

Kluwer Arbitration Blog

The Creation of a Global Arbitration Ethics Council: a Truly Global Solution to a Global Problem

Anne-Carole Cremades (Schellenberg Wittmer) · Tuesday, November 24th, 2015

The Swiss Arbitration Association (“ASA”) has called recently for the creation of a transnational body, the Global Arbitration Ethics Council, to whom matters of alleged unethical conduct would be referred. This entity would provide a truly global solution to a global problem and overcome one of the main criticisms levelled against both the IBA Guidelines on Party Representation in International Arbitration (the “IBA Guidelines”) and the 2014 Arbitration Rules of the London Court of International Arbitration (the “LCIA Rules”) and their Annex, namely that they place on arbitrators responsibilities for ethical issues that are alien to the arbitration process.

Indeed, under both the IBA Guidelines and the LCIA Rules, the enforcement of ethical rules and the power to pronounce sanctions against offending counsel are put in the hands of the arbitral tribunal. It is referred here to sanctions for purely ethical issues, as opposed to the other issues dealt with by these Guidelines and Rules, such as the consequences that the arbitral tribunal may draw from a given counsel conduct as regards, for instance, the admissibility and weighing of evidence or the decision on costs, which were already part of the arbitrators’ inherent powers. It is not referred either to *ex parte* contacts between counsel and arbitrators, or the subsequent appointment of counsel which has the effect of conflicting an arbitrator, which arguably are more an issue of independence and impartiality of arbitrators, rather than an issue of counsel ethics.

Two considerations are usually put forward in favour of granting to the arbitral tribunal the power to enforce ethical rules. First, the arbitral tribunal is best placed to deal with alleged breaches by counsel of ethical duties, since it knows what happened and can put it into perspective. The second is that local bar rules and councils are designed for the local legal market and are thus inappropriate or ill-equipped to deal with the complexity of multi-cultural international matters.

The first consideration is debatable. The true role of the arbitral tribunal is to resolve a dispute between the parties. It is not to decide whether counsel acted ethically or unethically. The proper administration of justice requires a separation between the judicial body that decides the case on the merits and the disciplinary body that decides whether counsel has breached any ethical duty. This is significantly the case in most jurisdictions. It is unhealthy for the judge or arbitrator deciding on the merits of the case to also rule on the ethical or unethical conduct of counsel arguing the case. Not only does it create disruption to the arbitration proceedings (thereby causing delay and costs), but it constitutes a danger for the independence and impartiality of the arbitrator. For instance, in the case of counsel accused of lying or assisting in the concealment or destruction of documents, how can the arbitral tribunal continue to be seen as impartial after embarking on the

review of privileged communications between one party and its counsel in order to rule on such accusations? Moreover, should the arbitral tribunal eventually find the counsel's conduct unethical, the party having retained said counsel will likely challenge some if not all of the arbitrators, thereby causing further delay and costs.

As to the second consideration, it is indeed true that local bar councils or supervisory bodies may not be the appropriate forum for deciding matters relating to ethical conduct of counsel in international arbitration. It may even not be easy to identify which national entity would have jurisdiction, especially when individual counsel working collectively (within a firm or as co-counsel) are admitted to practice in different (or even multiple) jurisdictions that have conflicting rules. Nonetheless, this does not, in and of itself, justify putting counsel ethics in the hands of the arbitrators, as done by the IBA Guidelines or the LCIA Rules.

In short, neither the arbitral tribunal nor the local bar councils are satisfactory fora to rule on allegations of unethical counsel conduct in international arbitration.

It is this very observation that prompted ASA's proposal to create a transnational body dedicated to international arbitration to whom matters of alleged unethical conduct would be referred. It is the Global Arbitration Ethics Council, which would have jurisdiction to enforce ethical rules and to sanction any violation thereof.

The Global Arbitration Ethics Council would be formed of delegates of the major arbitration associations (such as, for instance, IBA, ICCA, ASA, CIArb, CEA) and arbitration institutions (such as ICC, LCIA, SCC, Swiss Chambers, SIAC, HKIAC, Corte de Arbitraje de Madrid) that will, hopefully, adhere to the project.

From this pool of arbitration practitioners, a panel of decision-makers would be formed for each matter referred to the Global Arbitration Ethics Council, taking into consideration cultural, legal, geographical and other particularities of the case. The panel will not be the same to decide a case, for instance, between US counsel involved in an arbitration seated in New York, or between Swiss and French counsel involved in an arbitration in Geneva, or between UK lawyers practicing in Singapore involved in an arbitration in Dubai.

The proceedings before the Global Arbitration Ethics Council would be completely separate from the underlying arbitration proceedings. Any referral to the Global Arbitration Ethics Council would have no impact on the arbitration (except if the arbitral tribunal decides otherwise). This would ensure that the arbitral tribunal can focus on its job (i.e. resolving the dispute between the parties) and that complaints about alleged unethical conduct do not disrupt the arbitral proceedings (by causing delay or putting the arbitrators' impartiality at risk). Except emergency situations, the proceedings relating to ethical issues should even take place after the arbitration is completed, thus allowing counsel to better concentrate on the merits and, by the same token, providing for a useful cooling off period.

The arbitration associations and institution that adhere to the project would elaborate a joint set of core ethics principles, a kind of 'ordre public réellement international', that apply irrespective of the legal or geographical background of counsel or parties. In addition to these core principles, each panel would remain free to apply any other rules or guidelines (such as the IBA Guidelines or local bar rules) that it finds relevant under the circumstances of the case.

The sanctions that could be pronounced by the Global Arbitration Ethics Council would range

from a simple admonishment to the suspension of membership rights, or even the expulsion from the association of which the offending counsel is a member. Arbitral institutions could refuse to accept representation by offending counsel. Monetary fines could also be an option (albeit an option that would require much caution).

In order to provide a legal basis for the disciplinary powers of the Global Arbitration Ethics Council, the participating associations would have to include in their by-laws a rule providing that any member agrees to comply with the aforementioned core principles and to be subject to the jurisdiction of the Global Arbitration Ethics Council. This is typically the legal mechanism used by national bar organisations, but in a larger global scale. Similarly, participating institutions would require counsel to execute a document, at the start of the proceedings, in which they agree to comply with core principles and be subject to the disciplinary powers of the Global Arbitration Ethics Council.

Many details remain yet to be defined before the Global Arbitration Ethics Council is created. This will be the purpose of the global ethics summit that will be held on 26 November 2015 in Geneva. More than fifteen major arbitral associations and institutions have confirmed their presence, thereby guaranteeing truly global discussions leading, hopefully, to a truly global solution. To be continued.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



Wolters Kluwer

This entry was posted on Tuesday, November 24th, 2015 at 10:29 am and is filed under [Ethics](#), [Uncategorized](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.