

Kluwer Arbitration Blog

A Step in the Right Direction – Why National Arbitration Institutions Will Benefit from Adopting International Ethics Standards

Michael McIlwrath (MDisputes) · Saturday, February 1st, 2014

This is a response to yesterday's post by Duarte Gorjão Henriques, [“Incorporating IBA Guidelines Into A ‘Code of Ethics’: A Step Too Far?”](#)

My unambiguous answer to his title question is “right direction, not far enough!”. My response is from the perspective of an in-house counsel involved in negotiating dispute clauses in cross-border contracts.

Henriques, a practicing arbitration lawyer, does not share my enthusiasm.

The institution that is the subject of discussion is the ACL Arbitration Centre (of the Portuguese Chamber of Commerce and Industry) in Lisbon, where Henriques practices. He believes the organization may have acted rashly when it recently incorporated the IBA Guidelines on Conflicts of Interest into its Code of Ethics and arbitration rules, rendering it binding on all arbitrators in ACL proceedings.

While he does not question the value of the IBA Guidelines themselves, Henriques asserts that they 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.”

In other words, this argument goes, a provincial institution should be....well, provincial, and presumably leave cross-border disputes to others. As surprising as this may sound to those accustomed to law firms, institutions, and even cities jockeying for primacy in the competition for international arbitration, it is not inconsistent with the virtual absence of Portugal in disputes with parties from outside of the Portuguese-speaking world.

Fertile Ground for a Portuguese Arbitration Institution

As many international practitioners know, especially those active in the oil and gas industries, important commercial and legal ties crisscross the Portuguese-speaking world. One good example is Angola, a high-growth economy where a fair share of business, and perhaps an even greater percentage of legal work, is carried out in Portugal. This stems from a shared legal and political history and is reinforced today by other factors, including notoriously onerous visa procedures for entering the sub-Saharan country. And Brazil, as everyone knows, is a relative newcomer to the

New York Convention on the Recognition and Enforcement of Arbitral Awards.

Despite the potential opportunity, however, I have rarely seen a Portuguese arbitration institution proposed for dispute resolution in contracts where at least one party is from a non-Portuguese speaking country. And it would be an even rarer case for one to be accepted.

This leaves an obvious gap in an important and economically expanding region. To put things in perspective, think of Asia without the role played by SIAC or the HKIAC, or Russia and CIS countries without the Stockholm Chamber.

Assessing the Quality of a Foreign Arbitration Institution

No party wants to risk being “home-towned” by a provincial institution set up to benefit the locals. As an in-house counsel responsible for dispute resolution in my company, I would never advise my internal clients to accept the rules of a foreign/national arbitration institution without reasonable assurance of its (1) ethics and (2) competency in cross-border disputes.

But how can we know these things about an institution if we have no first-hand experience with it?

The most logical place to start is an institution’s public website, if they have this, or simply to call them and ask for information. (Some institutions do not have websites and others do not take or return calls, and in my mind this, by itself, is sufficient reason to reject them.)

The questions are fairly basic. Does the institution publish its rules in multiple languages, including in English? Does it appear to have a level of governance, ethical standards, and management that will provide comfort to a foreign party? Do they have transparent procedures for appointing arbitrators? Is their roster of arbitrators populated with an ample number of competent foreign arbitrators as opposed to just local lawyers? Do they offer only arbitration or also mediation?

[The ACL Arbitration Centre’s website](#) has a lot of material. Unfortunately for me, the site is in Portuguese, which I do not speak, although I was able to navigate my way to an English version of the [institution’s arbitration rules](#). Further, the names on the institution’s roster of arbitrators did appear – at least to me – to be locally grounded.

As a foreign party unfamiliar with the Lisbon arbitration community, I cannot assess the accuracy of Henriques’ assertion of the additional problem that they all also have unavoidable personal relationships. It may not matter, though, since this is a common and safe assumption for a party considering a foreign institution’s roster of mainly local practitioners.

From an Unlikely Place, A Bold Step in the Right Direction

There is nothing wrong with being a close-knit community of local practitioners content to handle domestic arbitrations. But with [article 12 of its arbitration rules, which incorporates the IBA Guidelines on Conflicts of Interest](#), the institution is laying the groundwork for broader ambitions.

To a foreign party who knows nothing else about the ACL, the message is clear: integrity is not some unknown local code of ethics, but well-known international standards that are taken so seriously that any arbitrator who fails to adhere to them will be removed.

It is difficult to imagine a stronger statement of its integrity that an institution could put into its

rules.

Right Direction, More Steps Needed

The ACL or any other Portugal-based arbitration organization will not become attractive to parties outside of the Portuguese-speaking world with this step alone. Much more is needed to convince us that the institution has the ability to handle our disputes efficiently and competently, and that it can appoint arbitrators from outside of Portugal.

But the incorporation of the IBA Guidelines is a bold and unquestionably sensible move in the right direction. It will be interesting to see whether, and how long, it takes other national institutions to follow.

In the meantime, score one for the Portuguese.


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