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Can Arbitral Institutions Be Expected to Promulgate Effective Rules of Ethics?

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On March 30, ITA and ASIL co-hosted their annual meeting in Washington, DC, and this year's theme was "A Spotlight on Ethics in International Arbitration: Advocates, Arbitrators and Awards." One of the panels explored the question of where best to house authority for determining the ethical obligations of parties and their attorneys. I moderated the panel discussion, and the very distinguished panelists included R. Doak Bishop (King and Spalding), Professor Marie-Claude Rigaud (University of Montreal and Canadian Bar Association), and Mairee Uran Bidegain (ICSID). The panel explored a number of possible ethics regulators, including arbitration associations, and panelists very briefly engaged the question of the institutional incentives to adopt effective ethics rules. Ethics rules can cover a variety of topics, including but not limited to the fees charged to clients, interviewing and preparation of witnesses, duties to disclose and confidentiality rights and obligations, and the use of guerilla tactics. Effective ethics rules would be both sensible and comprehensive, and they would both discourage bad arbitration behavior and provide a level playing field for the parties and their advocates, who commonly are based in different countries. The question of whether arbitral institutions have incentives to provide effective ethical rules is complex and deserves considerable additional exploration. I provide some initial thoughts here from the perspective of an academic outsider to the world of international arbitration. My intent is to provoke a conversation among the insiders about institutional incentives.

Arbitral institutions exist within a marketplace for dispute resolution services, and that marketplace can be expected to significantly influence any ethical rules that the institutions produce. How does the marketplace shape institutional incentives to create effective ethical rules? One might argue that the competition between arbitral institutions should create what jurisdictional competition scholars refer to as a "race to the top,"[1)] with each institution striving to produce the best set of institutional rules to govern the conduct of the parties and their advocates. A race to the top results when the competitors have strong incentives to create rules that customers desire, customers are free to choose among competing rules, and the customers' preferences align with social preferences about those rules.[2)] A race to the top could result for arbitration ethics rules because parties typically choose their arbitral institution before a dispute arises. From this ex ante perspective, the parties may not know who will be the claimant or the nature of their dispute or its merits, and they thus might not know which side is more likely to benefit from questionable ethical tactics. When neither side anticipates an advantage from questionable conduct, each party then might agree to submit disputes to an institution with rules designed to discourage such behavior.

Moreover, if they don't know ex ante what their dispute will look like, they parties are more likely to mutually agree to clear ethical rules that level their playing field. If the parties actually prefer strong and comprehensive ethical rules from an ex ante perspective, then the institutions are well-situated to regulate efficiently.

Party preferences could function in a different manner, however. Parties can sometimes, perhaps often, anticipate their own conduct and the disputes that could arise from it. Moreover, unless the country where an attorney is licensed to practice cedes its regulatory authority over international arbitrations, institutional ethical rules will be added to home country rules, creating additional layers that the lawyers drafting transactions might prefer to avoid. In addition, some ethical rules, such as those governing client fees and witness interviews, could favor common legal practices in some countries over others. Some contracting parties might avoid institutions that craft such biasing rules, out of a concern that the rules could limit the pool of available attorneys in arbitration. If such concerns are commonly present for contracting parties, then the arbitral institutions seeking to attract arbitration business could find themselves engaged in a "race to the bottom."[3] Under these circumstances, arbitral institutions attempt to be as lax as possible with respect to at least some ethical rules. If these are the incentives that the institutions face, then they are not well-positioned to adopt effective ethical rules. Regulatory authority is better placed elsewhere, at least for those ethical rules that create a race-to-the-bottom.

A third possibility is that the incentives faced by the arbitral institutions create something akin to a race to the middle. Under this scenario, the arbitral institutions face incentives to regulate conduct that virtually everyone would deem egregious. However, the institutions would be less inclined to adopt ethical rules that serve to unify party expectations, at least where providing the uniform playing field requires the institutions to take a side in matters where party expectations and lawyer rules and cultures vary. The very act of taking sides could discourage lawyers from countries with norms that clash with the rules from choosing that institution. Moreover, more moderate or nuanced ethical issues also might go unaddressed because parties could worry about the unanticipated consequences of signing on to those rules ex ante. Thus, under a race to the middle scenario, the most problematic ethical tactics are ruled off-bounds, but the more moderate ethical difficulties, and those where countries lack at least fundamental consensus, are left unregulated.

A fourth possibility is that the arbitral institutions choose to cooperate rather than compete over ethical rules for arbitration. The institutions could dampen the influence of the marketplace by forming a group and collectively crafting ethical rules that all agree to adopt and apply to international arbitrations. Competition can create variety, with different institutions adopting differing rules in order to attract a substantial subset of dispute settlement business. Cooperation would lead to uniform rules, at least across the major institutions. Uniform rules can be problematic from a social perspective, because they prevent the benefits of experimentation and they poorly serve the needs of diversely situated parties.[4] Moreover, uniform rules are hard to change, leaving arbitral institutions less able to adapt to changes in disputes and their resolution.[5] Notwithstanding these difficulties, however, cooperation can result when self-interested institutions, acting on behalf of self-interested clients, sense that self-regulation is needed to preempt states from undertaking regulatory efforts that could harm the institutions or their clients. Cooperation makes sense where arbitral institutions are better situated to craft sensible rules for arbitration and/or where the institutions attempt to promulgate less restrictive rules than those anticipated by states. Of course, the states themselves compete for arbitral business, so the threat of draconian state regulation may not be significant. But if it arises, the institutions might wish to take

matters into their own hands.

I predict that when arbitral institutions choose to regulate, whether as a result of competitive or cooperative forces, they are more likely to end up in the middle than at either the top or the bottom extreme. Some might call for more or greater regulations, but additional increments would have to come from the arbitrators, national regulators, or the parties' agreement.[6)] Arbitral institutions are unlikely to face incentives to regulate comprehensively or with strength. If not, the arbitral institutions can take the lead, but they will not themselves provide a solution to the current dilemma.

References

?1 For an argument that state competition for corporate charters creates a race to the top, see Roberta Romano, Law as Product: Some Pieces of the Incorporation Puzzle, 1 J. L. Econ. & Org. 225 (1985).

?2 See generally, ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009).

?3 For an argument that competition for corporate charters results in a race to the bottom, see William L. Cary, Federalism and Corporate Law: Reflections upon Delaware, 83 Yale L.J. 663(1974).

?4, ?5 O'Hara & Ribstein, supra.

?6 On the latter point, the institutions might offer a menu of alternative ethical obligations for parties to choose among, but parties may not want to spend time on these matters ex ante, and their interests often diverge ex post.