Attorney Ethics in International Arbitration

By
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INTRODUCTION

A character in Kurt Vonnegut’s *God Bless You Mr. Rosewater* stated,

“In every big transaction . . . there is a magic moment during which a man
has surrendered a treasure, and during which the man who is due to receive it
has not yet done so. An alert lawyer will make that moment his own, possessing
the treasure for a magic microsecond, taking a little of it, passing it on. If the
man who is to receive the treasure is unused to wealth, has an inferiority
complex and hopeless feelings of guilt, as most people do, the lawyer can often
take as much as half the bundle, and still receive the recipient’s blubbery
thanks.”

I have not been involved in international arbitration cases for almost a
decade. But in recent years, the impetus to promulgate codes of conduct
suggests there are concerns about the conduct of those who participate in
international arbitration. Arbitrators, arbitral institutions, parties and counsel vie
for vast sums of money. Whenever money is at stake, there is potential for
misbehavior. I evaluate the effects of adopting codes of conduct for attorneys
and arbitrators, and suggest that although they may have some impact on
arbitrator behavior, they are unwieldy and ineffectual in regulating counsel and
can have no effect on parties’ misconduct.

As with Holmes’s bad man theory of contracts, one can generally
prescribe ethical conduct only if there is a sanction for noncompliance. For
example, when conduct is criminal, the state sanctions the behavior through
prosecution. In reality, however, the state rarely prosecutes anyone involved in
litigation, even for the crime of suborning perjury. And, in international
arbitration, there generally are no oaths, the violation of which can result in
prosecution. Moreover, unlike the judicial system, international arbitration
generally is not subject to any forum-state disciplinary system.

State intervention is not impossible. Unethical behavior by counsel or an

1. *Kurt Vonnegut, God Bless You, Mr. Rosewater* 9 (1965)
arbitrator might be subject to disciplinary action by the body governing lawyers where they are licensed. But the most practical sanction is that which may be imposed by the arbitral tribunal itself as to parties and counsel or by the appointing authority as to arbitrators. And, theoretically, exposure of unethical behavior may cause harm to one’s professional career.

ETHICAL ISSUES

Parties in arbitrations can represent themselves or can be represented by lawyers, legally trained representatives or non-lawyers, such as corporate officers and technical advisors. Generally, except for small or specialized commercial arbitrations, parties in international arbitrations have legal representation. Some national laws require parties in international arbitration to establish that counsel is authorized to act on their behalf. This was the practice of the Iran-United States Claims Tribunal.

Legal representation in international arbitration can involve the same ethical issues that arise in legal representation in other matters—for example, conflicts of interest, incompetence, lack candor, dishonesty, communications with opposing parties and arbitrators, improper compensation arrangements, and privileges. Different regimes have a variety of rules or laws applicable to these issues. The extent to which choice of law principles can govern professional conduct issues is not easily determined. As Gary Born has written, when each state applies its own disciplinary rules, counsel may be unfairly subject to different standards in the same proceeding. But to relieve a lawyer of ethical obligations by the standards of the organization under which the lawyer is licensed to practice also is not workable. Relying on the rules in place at the seat of arbitration is not satisfactory—counsel generally are not familiar with the rules of conduct where the arbitration takes place. In light of these barriers to uniform regulation, Born says “the best resolution of this subject would be through the development of uniform international rules of professional conduct, applicable to counsel in international arbitral proceedings.” Although this suggestion is desirable, I believe in reality it may well be utopian.

IMPRACTICIBILITY OF A CODE OF ETHICS

Providing a uniform code of ethics for counsel will have little impact on the segment of international arbitrations in which there is no counsel or the party representatives are laypersons. As noted, industry arbitrations, such as commodities arbitrations, conduct their proceedings without counsel. Furthermore, governments are not always represented by attorneys. For

5. Id. at 2319.
example, at the Iran-U.S. Claims Tribunal, representatives for Iranian government agencies were not, to my knowledge, always attorneys. And there was no indication that those who purported to be lawyers were licensed to practice law. In international arbitrations, there is simply no assurance that someone who is acting as a representative, even as a legal representative, is actually an attorney licensed by a regulatory body.

Ethical norms do not exist as to many areas of behavior. There are some basic rules accepted almost everywhere. Examples include courtesy and respect for the tribunal members and opposing counsel, honesty and integrity, and the avoidance of unnecessary conflicts. Commonly, ethical precepts vary greatly from state to state. A uniform code may diverge from the standard of professional ethics in the country where the international arbitration is located, and the standard of professional ethics in the jurisdiction in which lawyers are licensed.

Even within a state, codes of ethics are not easily administered. Within the United States, state codes may vary among themselves and with the American Bar Association code of ethics. Those administering codes of ethics for attorneys have rendered many interpretative opinions on the prescribed ethical rules. States have had to create hotlines to provide advice to attorneys. And the codes are violated, as demonstrated by disciplinary proceedings for violations of ethical canons. Notwithstanding difficulties in their application, ethical codes in the United States are reasonably effective. Without reasonable clarity as to the application of codes of ethics and without an effective mechanism for sanctioning misconduct, such ethical guidelines are not sufficiently useful.

REGULATING MISCONDUCT BY THE TRIBUNAL

To the extent attorneys’ conduct in international arbitration can be regulated, it must be by the arbitral tribunal. To do so, the arbitral tribunal has to set forth at the outset what it expects from the attorneys. The subject of those expectations can include conduct during the arbitration, treatment of witnesses, spoliation, good faith in presentations, disclosure of information, communications with witnesses, communications with arbitrators, applicability of privileges and more. Then, if an attorney violates one of these expectations, the Tribunal can impose sanctions, such as disregarding evidence, drawing adverse inferences, and, in extreme cases, disqualifying counsel and even imposing a terminating sanction, if appropriate.

Arbitrator independence and decisiveness are central to this system of enforcement. Yet, can we be sure that arbitrators, who are paid by the parties, selected by attorneys, and looking for their next assignment will terminate a proceeding or issue a meaningful sanction when counsel or a party has misbehaved? At the Iran-United States Claims Tribunal, during a hotly contested case between the governments, counsel for the American company requested various files in other Tribunal cases in which Iran had apparently taken a position inconsistent with its position in the case under consideration.
After this matter was raised, the Iranian representatives went into the Registry at night and removed an entire category of its claims, including those in which it had taken the inconsistent positions. The President of the Tribunal took no action. It has been reported that in another proceeding, Iran’s representative learned, after impermissibly gaining information about the content of arbitrator deliberations, that an adverse ruling on issues of expropriation was likely. Presumably, Iran’s representative had knowledge of the confidential deliberations, while the American claimant did not. Iran’s representative then sought to settle the case at a figure below that which had been decided by the panel. Notwithstanding knowledge or suspicions of these improprieties, no sanction resulted. No ethical code would have prevented these reported inappropriate actions.

Inappropriate behavior by counsel and a party conceivably might result in non-enforcement of an award. This sanction is most effective when there is evidence that gross improprieties affected the arbitrators’ decision, such as when a party presents false evidence. But any such sanction can only take place if improper conduct is discovered and established. In international disputes, it is not easy to find evidence of misbehavior, and non-enforcement of awards is almost universally disfavored.

Despite these obstacles, I suppose a code of conduct might provide a starting place for arbitral tribunals to establish ground rules of behavior. Employing an “ethical checklist” at the outset of an arbitration would arguably be a more effective means to establish these grounds rules. The effectiveness of even these measures depends upon the impartiality, thoroughness, and determination of the arbitrators.

REGULATING ARBITRATOR MISCONDUCT

The regulation of the conduct of arbitrators shows how difficult it is to restrain the conduct of participants in international arbitration. Notwithstanding arbitrator codes of ethics, arbitrators still may engage in improper delegation of tasks, inappropriate interviews with party representatives, failure to act in a timely manner, charging excessive fees, and engaging in conflicts of interest. Investor-state arbitration, in particular, has come under increasing criticism due to questions regarding arbitrator integrity.

“Some authors have written of The Businessman’s Court with the implication that arbitrators tend to favor claimant-investors in order to increase prospects of reappointment.”

Certainly in tribunals in which there are government-appointed arbitrators, it is naïve to suppose that all of them will be impartial. Indeed, even the notion that party-appointed arbitrators are impartial has been labeled as a “pretense.”

As Professor Park has noted, “they [arbitrators] get pressed into service to fill the gaps left by overly vague institutional rules or lack of foresight by parties’ advisors.” Skyrocketing arbitrator compensation certainly is a factor that may compromise arbitrator behavior. For this reason, codes of conduct may not be particularly effective in controlling arbitrator misconduct. I suppose a widely-recognized code of conduct certainly has some effect on arbitrator behavior.

CONCLUSION

The concerns regarding the ethical conduct of parties, counsel and arbitrators in international arbitration may be seen as one strand of the growing disillusionment with arbitration in general. What was once a public service operation has become a profit center unto itself. The powerful employ it to the disadvantage of the less powerful. As a result, there has been a growing movement to proscribe predispute arbitration clauses in consumer, employment and franchise agreements. Courts have in increasing instances held certain arbitration clauses unconscionable and have refused to enforce awards. Legislatures are providing for detailed disclosures by arbitrators. Governments are opting out of ICSID. There is a concern that to the extent arbitration removes civil cases from the judicial system, the judicial system will be further harmed financially, and the development of the law will be adversely affected. On the other hand, we cannot ignore the fact that arbitration expanded to meet a need. Without international arbitration, we would be faced without a major tool to resolve international disputes. Rather than rejecting the

13. Park, supra note 9, at 676.
16. See e.g. CAL. CIV. PROC. CODE § 1281.9.
international arbitration model, our efforts should be directed to insuring the
integrity of international arbitration by focusing on costs, transparency and
impartiality.

As Woody Allen said in the graduation speech in Sideways: “Summing up,
it is clear the future holds great opportunities. It also holds pitfalls, the trick will
be to avoid the pitfalls, seize the opportunities, and get back home by six
o’clock.” Although a uniform code of conduct appears unworkable as a means
of control over counsel, it has promise for guiding arbitrators in dealing with
counsel. And codes of ethics for arbitrators may have some salutary effect. We
must seize the opportunity to search for effective means to foster confidence in
those who participate in international arbitration and in the integrity of the
system.