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How Far do the New LCIA Guidelines for Parties' Legal Representatives and the IBA Guidelines on Party Representation go?

Sapna Jhangiani (Clyde & Co Clasis Singapore Pte Ltd) · Wednesday, May 21st, 2014 · Clyde & Co.

By Sapna Jhangiani and Khaled Moyeed, Clyde & Co LLP

"To the question: What 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, the answer is no more obvious than it would be in London, Paris, Geneva and Stockholm. There is no clear answer …"

The conundrum identified above by Johnny Veeder QC in the 2001 Goff lecture has remained unanswered for many years. This blog examines two solutions which have recently presented themselves: firstly, proposed amendments to the LCIA Rules – which are expected to be promulgated shortly – such that counsel engaged in LCIA arbitrations will be subject to a set of new guidelines, and secondly, "*Guidelines on Party Representation in International Arbitration*" produced by the IBA as a result of the efforts of a working group set up for the purpose. We compare and contrast these two proposed solutions, both as to their content and likely impact, and comment on the possible journey towards a lasting solution.

New LCIA Rules

In relation to Johnny Veeder QC's conundrum, if the arbitration were an LCIA arbitration, there will shortly be a clear answer to the code of conduct applicable to counsel, at least to the extent covered in the new LCIA Rules. It is perhaps apt that Johnny Veeder QC was on the subcommittee which drafted the new LCIA Rules including the guidelines for counsel.

"*General Guidelines for the Parties' Legal Representatives*" appear as an annex to the new LCIA Rules. In summary, the guidelines state that counsel should not do the following: (1) engage in activities intended unfairly to obstruct the arbitration or jeopardise the finality of the award (for example, by repeated challenges which the legal representative knows are unfounded); (2) make false statements; (3) rely upon

false evidence; (4) conceal any document ordered to be produced by the tribunal; or (5) make unilateral undisclosed contact with any member of the arbitral tribunal.

The LCIA guidelines are not very long or detailed, for example, the annex containing the guidelines runs to less than a page. This makes the guidelines easy to follow and accessible to as many people as possible from a multitude of different jurisdictions. There is surely a danger, however, that their brevity could be misconstrued by some as a signal that a particular misconduct might go unpunished because it is not specifically mentioned in the guidelines. The answer to this is that the guidelines do not operate in a vacuum, but are expressly stipulated (at paragraph 1) not to derogate from any "*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*". By way of example, English solicitors and barristers are subject to far stricter and more comprehensive codes of conduct enforced by their respective regulatory bodies.

This brings us to what sanctions are available to a tribunal to punish counsel's misconduct, which is dealt with in the main body of the new Rules (at Article 18.6) rather than in the annex, and provides for the following sanctions: (1) a written reprimand; (2) a written caution as to future conduct; (3) a reference to the legal representative's regulatory and/or professional body; and (4) any other measures deemed necessary by the tribunal to maintain its general duties as set out in Article 14 of the new Rules.

These sanctions do not appear to be very onerous. A written admonishment would remain confidential as between the various stakeholders involved in the arbitration and may not act as a deterrent. The power to refer counsel to his/her professional or regulatory body for a clear breach of their professional code of conduct exists anyway (for example, in the case of English solicitors or barristers who breach their respective codes of conduct). This sanction is expressed in square brackets in the draft LCIA Rules, which may indicate that the LCIA was hesitant as to its inclusion as a possible sanction in the first place.

In practical terms, the question is whether a party-appointed arbitrator would be prepared to bite the hand that feeds them i.e. impose sanctions on the counsel that appointed them if they want to be appointed by the same counsel in the future. Indeed, even arbitrators who are not party-appointed may hesitate to impose sanctions on counsel for risk of limiting future appointments. This is perhaps a controversial, but reasonable question to ask as we examine the development of a code of conduct for counsel in international arbitration.

IBA Guidelines on Party Representation

The IBA guidelines have been regarded since their publication in May 2013 as fairly controversial. The IBA Rules on the Taking of Evidence were perhaps regarded with as much scepticism upon their release, and are now almost universally adopted. The IBA Guidelines on Party Representation may reach the same level of ubiquity one day.

The IBA guidelines are fairly comprehensive – they are divided into seven parts consisting of 27 guidelines, with comments on how the guidelines are to be applied. Some of the most salient principles set out in the IBA guidelines are that a party representative: (1) should not engage in *ex parte* communication with the tribunal; (2) should not make any false statements of fact; (3) should inform the client to preserve documents relevant to the arbitration; (4) should not make a request to produce documents or object to a request for an improper purpose; (5) should not conceal documents; (6) should identify himself/herself and the party he/she represents before seeking any information from a potential witness or expert; (7) should ensure witness/expert reports reflect the witness/expert's own opinion; and (8) should not encourage or invite a witness to give false evidence.

The sanctions available to a tribunal for counsel's misconduct are: (1) admonishing the party representative; (2) drawing adverse inferences in assessing the evidence or arguments advanced by the party representative; (3) considering misconduct when apportioning the costs of the arbitration; or (4) any other measures deemed necessary by the tribunal "*in order to preserve the fairness and integrity of the proceedings*".

Comparison

The powers to draw adverse inferences and apportion costs for counsel's misconduct under the IBA Guidelines on Party Representation are fairly onerous, and are not included in the LCIA guidelines. However, the catch-all remedy available to an LCIA tribunal to impose "*any other measures deemed necessary*" to maintain its general duties means that an LCIA tribunal could also possibly apply these sanctions in appropriate circumstances.

The other significant difference between the LCIA and the IBA guidelines is in relation to how they apply to counsel. In an LCIA arbitration proceeding under the new Rules, a legal representative must agree to comply with the guidelines as a condition to appear by name before the tribunal. On the other hand, the IBA guidelines can only govern counsel in an arbitration if the parties agree to opt in. It is a voluntary code of conduct. A tribunal could also apply them after consulting with the parties, but most tribunals would seek agreement before doing so.

Finally, the IBA guidelines are not "*intended to displace otherwise applicable mandatory laws, professional or disciplinary rules*". This is similar to the manner in which the LCIA guidelines apply to counsel. Practically, this means that where counsel is subject to a stricter code of conduct (eg. an English barrister or solicitor), the IBA guidelines should – theoretically – have little practical effect, assuming such codes of conduct tend to be followed. However, they may help an inexperienced lawyer or counsel from a developing jurisdiction to become familiar with the standards of conduct required in an international arbitration.

Conclusion

Some within the international arbitration community have long argued for a uniform code of conduct for counsel, for example, Doak Bishop called for the "*development and adoption of a uniform Code of Ethics for International Arbitration*" at the 2010 ICCA Congress in Rio. However, parties involved in an arbitration under the auspices of an arbitral institution other than the LCIA that do not opt in to the IBA guidelines will not be subject to an arbitration-specific code of conduct.

Perhaps the answer to the way forward can be found in the closing speech given by Chief Justice Sundaresh Menon at the 2014 ICCA Congress in Miami when he said that arbitration is "*better suited to evolution rather than to revolution*". With the introduction of the IBA and the LCIA guidelines, we are seeing evolutionary steps in the development of a uniform code of conduct for counsel in international arbitration, or a number of applicable codes. Other arbitral institutions may well follow the trend set by the LCIA and introduce their own codes of conduct, and many would argue that they would be wise to do so. As Chief Justice Menon remarked, international arbitration will respond to challenges, and evolve to what is best for its users and practitioners.

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