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Incorporating IBA Guidelines Into A "Code of Ethics": A Step Too Far?

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The Board of Directors of the "ACL Arbitration Centre" (the Arbitration Centre of the "Portuguese Chamber of Commerce and Industry – Lisbon Commercial Association") recently approved a new set of rules for arbitration proceedings administrated under its auspices. Along with the new rules, the Board also approved an "Arbitrator's Code of Ethics". Divided into 9 articles, this Code addresses issues such as the duty of disclosure, impartiality, independence, diligence and confidentiality. It also addresses issues concerning ex-party communications and the prohibition on soliciting appointments. All these are important principles, but on this occasion I want to draw your attention to the general principle provided for in Art. 1(3): 'This Code of Ethics shall be interpreted and integrated bearing in mind the IBA Guidelines on Conflicts of Interest in International Arbitration.'

Many issues may be raised in respect of the wording of this provision, in particular as to the meaning and extent of the expression "bearing in mind" ("tendo presente" in the original version). This expression allows us to interpret and construct this provision as a true incorporation of the IBA Guidelines into the Code of Ethics. Thus, we raise two fundamental questions.

Firstly, one must think of the impact of the IBA Guidelines on the arbitration proceedings that are still pending. This Code does not repeal any previous code or rules of ethics. In other words, it is a completely new regulation for ACL arbitrations. On the other hand, there is no provision as to the applicability of the provisions of this new Code. Therefore, the question that arises is whether or not these provisions are immediately applicable to pending procedures. Assuming that they are immediately applicable, do they have any retroactive effect?

By way of illustration, let us assume that prior to the entry into force of the Code of Ethics, a party has appointed as an arbitrator a lawyer of a law firm that 'had a previous but terminated involvement in the case without the arbitrator being involved himself or herself' (2.3.5 of the IBA Guidelines). I will not resume the debate but, prior to this Code of Ethics and within the Portuguese legal context, it was not clear whether this situation would entail a duty on the arbitrator to disclose (much less for those who believe in "Chinese walls") and if the silence of the parties would amount to a waiver. During the procedure, it becomes a patently "waivable red" situation. Is a new period for challenge now open? Is the arbitrator (now) required to disclose this fact? It is obvious that the disclosure is an "on-going" duty but this feature applies to new situations (i.e. the arbitrator must disclose new occurring situations of possible conflict). Is the "on-going" disclosure duty also applicable to changes in regulation?

These questions should have been dealt with by an appropriate provision in the Code of Ethics: in the light of new ethics rules, the arbitrator is bound to disclose situations that were not previously subject to that disclosure.

Secondly and most importantly, is there a real need to incorporate the IBA Guidelines into a "Code of Ethics"? I do not challenge the value of the IBA Guidelines in itself. As Jan Paulsson said about regulating arbitration, 'the future clearly lies in the emergence of fundamental best practices by which a variety of institutions, while preserving the identities and specific incidental features which certain users find attractive, may establish a baseline of acceptable practices' ('*Is Self-Regulation of International Arbitration an Illusion?*', LSE Conference, 9 May 2013). The Guidelines are indeed a remarkable effort to reproduce the 'understanding of the best current international practice firmly rooted in the principles expressed in the General Standards' (IBA Guidelines on Conflicts of Interest in International Arbitration).

In this respect, I absolutely agree with the timeliness, the pertinence, and the content itself of the IBA Guidelines. However, they are not more than that. They are mere guidelines. The Guidelines 'are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties' (Guidelines). Moreover, they are 'a beginning, rather than an end, of the process' (idem). The Guidelines surely represent a reflection of the "dynamic status quo", to quote Jan Paulsson once more.

Again, is there a need to "incorporate" the Guidelines in any institutional set of rules or any Code of Ethics? My first reaction was to question whether this "incorporation" would not lead to some normative crystallization or to some distortion resulting from a mathematical application of these guidelines. Moreover, would such "incorporation" trigger some confusion?

In 2010, the Portuguese Arbitration Association ("APA – Associação Portuguesa de Arbitragem") enacted a Code of Ethics, binding its members when serving as arbitrators. The majority of the arbitrators listed at ACL are members of the APA. However, there is not an exact match between the provisions of the APA's Code and the provisions of the ACL's Code (namely the provisions applicable by reference to the IBA Guidelines). By way of illustration, the APA's Code of Ethics provides that the arbitrator, before accepting the mandate, shall inform the nominating party about 'any professional or personal relationship with the parties or their representatives, which the arbitrator may deem relevant' (Art. 4(2)(a) of the Code of Ethics). According to the IBA Guidelines, the duty to disclose is not left to the arbitrator's judgement but rather to a criterion related to a situation where 'facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence (…)'. There is a significant nuance between the "judgement" of the arbitrator and the "eyes of the parties". What are then the provisions that an arbitrator should comply with?

On the other hand, it has been considered that the IBA Guidelines are shaped for large arbitration communities but not so much for small communities such as the Portuguese, where personal relationships are simply impossible to avoid, although this would not imply any inability to conduct arbitral proceedings in an impartial and independent manner. To what extent is the Code (and the IBA Guidelines by reference) appropriate for small arbitration communities?

These are certainly questions that should have been asked long before "biting off more than one can chew", to borrow a common expression.

Indeed, a comment was made on one of the proposals for the APA's Code of Ethics suggesting that this Code should only set forth the general principles of arbitrator ethics 'which may be further developed and detailed as the Portuguese arbitration practice will require'.

In the meantime – and always before any inclusion of the IBA Guidelines – one must observe and analyse the implementation of the Code of Ethics by itself and use it as 'an instrument for leveling and diffusing homogeneous rules and a pedagogical vehicle to the best ethical practices' (to quote once again the above cited comments on the proposal for the APA's Code of Ethics).

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