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A Code of Conduct for Counsel in International Arbitration

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Tuesday, November 16th, 2010 · WilmerHale

The subject of codes of conduct for international arbitration practitioners has received considerable attention of late. On one side of the debate, several proposals for such a code of conduct have been circulated recently – one at the ICCA Congress in Rio de Janeiro, another by the International Law Association ("ILA") Study Group on the Practice and Procedure of International Courts and Tribunals, and others by leading commentators. Proponents maintain, among other things, that a code of conduct for counsel in international arbitrations would bring greater integrity and certainty to the practice of international arbitration and level the playing field for practitioners from different jurisdictions and legal traditions. On the other hand, others are skeptical about the need for any such code of conduct, with participants at a recent ICC-YAF roundtable in Paris generally concluding that such a code was unnecessary and would lead to confusion. The International Bar Association ("IBA") appears to have taken the middle ground, adopting what seems to be a "wait-and-see" approach to the subject.

A reluctance by international arbitration practitioners to confront the subject of their common ethical obligations would be an ill omen. Experienced practitioners know very well the fundamental importance of counsel and counsel's behavior in most international arbitrations. Arbitral tribunals routinely rely on counsel's professional obligations – for example, in complying with disclosure orders, in communications with witnesses, in making factual and other representations and the like. In that sense, the content and reliability of counsel's ethical obligations is central to the arbitral process. The dramatic increase over past decades in the number of international arbitrations, and the expansion of the international arbitration community to include large numbers of new participants, underscores these points: implicit cultural or professional expectations cannot, if they ever could, be relied upon to ensure fair play. Whatever the outcome of a debate about the ethical obligations of counsel, it is essential to the integrity of the arbitral process that the debate take place. And seen from a different perspective, unless international arbitration practitioners have this debate, then others will have it for them – whether national regulators, legislators or others.

Of course, a code of conduct for counsel in international arbitration raises numerous difficult issues. Most fundamentally, what would be the character of any international code of conduct for counsel in international arbitration? Would the code purport to be binding and, if so, by what legal mechanism? Alternatively, would the code be in the nature of non-binding "best practices," which could provide guidance but no more? Similarly, what mechanisms would exist (or be adopted) to enforce a code of conduct for counsel in international arbitrations – national courts, national bar

associations, international arbitral tribunals?

On a more practical level, what organization(s) and/or institution(s) should discuss, and perhaps eventually work to draft, a code of conduct for counsel in international arbitration? The IBA is often mentioned as a natural candidate for devising such a code, given its previous involvement in developing the IBA Rules on Taking of Evidence and Guidelines on Conflicts of Interest. But initiative on the subject has at least so far been taken by the ILA and others – raising at least the question whether a role remains for the IBA?

And on the most granular level, what would be the content of a code of conduct? How would one reconcile very different approaches in different national jurisdictions to subjects such as witness preparation, privilege, confidentiality, zealous representation, candor to the tribunal and fees? Whose approach – civil law or common law or, at an even more nuanced level, Swiss, English, French, Chinese, Lebanese or U.S. – to a particular ethical issue should be used? How can different approaches be reconciled?

Finally, questions will also arise as to the relationship between any international code of conduct and national rules of professional responsibility. In many jurisdictions, counsel's conduct in an international arbitration is subject to obligations imposed by his or her local bar (which may or may not vary depending upon the fact that counsel is engaged in an arbitration or an arbitration seated abroad). What should be the relationship between these national rules of professional responsibility and an international code of conduct designed specifically for international arbitral proceedings?

All of these questions are, rightly, regarded as both delicate and difficult. That does not argue, however, for ignoring these questions. On the contrary, the difficulty and sensitivity of these issues instead argues strongly for confronting them. On the one hand, a failure to do so may well be taken as an inability of the international arbitration community to address issues that lie at the core of the integrity and legitimacy of international arbitration. Conversely, when the contents of particular ethical obligations are discussed in the practical contexts of international arbitral proceedings, broad consensus will very likely emerge on many or most issues, with attention then focusing on how to resolve particularly contentious areas of disagreement, either through substantive solutions or through choice-of-law rules.

The time has come for debate on a code of conduct for counsel in international arbitration. Doing so is essential to maintaining the integrity and promise of international arbitration. The debate involves difficult issues, but ones which need to be addressed in order for the arbitral process to maintain its preferred status in resolving international disputes.

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