Kluwer Arbitration Blog

Can I do this? – Arbitrator's Ethics

Philipp Peters (Konrad & Justich) · Tuesday, November 9th, 2010

"The jury system is a grand institution; so was the tower of Babel – all the difference is, that God took a hand in the one, and the devil occasionally takes a hand in the other."

This is Valmaer's view on the selection of juries for court litigation in Section 3 of his "Lawyer's code of ethics: a satire". Although the process of selecting and appointing arbitrators does not necessarily call for comparison with the selection of a jury, the question touched upon by this quote is equally applicable to either: whom do we trust with deciding our case?

Whether the nomination of arbitrators must be counted among the fundamental rights of a party in international arbitration, has been, and continues to be, the subject of discussion, commentary and even court decisions. But it should be undisputed that arbitration can work only if the parties have faith in the integrity of the system as a whole. Unethical actions by decision makers in a dispute detract from this integrity and can severely damage the parties' faith in the arbitration process. In other words, how can a party have faith in the system, if it does not trust the decision makers?

However, where do we draw the line between an arbitrator's acceptable behaviour and misbehaviour? What are the standards for distinguishing "ethical" from "unethical" actions? With many arbitrators hailing from the legal profession, national rules for professional conduct might be a tempting starting point for tackling the issue. This approach, however, has repeatedly been identified as incorrect and bound to fail for several reasons.

Firstly, national legislation is often not primarily aimed at contributing to or satisfying international standards and an international system in which the number of nationalities determines the number of different sets of rules is not a system at all. This problem has been approached repeatedly by international initiatives. Rule sets like the Code of Conduct for European Lawyers published by the Council of Bars and Law Societies of Europe seem to have gone more than one step in the direction of a more broadly applicable professional code. Two years ago, the Arbitration Committee of the International Bar Association founded the IBA Counsel Ethics Task Force which is currently in the process of "investigating" differences in national rules in an attempt to determine whether these differences could undermine the principles of fairness and equality in international arbitration. Only time will show whether this initiative will develop into an attempt to set down an international standard for a code of conduct in arbitration proceedings.

All these initiatives share one particular attribute with national rules for professional conduct. They are catered towards the more classical role of the attorney as party representative, which limits their suitability for establishing an ethical standard for arbitrators.

Finally, it is quite clear that a considerable number of arbitrations involve arbitrators who are neither lawyers nor bound by any code of ethics.

It is therefore understandable that the need for an international standard of “ethics for arbitrators” has been discussed repeatedly. However, there are critics who do not consider the idea of drafting international guidelines for arbitrators’ ethics worthwhile. Idealists argue that the answer to questions of ethics should come naturally to the homo moralis. Relativists consider the idea of presuming to define a uniform standard to be illusive, considering the cultural particularities that define ethics. Pragmatists dismiss the idea of an international standard as unfeasible, citing the lack of enforceability as its critical weakness.

Most of these arguments are valid and understandable to some extent. Of course, there is broad consensus on cornerstones or arbitrators’ behaviour and a number of basic rules will be accepted by most arbitrators as a matter of course. The general ideas of impartiality and independence, duty of disclosure, equal treatment and due diligence will usually not be disputed amongst international practitioners. However, this does not mean that those of us who are not blessed with an unwavering sense of ethics for every situation might not sometimes find themselves confronted with the question “Can I do this?” when dealing with the finer nuances of these principles. After all, it is often these “gray areas” in which arbitrators might be most tempted to act inappropriately, sometimes just by omissions, thereby often alienating the parties in an arbitration. In this regard, it is often not improper conduct in the decision making process of an arbitration. Rather, it is the arbitrator’s failure to conduct and steer the proceedings in a way that serve the purpose of arbitration.

Of course, cultural differences matter in a world of international business, and it is clear that in an arbitration related context, ethics cannot be universally defined in every detail. However, this does not mean that there is no common ground or minimum standard of conduct for arbitrators. After all, the “international” in “international arbitration” is said to shape this tool in a way that goes beyond an accumulation of national standards.

And, of course, in an ideal world, players who violate the rules have to bear the consequences for these violations. But this does not mean that the unbinding nature of transnational guidelines cannot influence arbitrators in considering their own actions. After all, compilations like the IBA Guidelines on Conflicts of Interest in International Arbitration, while not legally binding, and sometimes rejected by national courts and other decision making bodies, have – at least in part – found wide acceptance. It would be hard to argue that they have not influenced “ethics” in international arbitration to some extent.

Initiatives like the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes should therefore be welcome. On a broader international level, the IBA Rules of Ethics for International Arbitrators are now more than twenty years old, and even though the discussion about ethics is far from being dead, it seems to have shifted more towards questions of counsel ethics while codes of conduct for arbitrators focus mostly on the questions of impartiality and independence. While it is perfectly understandable that these issues are of utmost concern, keeping alive the discussions on the broader subject of “arbitrators’ ethics” seems to be desirable.

More recently, some arbitral institutions have taken up the challenge of creating codes of conduct for arbitrators acting under their auspices, most of them in Eastern Europe. Examples include the Court of Arbitration at the Polish Chamber of Commerce, the Permanent Court of Arbitration

attached to the Chamber of Commerce and Industry of Slovenia or the Latvian Chamber of Commerce and Industry. While some of these codes are no more than general, moral guidelines, others go further and regulate specific situations which typically arise during an arbitration. Sometimes, these rules of ethics are enforced. For example, under the rules of the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia, an arbitrator violating the code of ethics is explicitly considered to have failed to fulfill his or her duties. On the basis of this, the institution "may" terminate the arbitrator's mandate either upon request of a party or, in exceptional circumstances, on its own accord. This regime makes the code of ethics more than just a guideline, creating a mechanism to control an arbitrator's behaviour beyond just the adherence to fundamental principles.

It remains to be seen whether arbitral institutions will follow this path of regulating arbitrators' conduct in the future. For the moment, the major institutions seem to be satisfied to leave this issue to the international arbitral community. On an international level, there should be no reason not to aim for an updated broad consensus, except, maybe, for the difficulties typically associated with achieving such consensus. After all, the consolidation of an international ethical standard for arbitrators might be a part of the recipe that could help to reduce the number of instances in which parties find themselves having an "arbitration hangover".

This entry was posted on Tuesday, November 9th, 2010 at 12:17 am and is filed under Arbitrators, International arbitration
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