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The Quest for Uniformity in Ethical Standards for Party Representatives in International Arbitration

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The lack of consensus on ethical standards of conduct for counsel in international arbitration has given rise to two enduring problems. First, lawyers may find it hard to know how they should act where the professional rules of their home jurisdiction differ from, or conflict with, those at the seat of arbitration. Second, parties themselves may be unfairly disadvantaged where their counsel is subject to more restrictive ethical obligations than counsel for the other side.

A common example of the ethical challenges faced by counsel in practice is witness preparation. In the United Kingdom, the solicitors' code of conduct prohibits lawyers from preparing their witnesses for testimony. This restriction is also imposed upon lawyers from many other common law jurisdictions. By contrast, lawyers in the United States are allowed, and indeed expected, to do so. In an international arbitration, a prudent U.S. counsel will thus proceed as usual and prepare his witnesses for testimony; the U.K. lawyer, on the other hand, could be disbarred for the same conduct. In this case, the U.K. lawyer's client could be disadvantaged for no other reason than that, under the professional rules of his home jurisdiction, their counsel is more restricted when it comes to their dealings with witnesses.

This is clearly an undesirable state of affairs. It would instead be preferable to level the playing field of ethical obligations in international arbitration without offending local codes of conduct. Precisely how we should do this remains the challenge to the question.

A Global Arbitration Ethics Council

One potential solution that has been put forward by the Swiss Arbitration Association ("ASA") is to create a transnational body – the Global Arbitration Ethics Council – with its own set of core ethical principles. The council would comprise arbitration practitioners from the major international arbitration associations and institutions. Its primary responsibility would be to resolve all claims of ethical misconduct in international arbitration, taking into account the cultural, geographical and other idiosyncrasies of the case. A complaint brought before the council would be entirely separate from the main arbitration proceeding.

Vesting the regulatory function in a single, transnational body would also remove the risk of fragmentation and inconsistency. Also, if the major arbitration institutions and associations were to endorse the council, the council could have access to a far broader range of sanctions than is

currently available to tribunals.

However, the fundamental flaw in this proposal is that it is overly idealistic to suggest that the major international arbitration institutions and associations would be able to suddenly reach a consensus as to the "core principles" of ethical conduct in international arbitration. As appealing as this proposal might appear, it expects too much of the major international arbitration institutions and associations as things currently stand.

Other unanswered questions involve the council's jurisdiction and the extent of the council's disciplinary powers. Proponents of the idea have suggested that all that is needed would be for the major arbitration institutions to require lawyers participating in arbitrations under their rules to be subject to the council's jurisdiction. But how far would this jurisdiction reach? Would the council have the power to sanction lawyers for conduct that is in breach of the council's core principles, even though such conduct is permitted under the counsel's local bar rules? And would the council's powers be limited to admonishment or would they include the power to exclude counsel from future arbitrations? Clearly there are many important issues that would need to be addressed before a transnational body such as the Global Arbitration Ethics Council can be established and, perhaps more importantly, obtain global recognition.

Binding Codes of Ethical Conduct

Another potential solution would be for the major arbitration institutions to individually adopt binding codes of ethical conduct which would automatically be incorporated into their rules of arbitration. One such example is the LCIA's General Guidelines for the Parties Legal Representatives (2014). The LCIA Guidelines are binding on any counsel who appears in an arbitration administered under the LCIA Rules. They provide guidance in areas such as ex parte communications with arbitrators, submissions to the tribunal, disclosure and the preparation of evidence. In the event of a breach, the LCIA Guidelines empower the tribunal to reprimand the relevant counsel and take any other measure to fulfil the tribunal's general duties under the LCIA Rules.

The benefit of such an approach is that if key international arbitration institutions were to adopt similar binding codes of conduct, more and more parties to institutional arbitration would be forced to adopt them and thus become familiar with them. This, in turn, would lead to greater uniformity in ethical standards of conduct in international arbitration.

However, the key problem with this proposal is that a mandatory, binding code of conduct may not cohere well with the inherently flexible nature of arbitration. Moreover, compelling party representatives to comply with a binding code of conduct seems to overlook the fact that standards of ethical conduct may vary across regions and jurisdictions. This does not solve the immediate problem of bridging the ethical gap. While the end goal would be the creation of a universal and uniform code of ethical conduct, we should not, in our attempts to move towards that goal, think that standards of ethical conduct are independent of culture and context.

The ability of a tribunal to use adverse costs orders as a sanction for unreasonable conduct by counsel can be a powerful tool to regulate procedural conduct – although such orders inherently penalise the end user, not their lawyer. Therefore, another problem is whether a tribunal, which has power over the parties to an arbitration, should also have the power to adjudicate on the conduct of the parties' representatives. Critics of this approach argue that decisions regarding the ethical

conduct of counsel are alien to the arbitral process and should remain separate from it. On this view, the responsibility of the tribunal is simply to resolve the arbitration proceedings in an orderly manner; decisions about whether a lawyer has acted unethically should be left to the local bar association. Indeed, one concern is that requiring tribunals to determine whether counsel have acted unethically may compromise the impartiality and independence of the tribunal when it comes to deciding on the merits of the case.

Non-Binding Codes of Ethical Conduct

A third potential solution, which has drawn recent support from former Singaporean attorney-general V.K. Rajah, would be for international arbitration institutions to adopt non-binding ethical codes of conduct. The IBA Guidelines on Party Representation in International Arbitration (2013) are one such example. The IBA Guidelines cover similar areas to the LCIA Guidelines, though they provide for broader sanctions including adverse costs orders. The key difference between the two is their legal force. Unlike the LCIA Guidelines, the IBA Guidelines only apply where the parties or tribunal agree that they shall apply, and subject to any amendments that they might make.

The main benefit of an approach based on non-binding instruments is that it would facilitate greater uniformity in ethical standards while preserving the parties' freedom to adopt and amend them. However, this approach does have its limitations. First, the IBA Guidelines were intended to provide guidance in areas where party representatives commonly encounter some degree of ethical uncertainty. They do not, however, cover all aspects of party representative conduct in international arbitration. Second, there is still the risk of conflicting ethical obligations where the institution's code of conduct conflicts with or remains silent on areas covered by applicable national bar rules. Third, the sanctions available to a tribunal under the IBA Guidelines are directed largely at the parties rather than their counsel. There therefore remains some doubt as to the efficacy of such guidelines in actually shaping the conduct of party representatives. Finally, as the ASA has pointed out, there is the concern that the IBA Guidelines draw primarily on common law practices, thereby limiting its applicability in civil law jurisdictions. The extent to which such guidelines can bridge the common and civil law divide, remains to be seen.

The Future

Clearly, the IBA Guidelines are not perfect. However, they do provide a blueprint for a practical, short-term approach, which, in the long run, will help bring party representatives closer to a common understanding of what should and should not be done. Admittedly, there will be some practices, such as witness preparation, on which a consensus will not easily be reached. That being said, non-binding codes of conduct should go so way to helping establish a common ground in many other areas of practice in international arbitration. The immediate challenge lies in garnering support for non-binding codes of conduct among major international arbitration institutions like the SIAC. In the longer term, this approach could be improved by making the codes of conduct more comprehensive, ensuring that they draw on both common law and civil law practices, and transferring the regulatory function from tribunals to the arbitration institutions themselves. Though non-binding codes of ethical conduct may not create international consensus overnight, they provide a meaningful way forward in the quest for uniformity in ethical standards for party representatives in international arbitration.

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