

Kluwer Arbitration Blog

Is It Time for a Code of Conduct for Arbitrators in International Commercial Arbitration?

Sadaff Habib (Equanimity Arbitration) and Nayiri Boghossian (Al Owais Advocates & Legal Consultants) · Friday, October 6th, 2023

As the pool of international arbitrators has grown, and continues to grow, acting as an arbitrator is now seen more as a career path as opposed to a retirement plan. In fact, we can now confidently say that a [profession of arbitrators exists](#).

With this, the identity of a typical arbitrator has significantly changed, and the pool has become increasingly diverse. This growing diversity, accordingly, has given rise to the need for guidance on how arbitrators should interact with one another and with party counsel. This is a topic which has not yet received enough attention as the focus has so far been on ways to improve arbitration in terms of procedural, legal and technical aspects. See, for example, prior coverage on Kluwer Arbitration Blog on related topics, such as [building quality and trust in the arbitral process](#) and the Spanish Arbitration Club's [code of best practice in arbitration](#).

While most professional rules, which an arbitrator (subject to their profession) may be bound by, dictate certain standards of professional conduct, including ethical standards, there are no such rules when it comes to arbitration. We explore in this post the rules and guidelines that currently apply to an arbitrator's conduct, whether the existing body of rules and guidelines are adequate and the need to revisit these rules and guidelines in order to create a code of conduct for arbitrators which arbitral institutions can apply. The post focuses on institutional arbitration because such institutions are in a position to regulate the conduct of arbitrators.

What Do the Existing Rules and Guidelines Require of Arbitrators?

An arbitrator's conduct is not subject to the laws or rules of a certain country except that the law of the seat often requires an arbitrator to maintain independence and to act impartially. For example, where Dubai is the seat of arbitration [Article 10\(4\) of the UAE Federal Arbitration Law No. 6/2018](#) requires arbitrators to act impartially and independently. Similarly, where the UK is the seat of arbitration, [Section 33\(1\)\(a\) of the Arbitration Act 1996](#) requires arbitrators to act impartially. This requirement is also present in the rules of many arbitral institutions. For example, [Article 14.1 of the Dubai International Arbitration Center Rules 2022](#) and [Article 13.1 of the Singapore International Arbitration Center Rules 2016](#) both require that arbitrators act with independence and impartiality.

Turning to the existing guidelines on offer in relation to an arbitrator's conduct, these guidelines should be considered with caution not only because they are not binding but also because they are insufficient.

The most popular amongst these are the “[IBA Guidelines on Conflict of Interest in International Arbitration](#)” (IBA Guidelines). They set out the various scenarios covering an arbitrator's relationship with the parties and their counsels in order to determine the need for disclosure of conflict of interest given that independence and impartiality are fundamental.

The “[IBA Rules of Ethics for International Arbitrators](#)” go further as they require that, in addition to independence and impartiality, arbitrators respect other ethical standards such as diligence, efficiency and confidentiality.

The “[ICCA Guidelines on Standards of Practice in International Arbitration](#)” (ICCA Guidelines), which were launched in 2021, attempt to go above and beyond the IBA Guidelines discussed above as they require that all participants in an arbitration act with integrity, respect and civility. To act with respect would not only involve a mutual respect for colleagues and participants in an international arbitration, but also a respect for diversity and an awareness of the risk of unconscious bias to refrain from discriminatory conduct. Under the ICCA Guidelines, arbitrators are to conduct themselves in a manner that is courteous, impartial and respectful. Examples of such conduct include empathy, avoiding a patronizing or an authoritarian attitude, exercising self-control even in stressful situations, avoiding unconscious bias or offensive language.

There is no disagreement among the above referenced rules and guidelines that independence and impartiality are the key obligations of an arbitrator. Diligence has also become a requirement in recent years. While the ICCA Guidelines have gone a step further through requiring an arbitrator to be respectful and act with civility, and have provided concrete examples of such conduct, the arbitration community would benefit from more detailed guidelines particularly in light of the increasing diversity it is witnessing whether in terms of arbitrators or counsels.

A Code of Conduct for Arbitrators?

It is worth noting in this context that the international investment arbitration community has recently witnessed the adoption of the [UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes](#), a joint work of both UNCITRAL and ICSID. The draft Code of Conduct requires civility in an arbitrator's conduct and defines “civility” as “*being polite and respectful when interacting with participants in the IID proceeding. It is also associated with the Arbitrator's demonstration of professionalism.*” However, we argue that this needs to be further expanded to perhaps refer to examples of what may constitute impolite or disrespectful behavior.

Similarly, the international commercial arbitration community requires further guidance as mentioned above. Readers would agree that acting courteous and in a respectful manner is a basic and obvious requirement. What is less obvious though are the subtle ways in which disrespect manifests itself. This becomes particularly relevant in tribunals that reflect the diversity of the arbitration community. People come from different backgrounds and with that carry different perceptions of what acting courteous and with respect involves. Hence, there is a need for a code of conduct which clarifies what is acceptable behavior in international arbitration.

One would expect tribunal members to deliberate with the aim of exchanging views in a meaningful manner, which requires to genuinely listen to another arbitrator's viewpoint and respect such viewpoint. However, it is not unheard of that an arbitrator may fail to respect the viewpoints of another arbitrator during deliberations and/or in any interaction amongst the tribunal members. One form of disrespect is to undermine a differing viewpoint. Where such conduct stems from unconscious bias based on age, gender or ethnicity, awareness is required in the arbitrator profession. Moreover, an arbitrator should not hinder tribunal deliberations where she/he has a different viewpoint. Instead, such an arbitrator should engage in a civilized dialogue with the other tribunal members, that is, in receptive and open communication during deliberations and throughout the proceedings. Being receptive of a differing viewpoint requires genuinely listening and assessing such viewpoint as well as a willingness to look at issues from a different perspective. Disagreement and objection to another person's views can and should be done in a respectful manner.

An arbitrator should also apply the highest standards of respect and civility when communicating with party counsel. For example, an arbitrator should ensure that party counsels who belong to a diverse group get the chance to present their case without interruption during oral hearings, that no offensive or undermining comments are made whether by the tribunal or opposing counsel and that they are treated equally in every aspect.

It is clear that politically incorrect remarks particularly based on gender or ethnicity and/or comments or language that were historically tolerated in certain groups can no longer and should no longer be tolerated within the arbitration community.

Monitoring the New Rules of Conduct

Whether an entire new set of rules of conduct for arbitrators is created or the ICCA Guidelines is expanded, issuing a new code of conduct for arbitrators is not enough. The implementation of such a code would need to be monitored. Inevitably, the responsibility and the power to do so rests with the arbitral institutions, as far as institutional arbitration is concerned, because they remain the primary regulators of international arbitrators.

Arbitral institutions could consider the following accountability measures to ensure that an arbitrator observes such a code of conduct.

Such a code of conduct could be integrated by institutions into their rules and the institution could require that an arbitrator at the time of accepting the appointment undertakes to abide by these principles in addition to confirming and/or signing a declaration of independence, impartiality and availability, which has been introduced by certain institutions such as the [ICC](#).

An arbitral institution could incorporate in its rules a mechanism to deal with a situation where an arbitrator does not comply with the code of conduct. This is not a novelty.

[Article 17.3 of the SIAC Rules 2016](#) allows the President who is defined as "*the President of the Court and includes any Vice President and the Registrar*" to remove an arbitrator in certain instances such as failure to perform his functions in accordance with the SIAC Rules or where an arbitrator is not acting with due diligence. Although the authors understand that this provision is rarely used and if used this is done with caution, it is a great example of an avenue to deal with

non-complying and/or unethical arbitrators. Similar provisions related to the rules of conduct may be implemented by other institutions.

Conclusion

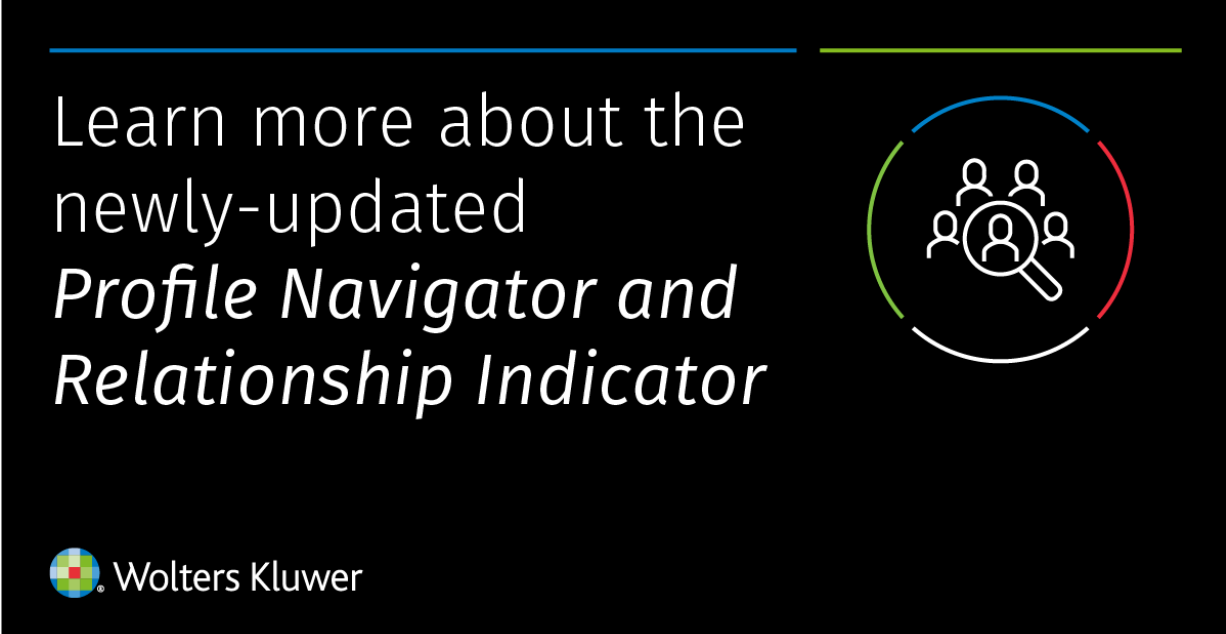
An arbitrator is an individual that the parties entrust to arbitrate their dispute in a cost and time effective manner. It does not serve the parties where the tribunal has extensive deliberations because of an arbitrator's poor conduct or where a tribunal exhibits bias towards a party's counsel, for example, because of race, gender or ethnicity; it only adds to the parties' cost and time. And the adage, justice delayed is justice denied, holds true. Therefore, and as is the case with most professions, it is necessary for the arbitration community to consider having a code of conduct for arbitrators in international commercial arbitration to adhere to, and for institutions to assist in holding arbitrators accountable. Equally important is creating an environment where collegial and respectful behavior prevails and such environment can only be achieved through adopting new rules of conduct.

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