolving cross-border disputes. Accessed at <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf

[6] Born, G., International Commercial Arbitration, 3rd Edition, Wolters Kluwer, 2021 at pg. 71

[7] Strong, Legitimacy and International Arbitration: An Alternate view, University of Misouri Law School, Available at http://arbitrationblog.kluwerarbitration.com/2017/10/04/legitimacy-international-arbitration-alternate-view/

of the factors which feature prominently in the legitimacy question is the regulation of professional ethics in international arbitration.[8] In national courts, judges are often deemed to be vested with powers to sanction the conduct of counsel who misbehave or carelessly breach procedural orders.[9] These powers could include punitive costs against counsel and reprimands.

On the contrary, there have been various debates as to whether counsel's conduct should be sanctioned by arbitrators.[10] These questions have been intensified in recent times due to the increasing spate of sharp practice and untoward behaviour by counsel in arbitral proceedings which have come to be known as "Guerrilla Tactics". Practices such as the continuous request for disclosures, persistent breach of procedural orders on timelines and other extreme misconducts of counsel in international arbitration have raised concerns for action.

Even though there appears to be a consensus that misconduct by counsel should be regulated and sanctioned as noted earlier, the most pressing question has been who should mete out such sanctions. This question is not without justification. It is difficult to ascertain the specific set of rules which is applicable to counsel's conduct in international arbitration due to its multi-faceted nature. As rightly asked by Veeder QC:

> "[W]hat are the professional rules applicable to an Indian lawyer in a Hong Kong arbitration between a Bahraini claimant and a Japanese defendant represented by New York lawyers?"[11]

The scenario raised above is the dilemma that tribunals are faced with on several occasions. Despite this conundrum, what could be easily said is that the behaviour of counsel in international arbitration must be regulated to ensure that the arbitral process achieves the very reasons why parties resort to it. The regulation of the counsel's conduct ensures that party representatives do not abuse the process by deliberately subjecting it to unnecessary tactical delays

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[8] Schill, S. Conceptions of Legitimacy of International Arbitration, ACIL Research Paper, 2017-14, Available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2932147_code1636539.pdf?abstractid=2932147&mirid=1

[9] Crowell, M. The Court's Inherent Authority to Discipline Lawyers, University of North Carolina School of Government, May 2011, available at https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Court%20Authority%20to%20Discipline.pdf

[10] Wilske, S, "Sanctions Against Counsel in International Arbitration – Possible, Desirable or Conceptual Confusion?", 8(2) CONTEMP. ASIA ARB. J. 141

[11] Veeder., V.V., The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith, 18(4) ARB. INT'L 431, 433 (2002)

and ensures that the process upholds some form of ethics which promotes its legitimacy.

Cognizant of this, the International Bar Association adopted its Guidelines on Party Representation in International Arbitration in 2013. The guidelines were inspired by the need for party representatives to act with integrity and honesty and avoid conduct which is put up to produce unnecessary delay and expense thereby obstructing the arbitral process.[12]

As commendable as this is, the guidelines are not binding and can only be applied when parties and the tribunal agree on its application to the process. Even more, the guidelines do not answer the question of who has the utmost duty and power to sanction and disqualify counsel/attorneys in international arbitration. Nonetheless, it demonstrates a global recognition of the need to sanction counsel's misconduct in international arbitration.

PART B

WHO COULD POSSESS THE POWER OF SANCTION?

Before ascertaining whether tribunals should possess powers of sanctions, there is the need to recognize that the multi-faceted nature of international arbitration could see the players such as local courts, arbitration institutions and bar associations exercising sanctioning authority over counsel.

International Arbitration is a subject of competing theories. There is the nationalist or territorial theory[13], which considers arbitration to be rooted in the legal regime of the seat of arbitration. Transnational theorists like Gaillard have however regarded arbitration as not linked to any specific national legal order but possibly subject to different rules of law.[14]

These competing theories trickle down to the question of who has the ultimate duty to sanction attorneys/counsel in international arbitration. When one views international arbitration as rooted in the national legal regime, it follows that the whole arbitral process is seen considering the legal framework of the seat of the arbitration. In this regard, careful consideration is given to the laws of the

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[12] International Bar Association, Guidelines on Party Representation in International Arbitration, Adopted by a resolution of IBA Council on 25 May 2013, at pg. 2

[13] Mann, F.A., The UNCITRAL Model Law: Lex Facit Arbitrum, 2 Arb. Int,l 241–60 (1986).

[14] Gaillard, E., Theory of International Arbitration, 2010

seat and the role of the national courts in supervising arbitration as a primary option.

- **National Courts?**

For those who view arbitration with respect to the nationalist theory, it is not difficult to accept that national courts should have the power to sanction counsel. This view is anchored in the perception that the regulation of international arbitration is rooted in the national legal regime and consequently any aspect of the process must be subject to the regulatory enforcement of the national court.

There are various reasons why the sanctioning of counsel in international arbitration by the national courts would seem a far-fetched idea. The main reason is the issue of the enforceability of such sanctions. The transnational nature of international arbitration admits counsel of different jurisdictions who appear before arbitral tribunals. In this regard, an arbitration seated in England may have parties represented by lawyers from New York with others from Sau Paulo. These lawyers may neither be citizens nor residents of the seat of arbitration. How then will a national court of the seat of arbitration exercise its powers of sanctions coercively against such errant counsel? If a national court were to award cost against counsel in International Arbitration for failing to comply with the orders of a tribunal, how could such a court enforce its orders in the jurisdiction of the errant lawyer who does not practice or have any asset in the jurisdiction of the national court?

A resort to the legal framework of the New York convention will not suffice as that relates only to arbitral awards and not orders made by domestic courts which are seats of arbitration. Also, states in making their seats attractive for international arbitration have ignored the extension of their ethical rules to counsel in international arbitrations.

For the foregoing reasons, it is highly challenging for national courts to exercise powers of sanctions or disqualification against counsel or attorneys in International Arbitration.

- **National Bar Associations or Law Societies?**

As already indicated above, lawyers who appear before arbitral tribunals could be members of the different national bar associations or law societies.[15] These associations or societies do have unique codes of ethics which regulate the practice of their members. Should these associations or societies be given the mandate of sanctioning?

Aside from the fact that granting such powers of sanctions to National Bar Associations will lead to undue delay in the arbitration process[16], there is also a tendency for disagreement on what will constitute misconduct. Legal cultures vary from jurisdiction to jurisdiction. What constitutes misconduct in one jurisdiction may not necessarily be viewed as such in another jurisdiction. Additionally, even though some bar associations may specify codes of conduct of counsel behaviour, these may be limited to domestic arbitration and may not extend to International Arbitration.

Perhaps the most critical obstacle to exercise of sanctions by bar association will be that of confidentiality. Bar associations are not parties to arbitration agreement and as such are excluded from obtaining any information relating to an arbitral process. A counsel or party who has been a victim of a guerrilla tactics employed by an opposing counsel cannot report such misconduct to the bar association in a vacuum, they would have to disclose the existence of the arbitration, names of parties, and give some factual background. This will clearly be in breach of the duty of confidentiality. As Hanns-Christian Salger notes, aggrieved parties who are affected by guerrilla tactics will think twice before reporting such conduct to bar associations due to the usual confidentiality obligations imposed on the parties, arbitrators and their counsel.[17]

[15] Catherine Rogers, "Lawyers without Borders", 30 U.Pa.J. Int'l L 1035-1050

[16] Rowley, W. S. J. Guerrilla Tactics and Developing Issues, In GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION

[17] Hanns-Christian Salger, The Role of Bar Associations, in "Guerrilla Tactics in International Arbitration", at pg. 296

- **Arbitration Institutions**

The influence of Arbitration Institutions in international arbitration cannot go without mention. They provide immense support for the arbitration process by offering parties the necessary avenue and tools to regulate proceedings. One of such areas of support is the possibility of incorporating rules of ethics and possible sanctions into the rules of an arbitration institution.[18]

In this case, when parties elect to resolve their dispute through a designated arbitration institution, their legal representatives would be deemed to be subject to any rules of conduct set by the Arbitration Institutions. The LCIA for instance has incorporated some guidelines on the conduct of legal representatives in the index of its Rules.[19]

The regulation and sanctioning of counsel by the Arbitration Institutions take away the challenge of confidentiality as Arbitration Institutions by virtue of the role they play are caught within the circle of disclosure of information relating to the arbitration.

However, entrusting the duty of sanctions to arbitration institutions defers the urgent need for control of counsel behaviour. Thus, until the institution's court or designated body investigates a complaint by an aggrieved party of misconduct, the perpetrator of the misconduct is motivated to persist with their action.

Additionally, even if arbitration institutions provide guidelines regulating counsel behaviour and stipulating sanctions, parties may agree not to be bound by these guidelines due to the concept of party autonomy. Indeed, the LCIA guidelines for party representatives do not appear to be absolute in themselves. Paragraph 1 of the said guidelines provides emphatically that the guidelines are not intended to derogate from the arbitration agreement or the counsel's duty to the party they represent in the arbitration.[20]

Some scholars and commentators have expressed doubts about whether Arbitration Institutions should concern themselves with the sanctioning of counsel. Carlevaris notes that it is not the role of arbitral institutions to regulate

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[18] Wilkse, S, "The Duty of Arbitral Institutions to Preserve The Integrity Of Arbitral Proceedings," (2017) 10(2) CONTEMP. ASIA ARB. J. 201, at pg. 205

[19] LCIA Arbitration Rules, Effective 1 October 2020, Available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx

[20] Ibid, para.1

ethics by adopting a code of conduct for counsel.[21] In his view institutions are to rather play an indirect role by using their various tools to influence ethics.

Arbitral institutions however remain instrumental in the quest for ethical practice in international arbitration by counsel. They can be effective as an enforcing agent of arbitrators or tribunals when the latter issues sanctions to counsel. This calls for an examination into the scope of arbitrators' powers to sanction counsel or attorneys.

PART C

ARBITRATORS' POWER TO SANCTION AND ITS LIMITATIONS

Arbitrators are the pivot around which the resolution of disputes by international arbitration revolves. There have been various arguments about the nature and scope of arbitrators' work in international arbitration. The question has been whether arbitrators are simply service providers who are contracted by an agreement of the parties to resolve a dispute, or they exercise judicial powers. This paper does not seek to add to that debate.

Nonetheless, the judicial powers of arbitrators cannot go without notice. This is seen in their determination of facts in disputes and their application of relevant laws to the facts for a binding resolution of disputes between private parties.[22]

As with every judicial proceeding, there is a need to regulate the process to promote its integrity and instil confidence in the parties who are participants in the process. Accordingly, in litigation before national courts, there is a general perception that judges have some inherent powers which are to enable them to control matters before the court[23] and sanction conduct which directly disobeys the court's orders.[24]

The advent of guerrilla tactics in international arbitration has seen many a counsel devising unhealthy strategies aimed at deliberately delaying the process, defying orders of tribunals or incessantly challenging arbitrators. These

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[21] Anrea Carlevaris, Secretary General of the ICC Court of Arbitration, made this remark at Queen Mary University of London's Institute for Regulation and Ethics on 11 September 2014.
[22] Roger J. Perlstadt, Article III Judicial Power and the Federal Arbitration Act, 62 Am. U. L. Rev. 201 (2012), available at http://scholarship.law.ufl.edu/facultypub/336
[23] Nasco, Inc. v. Calcasieu Televsion & Radio Inc, 894 F. 2d 696, 703 (5th Cir. 1990.
[24] Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

tactics frustrate the arbitral process and prevent it from achieving the objectives for which parties resort to arbitration.

Accordingly, it has been submitted elsewhere that the power of arbitrators to sanction counsel is inherent or implied.[25] One that is necessary for the protection of the integrity of the arbitral process and to enable the tribunal to render an enforceable award. This, it is submitted is a viable argument. When parties agree to resolve their dispute by arbitration, they are deemed to have opted for a process which does not suffer the setbacks of litigation such as undue delay. Consequently, arbitrators in the performance of their functions are deemed to be entrusted with some powers to ensure that the arbitral process does not suffer any undesirable setback from the deliberate actions of counsel.

In the exercise of their inherent powers, arbitrators could sanction counsel either through a reprimand, award cost against counsel or even disqualify counsel from proceedings.[26] Thus in the case of Hrvatska Elektroprivreda v. Slovenia[27] the ICSID tribunal relied on its inherent powers to disqualify a party's counsel from appearing before the tribunal based on being a door tenant in a London Chambers with the tribunal's president. This decision is commendable as it afforded the tribunal the benefit of avoiding the potential for the award to be set aside based on a conflict of interest.

It is however agreeable that what is termed as "inherent powers" cannot be easily defined and should be expressly narrowed in scope to prevent arbitrators from exceeding these powers.

In this regard, sanctions such as disqualification should be sparingly resorted to. Arbitrators should resort to the sanction of disqualification when their counsel's representation of a party results in a conflict of the interests of arbitrators and counsel due to their professional relationship or any grounds. An unjustifiable disqualification of counsel could raise potential issues which could lead in the challenge of the award. A party must claim that the disqualification of their counsel resulted in they not been adequately represented before the tribunal.

- **Potential Advantages of Arbitrator's Powers to Sanction Counsel**

[25] See, International Law Association, Report for The Biennial Conference in Washington D.C. April 2014.

[26] Wilske, S., Sanctions Against Counsel in International Arbitration – Possible, Desirable Or Conceptual Confusion, supra.

[27] Hrvatska v. Elektroprivreda, d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (6 May 2008).

Arbitrators are the most proximate people to the facts resulting in alleged misconduct or guerrilla tactics. Actions that seek to delay proceedings are usually conducted in the proceedings before arbitrators or in defiance of their orders. Consequently, it is only reasonable that the power to sanction such behaviour should be entrusted to arbitrators themselves as a first resort for the following advantageous reasons.

The main advantage of the power of arbitrators to sanction or disqualify counsel is that it offers a more expeditious approach to the regulation of counsel's conduct and ethics. As soon as a behaviour of situation which compromises the integrity comes to the arbitrator's attention, they will be able to intervene promptly in ensuring that the integrity of the proceedings is maintained without delaying the process. This is particularly so in situations where counsel appears before a tribunal and their appearance raises issues of conflict of interest.[28] Arbitrators should be able to rule over such situations without referring such matters to a third party for a decision. A prompt decision in this regard will obviate any delay caused by reference and afford parties ample time to change representation.

The sanctioning of counsel by tribunals also enables misconduct of counsel to be dealt with without any worry about breach of confidentiality as arbitrators are already privy to all the relevant information.

- **Disadvantages/Limitations of Arbitrator's Powers to Sanction Counsel**

Despite the significant benefits of having arbitrators exercising powers of sanctions over counsel. Several questions have been raised about its appropriateness and legitimacy.

The main challenge in this regard is a jurisdictional one. Arbitrators exercise the authority conferred on them by an arbitration agreement. Counsel are ordinarily not parties to arbitration agreements. Thus, the question has been raised whether arbitrators can duly exercise powers of sanctions in the absence of any agreement between them and party representatives. Indeed, some cases have overturned decisions of arbitrators which awarded penal costs against

[28] Hwang, M.; Hon, J, "New Approach to Regulating Counsel Conduct in International Arbitration, in Stavros L. Brekoulakis , Julian D. M. Lew , et al. (eds), The Evolution and Future of International Arbitration, International Arbitration Law Library, Volume 37 , pp. 345

counsel.[29] In the case of CIBC Oppenheimer Corp. v. Friedman, No. B141521[30], the court vacated a penal sanction of $700,000 which was awarded against an arbitrator. The court held the arbitrators exceeded their powers when they sanctioned counsel as counsel was not a party to the arbitration agreement. Consequently, entrusting powers of sanctions to arbitrators could be counterproductive as sanctions could be challenged and overturned in state courts based on their legitimacy.

Thus, in the case of The Rompetrol Group N.V. v. Romania[31] when the respondent called upon the tribunal to disqualify counsel for being a previous employee of the law firm of which one of the arbitrators was a member, the tribunal refused the request by taking a doubtful view whether arbitrators' inherent powers to preserve the integrity of proceedings extended to the exclusion of counsel. The Tribunal noted that the power to disqualify counsel was one which was supposed to be expressly provided and absence of such express provision tribunals could only assume this power by extrapolation if there was an undeniable and overriding need to safeguard the integrity of proceedings.[32]

Unfortunately, the tribunal did not offer any guidance on what constitutes an undeniable and overriding need. It is accordingly difficult to accept this position. This limitation or disadvantage could be resolved by the tribunal agreeing with the parties and their counsel in the first procedural order on the scope of the arbitrator's power to sanction for misconduct of counsel.

Arbitrators are not agents of the state and as a result, cannot exercise powers of sanctions when misconduct borders on criminality. Thus, entrusting the powers of sanctions to arbitrators in this regard will mean they would only have to refer misconduct bordering on criminality to the appropriate state agency for investigations and sanctioning. Under such a situation the powers of sanctioning to arbitrators become counterproductive.

Additionally, due to the lack of direct enforcement mechanisms over counsel, arbitrators in seeking to sanction counsel may impose these sanctions on the

[29] CIBC Oppenheimer Corp. v. Friedman, No. B141521 (Cal. App., 2Dist., 2/21/02).
[30] supra
[31] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on the Participation of a Counsel (14 Jan. 2010).
[32] Ibid at pg. 16

parties with the hope that counsel suffers the consequence.[33] This is usually seen in the case of awarding of costs. It is however difficult to see how counsel suffers when their clients bear such costs. This problem could be addressed with the support of arbitration institutions by introducing enforcing mechanisms like the blacklisting[34] of counsel who do not comply with the sanctions of arbitrators who sit on cases administered by their institutions.

Presently, there exists no universally accepted set of guidelines or code of conduct regulating the ethics of counsel in international arbitration. The IBA Guidelines on Party Representatives are not binding and can only be resorted to upon agreement by the parties. Under the present circumstances, entrusting the regulation of sanctions to arbitrators could result in a situation where arbitrators resort to their own ideological conception of what constitutes proper conduct by counsel.[35] This could be influenced by the legal system of the arbitrator's origin.

Despite these disadvantages, it is obvious that counsel's misconduct cannot be left unregulated and unsanctioned. Comparatively, the proximity of arbitrators to counsel's misconduct makes them a preferable choice in the sanctioning of counsel to nip such misconduct in the bud expeditiously.

CONCLUSION

Even though there is a consensual call for the regulation of ethics and counsel conduct in international arbitration, the absence of a uniform set of guidelines for the regulation of international arbitration poses a challenge as to who is the appropriate body to enforce sanctions in international arbitrations. This paper has made a comparative assessment between national courts, bar associations, arbitration institutions and arbitrators or arbitral tribunals in the sanctioning of counsel in international arbitration.

Given the relative setbacks of national courts, bar associations and arbitration institutions in sanctioning counsel, arbitrators and tribunals are better placed to perform this function. The sanction of counsel by arbitrators, it has been observed falls within their inherent powers in protecting the dignity and integrity of the arbitral process. Arbitrators are more preferred as the first resort to sanctioning of counsel as they are proximate to alleged misconduct, can

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[33] See, Pope & Talbot v Canada, UNCITRAL/NAFTA, Decision on Confidentiality of 27 September 2000 at para 12

[34] See Wilske, S., Sanctions Against Counsel in International Arbitration, supra

[35] See, Vagts, 'The International Legal Profession' 260 (1996),

remedy a misconduct without undue delay and include sanctions in the awards. This is not without challenges. The enforceability of sanctions by arbitrators remains questionable. They may also veer off their “inherent powers”. Nonetheless they remain a more practical resort to the sanctioning of counsel as noted above.