Kluwer Arbitration Blog

LIABILITY OF COUNSEL IN INTERNATIONAL ARBITRATION: Any Changes?

Lisa Bench Nieuwveld (Conway & Partners) · Friday, March 29th, 2013

A week ago today, it was my privilege to participate in the annual UNCITRAL/VIAC/YAAP Joint Conference, addressing hot topics in international arbitration. The conference successfully considered many key topics, including my topic, liability of counsel in international arbitrations. This topic, similar to my recent book topic (Kluwer Law International, Third-Party Funding in International Arbitration), is receiving a lot of attention with limited actual changes.

In 2011, the IBA released their latest guidelines on this area, entitled The IBA Principles on Conduct for the Legal Profession (referred to generally herein as Guidelines), which replace a much older version, the Code of Ethics from 1954 and edited in 1988. This set of Guidelines provides 10 very general statements on essentially the ethical conduct of the counsel representing parties in international arbitrations. Much is said, published, etc. on the behavior of the arbitrators; however, there are limited resources available on the counsel.

Post-the IBA Guidelines, I must wonder whether truly any changes have occurred? First let us step back at some of the allegations raised to assert the need for a sort of ethical code. First, in a comment by Edna Sussman and Solomon Ebere (see All's Fair in Love and War, The American Review of International Arbitration, 2011/ Vol. 22, No.4), a small survey was conducted of players in international arbitrations to attempt to discover what questionable ethical tactics were commonly employed. Some of these tactics would clearly be illegal under one jurisdiction, but, in reverse, clearly unethical for the counsel to NOT do in another jurisdiction. Some interesting tactics used – guerilla tactics as labeled by the authors – included threatening witnesses, asserting frivolous new claims at the last hour and threatening to appeal on the grounds of due process if the claim was not allowed, asserting frivolous challenges against the arbitrators as a delay tactic to the proceedings, and unprofessional behavior against the other counsel and even the tribunal during the proceedings. There were other discovered tactics as these are just a few.

Others in other conferences looked to specific cases to indicate the need for such a code – pointing to the more transparent ICSID cases in which parties may appoint a counsel with a potential conflict of interest to their team AFTER the establishment of the tribunal, for example. So, it is clear that different behaviors occur in such a multi-cultural dispute resolution forum and everyone approaches whether these tactics are ethical or not from a different paradigm. So, does finally creating guidelines truly resolve this behavior? And, more importantly, who and how should such an ethical code (or any ethical rules – i.e. the ones of the jurisdiction of the counsel acting out or the situs of the arbitration) be enforced to effectively avoid abuse during the proceeding? Should it

be through the tribunal or the institution? What if it is an ad hoc proceeding – should then it be incorporated in the UNCITRAL Model Arbitration Rules to cover, supposedly, a large portion of the ad hoc proceedings?

I applaud the efforts made and the no doubt hard work of those who have worked diligently on these guidelines or others like them. I just have to wonder – have they truly addressed the practical problems of how to interpret and apply ethical guidelines universally? Of who and how they should be enforced? With so many jurisdictions (and thus cultural differences) abounding in international arbitration, is it possible to construct a method that can be universally embraced? If any readers have successfully been influenced by the efforts thus far made, I would gladly receive their thoughts.

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