Kluwer Arbitration Blog

Rethinking Counsel Ethics in International Arbitration

Iris Ng (Singapore Attorney-General's Chambers) · Thursday, December 12th, 2019

Counsel ethics has been a recurring talking point in arbitration circles. Most recently, the topic was raised at the 2018 SIAC Congress, then again by a panel at the 2019 Australian Bar Association Conference. The continued interest in this issue is unsurprising. As arbitration becomes more international, we must increasingly confront the difficulties that arise from diverging ethical standards in multiple jurisdictions. A range of approaches has been proposed, ranging from mandatory regulation through a binding code of conduct, to soft law instruments such as the IBA Guidelines, to a *laissez-faire* approach of no additional regulation. This article argues that to resolve the counsel ethics issue, it is worth considering a choice of law rule for ethics rules that is implemented via a non-enforcement pact by bar associations or law societies (referred to in short as "ethics enforcement bodies") around the world.

Problems arising from the plurality of ethical views

As explained by Prof Catherine Rogers in her book *Ethics in International Arbitration*, there are two main problems arising from the plurality of ethical views in international arbitration.

The first is the double deontology problem, which arises where a lawyer is regulated by the legal professional or ethical rules of more than one jurisdiction and these rules conflict. Counsel is then left in the catch-22 position of violating a rule no matter what he or she decides to do. Prof Rogers raises the example of a German attorney who ended up being jailed in England for refusing to make disclosure under English law, when he would have been disciplined for violating a client's confidence under German law had disclosure been made.

The second is the "inequality of arms" problem, where proceedings are procedurally unfair because one side "gains" an advantage that is not open to the other because its counsel is permitted to engage in conduct the other side's counsel is not. There are at least three contentious areas:

- Witness preparation. What happens when an English lawyer is barred from witness preparation, but the opposing side's American lawyer is obliged to do so by his professional conduct rules?
- Document disclosure. US-style discovery is infamous for being more extensive than disclosure in civil law traditions.
- Lawyer-client communications. Lawyers are sometimes subject to different disclosure duties vis-à-vis their clients. This divergence is illustrated by the Commentary on Article 5.3 of the Council of Bars and Law Societies of Europe (CCBE) Code, which states: "In certain Member States

> communications between lawyers … are normally regarded as to be kept confidential as between the lawyers … [and] cannot normally be passed to the lawyers' clients … In yet other Member States, the lawyer has to keep the client fully informed of all relevant communications from a professional colleague acting for another party, and marking a letter as "confidential" only means that it is a legal matter intended for the recipient lawyer and his or her client, and not to be misused by third parties …".

Review of current proposed solutions

Two of the more popular proposed solutions to the above problems are a uniform ethical code or institution-specific codes of conduct. The former entails getting an independent third party to formulate a uniform code of ethics for counsel. The most fruitful attempt thus far is the IBA Guidelines on Party Representation in International Arbitration ("IBA Guidelines"). The latter involves arbitral institutions themselves coming up with codes of conduct. Examples include the LCIA's General Guidelines for the Parties' Legal Representatives that are annexed to the 2014 LCIA Rules (discussed here and here).

In between is the hybrid approach of uniform ethical codes that are co-opted as part of institutional rules. This has been done in respect of the IBA Guidelines by the 2016 Australian Centre for International Commercial Arbitration Rules and the 2016 Lagos Chamber of Commerce International Commercial Arbitration Centre Rules.

However, all these approaches share one key shortcoming: They do not resolve the double deontology problem, even though they would resolve the inequality of arms issue (given that both sides are bound by a single code). As Prof Gary Born points out, the difficulty with such a regulatory framework is that any guidelines issued would "sit on top of" national ethical standards that apply to counsel. In that sense a uniform ethical code adds to, rather than cuts through, the morass of rules that counsel faces.

Solving the double deontology problem through choice of law analysis

My argument is essentially that to solve the double deontology problem what we need is not more rules, but a *way to choose* which of the existing rules should apply and a *mechanism* of implementing this rule.

The choice of law solution is the next-best solution to binding, universal harmonisation, given that an international convention is probably too much to hope for in light of the numerous more pressing issues plaguing the international community. There is also the challenge of formulating truly "universal'" or representative codes of conduct (*e.g.*, the IBA Guidelines have been criticised for their North American and European focus) that are also concrete enough to give useful guidance.

Formulating an appropriate choice of law rule

Conflict of laws, or private international law, deals with the issue of which law should be applied to a dispute that has cross-border elements (amongst other things). This is done through the formulation of choice of law rules specific to each kind of dispute (*e.g.*, contract, tort or property disputes). There are at least five possible choice of law rules to decide which law governs when the double deontology problem arises:

- Rule 1: Rules of the lawyer's jurisdiction of origin prevail.
- Rule 2: Rules of the qualification that the lawyer is acting under prevail.
- Rule 3: Seat rules prevail.
- Rule 4: Contractual approach – the parties' choice of ethics rules applies to both parties' lawyers.
- Rule 5: Self-determination – the lawyer's choice of ethical rules applies to himself or herself.

I argue that Rule 5 is the most suitable rule.

In favour of Rule 1, a lawyer-centric choice of law rule makes sense because the lawyer is the object of regulation. The jurisdiction of origin would have to be the jurisdiction of first qualification, given that other potential indicia such as nationality and domicile of the lawyer are unhelpful (these are not necessarily connected to the lawyer's working life). But even leaving aside the arbitrariness of this rule (if first-qualified, why not last-qualified?), Rule 1 is arguably too parochial for international arbitration. Even though a jurisdiction retains an interest in regulating the conduct of its legal professionals no matter where that professional is, that understanding is traditionally formulated in relation to a lawyer qualified in one jurisdiction who *would otherwise be unregulated* abroad. A more flexible view is arguably needed for lawyers qualified in multiple jurisdictions who act in international arbitration cases.

Rule 2 is a transaction-specific rule that focuses on the capacity in which the lawyer is acting in any given case. For example, for a French and English dual-qualified lawyer, is he or she being retained for expertise in French or English law? While superficially attractive, Rule 2 runs into difficulty when we recall that lawyers are not always retained specifically for their legal expertise in one system of law. Other factors include their commercial acumen, their familiarity with certain subject matter, *etc*.

Rule 3 – opting for the ethical rules of the seat – is simple, clear, and effort-saving in that it piggybacks on something that must generally be established in international commercial arbitration. Against this, there are three counterarguments. First, we appear to be indirectly allowing parties to select ethical rules for their lawyers because they are allowed to choose the seat (granted, this concern might not be significant in practice because parties arguably have more important factors on their mind than counsel ethics in choosing a seat). Secondly, it would be excessively onerous for the lawyer, who would be subjected to a system of ethics regulation that he or she may be unfamiliar with (and could unknowingly breach). Thirdly, there is the issue of who bears responsibility for disciplining lawyers who fall afoul of seat ethics rules. We could leave this to the ethic enforcement bodies, but they would have little incentive for disciplining lawyers who are not even part of the local bar.

Rule 4 finds some support in the literature. The idea is that "parties may choose the ethics rule applicable to the lawyers in the proceeding, exactly as they may choose the governing law".[1)] Commentators point to the similarity between law and ethics rules to justify this – both embody public policy, regulate conduct, and exist to facilitate transactions.[2)] But there is, in my view, an

important conceptual distinction. In choosing the substantive and procedural law, parties are choosing the system of law applicable *to themselves and their transaction*. In choosing ethical rules, parties are choosing rules to apply to *their lawyers*. Party autonomy justifies the former (affecting parties *inter se*) but not the latter. Additionally, there are practical difficulties if parties do not expressly choose the applicable ethics rules. Would we then have to look for an implied choice, or a choice with the closest and most real connection (applying by analogy the test for substantive law of a contract or law governing the arbitration agreement)?

We then come to Rule 5. When faced with the double deontology problem, you allow the lawyer to choose which jurisdiction's qualification he or she would like to be treated as acting under. That must be declared at the outset of the arbitration and counsel will not be allowed to change his or her mind along the way. Counsel must then play by the chosen ethical rules, or risk being hauled up for disciplinary action before the ethics enforcement body of that chosen jurisdiction. Rule 5 is fair to the lawyer, who will not be subject to an alien system of law. It is efficient because resources need not be spent on an inquiry into the lawyer's background or connections to the case. It accords with comity, because its foundational assumption is that all ethical systems are equally worthy of consideration and choice. As for the potential objections to Rule 5:

- It might be argued that lawyers will be opportunistic and simply pick the rules that are perceived as more "lenient". But even if they do, is that not pursuant to a moral decision that they are entitled to make for themselves? There are various views of what it means to be a good lawyer (see *e.g.*, David Thunder, "Can a Good Person be a Lawyer?" and Stephen Pepper, "The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities"). The decision of which model of lawyering to adopt is one that can *only* be made by the lawyer in his or her exercise of autonomy and practical reasonbleness.
- It might also be argued that it is objectionable for lawyers to be free to choose their fetters. But the objection is misdirected because in Rule 5, lawyers are not choosing *whether* to be ethically regulated but *which set* of ethical obligations to be regulated by. The entire premise of invoking Rule 5 is that there are at least two sets of ethical rules the lawyer may be bound by. The lawyer is being asked to pick *one*; "none" is not an option.

The role of ethics enforcement bodies

Any solution to double deontology problem through choice of law analysis must involve ethics enforcement bodies because they are the ultimate decision-makers on whether to prosecute wayward lawyers. I suggest that ethic enforcement bodies could agree on a non-enforcement pact or pledge in accordance with Rule 5. That is, they come to an understanding that they should *only* initiate proceedings regarding the conduct of a lawyer *if* the lawyer has opted to be bound, in that arbitration, by that jurisdiction's ethical rules.

The incentives for ethics enforcement bodies is essentially maximum payoff with minimum effort. There is understandably little appetite for extensive reform because it is not even clear how big of an issue the double deontology problem is in practice. Besides the empirical question of how many lawyers are qualified in multiple jurisdictions, sometimes the conflict that leads to the double deontology problem might be illusory: (a) There may be exceptions that a lawyer can invoke (such as client consent), that would take the sting out of one of the rules and resolve the conflict. (b) National law may carve out international arbitration from general regulation to give counsel some

wiggle room. For example, Swiss or French law-regulated counsel may engage in pre-testimonial communication with witnesses in international arbitration, even though this is banned in litigation or domestic arbitration.[3)] Only if these two situations do not apply is there a "true" conflict that bring the double deontology problem into play. With the non-enforcement pact that codifies Rule 5, the onus and initiative is placed *on the lawyer* (the party with the most interest) to declare which system of rules applies. Only after that determination is made will the chosen jurisdiction's rules apply, and the ethics enforcement body be called upon to act *if* there is a breach.

Such a pact can take a similar form to the Equal Representation in Arbitration Pledge or the Women in Law Pledge, albeit one with ethic enforcement bodies as pledgees or signatories.

To sum up, a choice of law rule combined with agreement by bar associations on a non-enforcement pact would go some way towards solving the double deontology problem.

**The article is written in the author's personal capacity, and the opinions expressed in the article are entirely the author's own views.*

References

?1 N M Crystal and F Giannoni-Crystal, '"One, No one and One Hundred Thousand" … Which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration" (2013) 32 Mississippi College Law Review 283 at 284.

?2 J M Little "The Choice of Rules Clause: A Solution to the Choice of Law Problem in Ethics Proceedings" (2010) 88 Texas Law Review 855 at 874.

?3 Rogers, Catherine A., Cross-Border Bankruptcy as a Model for Regulation of International Attorneys (June 20, 2010). *Making Transnational Law Work In A Global Economy: Essays In Honour Of Detlev Vagts*, Pieter H. F. Bekker, Rudolf Dolzer, Michael Waibel, eds., Cambridge University Press, 2010, p 645.

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