Who Should Regulate Counsel Conduct in International Arbitration?

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Charles ('Chip') B. Rosenberg, M. Imad Khan (White & Case LLP)

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Historically, there has been no binding uniform code of ethics governing the conduct of counsel appearing before international arbitral tribunals or dictating how issues of counsel conduct are to be resolved in international arbitration. Recently, however, efforts have been made to fill this void by international organizations and arbitral institutions. For example, in 2013, the International Bar Association promulgated its Guidelines on Party Representation in International Arbitration, and in 2014 the LCIA took a step further by promulgating revised Arbitration Rules which included mandatory "General Guidelines for the Parties' Legal Representatives."

On March 30, 2016, the Institute for Transnational Arbitration (ITA) and the American Society of International Law (ASIL) sponsored a conference to explore ethical obligations of advocates in international arbitration and the future of regulating counsel conduct.

In one of the panels, moderator Professor Erin O'Hara O'Connor of Vanderbilt University, panelists Doak Bishop of King & Spalding, Professor Marie-Claude Rigaud of the University of Montreal, and Mairée Uran Bidegain of ICSID, and conference commentator Professor Victoria S. Sahani of Washington & Lee University seemed to agree that there should be some regulation of counsel conduct in international arbitration. However, they did not reach consensus regarding *who* should regulate the conduct of counsel in international arbitration.

Possible Regulators of Counsel Conduct

The panelists proposed several actors who might be responsible for regulating counsel conduct. Mr. Bishop and Professor Rigaud identified the following options in national frameworks and the international arbitration sphere:

(1) national bar associations under whose jurisdictions advocates are licensed to practice law;
(2) national courts of the seat of arbitration;
(3) national courts where the arbitral award is to be enforced;
(4) arbitral tribunals adjudicating the underlying dispute;
(5) arbitral institutions whose rules govern the arbitration; or
(6) a Global Arbitration Ethics Council, as proposed by the Swiss Arbitration Association.

In the absence of any uniform code of ethics governing counsel conduct in international arbitration, there has been a reliance on mandatory national rules. Such national rules, however, are limited in that they (1) rarely envisage the unique circumstances that apply to counsel conduct before

international arbitral tribunals; and (2) can differ substantially between jurisdictions in a number of important respects, which can be problematic not only because counsel may be subject to diverse and potentially conflicting bodies of domestic rules, but also because relying on national frameworks to regulate counsel conduct risks a fragmented response to a transnational problem.

Arbitral Tribunal's "Inherent Right" to Regulate

Given the challenges of relying on national norms, it is not surprising that many international arbitral tribunals have assumed the power to regulate counsel conduct on the basis of the tribunal's "inherent right" or "inherent powers."

The ICSID tribunal in Hrvatska Elektroprivreda, d.d. v. Slovenia, for example, addressed whether it had the power to prevent Slovenia from retaining the counsel of its choice following the claimant's objection based on an alleged conflict of interest. Although the tribunal noted that the ICSID Arbitration Rules did not explicitly give the tribunal the power to exclude counsel, the tribunal concluded that an international arbitral tribunal possesses the inherent power to deal with issues necessary for the conduct of matters falling within its jurisdiction, and that such inherent power exists independently of any statutory reference. Likewise, the ICSID tribunal in Rompetrol Group N.V. v. Romania reaffirmed that while the ICSID Arbitration Rules contain no explicit provision allowing a tribunal to regulate counsel conduct, an ICSID tribunal inherently possesses such power. The tribunal, however, emphasized that its power to regulate counsel conduct was limited and, therefore, should be exercised rarely and only in compelling circumstances.

Similar to ICSID tribunals, an ICC tribunal in an unpublished decision assumed the inherent power to regulate counsel conduct based on its obligation under the ICC Arbitration Rules to protect the integrity of the arbitral proceedings in accordance with fairness and due process.

However, not all arbitral tribunals agree that that they possess the inherent power to regulate counsel conduct. In ICC Case No. 8879, the tribunal addressed whether it had the power to exclude counsel on the basis of a conflict of interest. The tribunal concluded that the question of counsel conduct should be the subject of "domestic proceedings," reasoning that domestic courts are better suited to address grievances regarding counsel conduct than international arbitral tribunals.

Moreover, even when arbitral tribunals have assumed the power to regulate counsel conduct, they have not dismissed the relevance of national rules of ethical and professional conduct in reaching their decisions. For example, when a counsel challenge was raised in the Frankfurt Airport Services Worldwide v. Philippines annulment proceeding, the *ad hoc* Committee noted that it was bound to ensure that counsel appearing before it complied with generally recognized principles of ethical and professional conduct. The Committee thus referenced rules of ethical and professional conduct applicable in different national jurisdictions in order to ascertain common general principles to guide the Committee.

Arbitral Institutions as "the Best of Many Bad Options?"

Ms. Uran Bidegain addressed whether arbitral institutions are well suited to regulate counsel conduct. She noted that there is consensus in the literature in favor of arbitral institutions serving as regulators considering that institutions (1) may empower tribunals to regulate counsel conduct through enforceable rules; (2) are accepted by the international community to impose rules; and (3) already serve as guardians of procedural integrity and fairness. That arbitral institutions are well suited to serve as regulators is also consistent with the 2015 Queen Mary/White & Case International Arbitration Survey, which indicated that the largest portion of respondents (35%) supported regulating counsel through institutional rules.

However, relying on international actors is not without its challenges. As Ms. Uran Bidegain noted, there are several reasons holding back arbitral institutions from regulating counsel conduct, including the risk of fragmentation if the many arbitral institutions around the world promulgate their own set of rules to govern counsel conduct, the risk of losing the flexibility required in arbitration, and the risk of disrupting and delaying the arbitral proceedings.

In light of these considerations, it would seem that arbitral institutions may be “the best of many bad options,” as they can affirm the power of arbitral tribunals to deal with counsel conduct while addressing the transnational nature of international arbitration. The LCIA has already adopted mandatory rules to govern the conduct of counsel appearing before arbitral tribunals governed by its rules. It now remains to be seen whether other arbitral institutions will follow the lead of the LCIA.