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ACICA
Australian Centre for International Commercial Arbitration

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ACICA
Australian Centre for International Commercial Arbitration

Leader in International Dispute Resolution

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THE ACICA REVIEW

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Ethics in arbitration – individual obligations - global consequences

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This paper was presented at the Federal Court of Australia, Melbourne, on 7 March 2018 as part of the National Commercial Law Seminar Series organised by the Federal Court of Australia, the Commercial Bar and Monash Law School.

Introduction

In the past decade there has been increasing interest in the subject of ethics in arbitration, particularly in international commercial arbitration. There are often no clear answers to ethical dilemmas and in many instances ethical obligations of lawyers in one jurisdiction conflict with equally appropriate and value-based ethical obligations of lawyers subject to different professional conduct regulations in another jurisdiction. It is therefore not surprising that there is in fact no international standard of ethics applicable to all persons engaging in international commercial arbitration (including both arbitrators and counsel). The task of reconciling professional conduct rules from around the world into one precise and commercial set of standards which acknowledges and respects cultural differences is a daunting task.

Chief Justice Sundaresh Menon expressed a different view, when his Honour stated in his opening of the ICCA Congress in Singapore in 2012:[1]

> *As we contemplate these problems of moral hazard, ethics, inadequate supply and conflicts of interests associated with international arbitrators, it seems surprising that there are no controls or regulations to maintain the quality, standards and legitimacy of the industry. This has much to do with how modern arbitration developed from an initially small and closely-knit group of honourable practitioners who saw arbitration as the discharge of a duty to help resolve the disputes of people of commerce in a fair, even-handed and commercially-sensible manner rather than as a business proposition. We look back at this in-built informal mechanism of peer group controls with nostalgia: but this "age of innocence" as it has been famously described has very much come to an end. Is it time then for us to give up our cherished notions of autonomy and subscribe to an international regulatory regime?*

Paula Hodges QC, in a paper published in Kluwer Law International in 2017, referenced Chief Justice Menon's speech, Paula observed that:

> *… the significant increase over the past decade in the number of international arbitrations taking place and the expansion of practitioners participating in the process necessarily renders the question of ethics an important, but increasingly difficult, one to address.*

However, when you contemplate the very factors which make international arbitration attractive to business, such as flexibility, confidentiality and award enforcement (under the New York Convention), it is easier to understand why it is that in spite of all the discussions and the attempts of institutions and associations around the world to impose ethical obligations on those involved in international arbitration, the task is in fact riddled with challenges.

To explain this further –

(a) Flexibility

When parties agree that their disputes will be resolved by arbitration, they can choose ad hoc or institutional arbitration, they can choose the seat or place of arbitration (which will dictate the procedural law applicable to the proceedings), they can agree

1 http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf

that hearings will be held somewhere other than the seat, they can decide that the arbitration agreement will be governed by a particular law (not always the same law as the container agreement).

Again, when a dispute arises, they can choose an arbitrator from a particular jurisdiction, of a particular profession and having membership of a particular association.

These choices are one of the reasons that arbitration is seen as flexible – but the choices made mean that in any one arbitration proceeding, ethics might apply through the seat, the home jurisdiction of any lawyers involved (including the arbitrators), under the arbitral rules or through the professional membership of the arbitrators. And whilst we all have in our own mind a definition of what ethical conduct involves, cultural differences and jurisdictional differences mean that expectations are not always consistent.

(b) Confidentiality

Arbitration proceedings are almost always confidential. This means that only the parties and the tribunal know how a proceeding is conducted. This also means that policing a global ethics standard might be difficult – on the other hand, the fact that arbitration is confidential suggests that the development of a global code of ethics would further encourage confidence in the arbitration process.

(c) Enforcement of arbitral awards

In convention countries, where enforcement proceeds under the New York Convention, enforcement does not involve an analysis of the merits of the arbitration and the principal documents provided to the court are the arbitration agreement and the award itself.

Supporting affidavits might provide the court with additional information where there is a defence of lack of procedural fairness, however this information will be limited to evidence which supports one of the exceptions to enforcement as set out in the *International Arbitration Act 1974* (Cth) (Act). The evidence will not provide details to the court of the specific conduct of an arbitrator or counsel who is alleged to have breached ethical standards.

This paper considers ethical standards applicable to both arbitrators and to counsel practising in international commercial arbitration. It includes a review of the sources of ethical standards and identifies questions in relation to their application and operation, particularly in an international market.

What are ethics?

Ethics are usually described as moral principles that govern a person's behaviour or the conduct of an activity. In the legal sense, we understand ethical obligations as professional conduct rules. In a sense, they are rules of conduct which are derived from and reflective of standards and values.

The discussion on ethics in international arbitration, however, often blurs the line between true ethics as moral principles and rules of conduct. There is a tension for example in the commentary which includes an obligation of disclosure (for the purpose of avoiding bias or conflicts) as an ethical obligation – the obligation to disclose a conflict or matters which might suggest a conflict might be described more accurately as a rule of conduct. One must accept, however, that the moral principles applied by the potential arbitrator in deciding whether to disclose something which is not black and white does raise a question of ethics.

Ethical obligations are often associated with professions.

Professions Australia (an Australian organisation representing 20 professional associations), defines a profession as:[2]

> *…. a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of*

2 http://www.professions.com.au/about-us/what-is-a-professional

learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others. It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community.

With one exception the full extent of this quote could quite easily describe those who practice in arbitration, including arbitrators and counsel (disciplined group of individuals – adhere to ethical standards – possessing special knowledge and skill – apply this knowledge and skill in interests of others). The missing link is the absence of an agreed code of ethics. This absence has led to vigorous debate in recent years and the creation of an increasing number of published rules and guidelines seeking to fill what might be described as a 'void', but all having limited rather than universal application.

There is a question (and a divergence of views), however, as to whether a global code of ethics would change the way international arbitration is conducted or is necessary to ensure the integrity of the arbitration process. The obvious challenge (if consensus can be reached to introduce a code of ethics) is that the arbitration involves individuals engaging in a common activity, but where that engagement traverses multiple geographical locations and legal jurisdictions. The identification of the 'moral principles' which should apply to arbitrators and arbitration practitioners in such a disparate group is difficult, even where many individual members are subject to specific professional ethical obligations through regulation in their home jurisdiction. Another difficulty (as mentioned above) is distinguishing clearly between what truly is a question of ethics and what is more accurately described as a rule of conduct.

Whilst there is much written about ethical standards, the term ethics seems to be referred to in the context of arbitration with what might be described as a 'stretch definition' – it extends to conduct and not just to values with which we associate ethics.

That said, it is clear amongst the commentators that certain ethical standards are part of the playing field in arbitration – these include the standards and expectations around disclosure and conflicts of interest, equal treatment of parties, a fair hearing and evidence. Initiatives such as that of the Swiss Arbitration Association (ASA) in 2014 when it called for the creation of a Global Arbitration Ethics Council demonstrate the extent to which this topic occupies the minds of international arbitration practitioners. The Swiss proposal involved an international council formed with representatives of all arbitration associations and arbitral institutions around the world who chose to be involved in the project.

The proposal itself had challenges – issues requiring resolution included whether the pool of representatives would indeed be representative of the individuals who might come before it, what the procedures would be for the hearing and determination and the question of the substantive rules which would be applied by the council.

Interestingly the findings released by the ASA at the time of the proposal noted that its working group on counsel ethics in arbitration found that *there were extremely few complaints lodged with national bar councils or supervisory bodies in relation to international arbitration*[3].

It is entirely appropriate to ask in the context of this research, whether further work is required in relation to an international ethics code or whether the existing regime, as imperfect as it is, is the best we can get.

Sources of ethics in international arbitration

Professional conduct rules

The primary source of ethical standards applicable to lawyers who act as arbitrators and legal counsel appearing in arbitration proceedings will be those which

3 http://www.arbitration-ch.org/en/asa/asa-news/details/993.asa-working-group-on-counsel-ethics-releases-latest-findings.html

apply by virtue of the individual counsel's admission to practice. Certain commentators have posed the question as to whether those standards, which are usually recorded in rules of professional conduct, continue to apply to counsel when they engage in arbitration outside of their home jurisdiction. The author's view is that it would be contrary to the whole purpose of ethical standards to say that they only apply to a lawyer within certain geographical boundaries.

Gary Born would agree[4]:

> *The professional conduct rules of many national bars either expressly or impliedly regulate the actions of lawyers admitted to practice before that bar during their representation of parties to an international arbitration. There is no 'arbitration exception' or 'international arbitration exception' from most national rules of professional conduct; a lawyer is subject to the same ethical regulations in arbitration as in his or her other professional activities.*

Indeed, it is difficult conceptually to argue that an arbitrator or counsel working in a jurisdiction other than their home jurisdiction is not required to apply the same ethical and professional standards to which they are amenable in their home jurisdiction. There is a further very practical reason why this should be the case – many hearings and case management conferences do not take place face to face – the lawyers representing the parties in these conferences can be anywhere in the world, including in their own office. It makes no sense for legal counsel to be subject to one set of ethical or professional conduct rules when they participate in a hearing by phone or video and to lose the obligation to comply with those rules when he or she leaves the country.

This being the case, the potential for conflicting standards for party representatives acting within the same arbitration proceeding is immediately apparent. One such conflict which is often cited by commentators is the interaction and briefing by counsel of fact witnesses and expert witnesses in international arbitration proceedings. There are distinct differences across jurisdictions as to the extent to which communications can take place, the extent to which a witness can be 'briefed' before giving evidence and the aptness or otherwise of contacting a witness for another party.

International guidelines

The International Bar Association (**IBA**) has been active in this area and produces a series of guidelines which help regulate the conduct of arbitrators and counsel in international arbitration.

These include the:

- IBA Guidelines on the Taking of Evidence in International Arbitration
- IBA Guidelines on Conflicts of Interest in International Arbitration
- IBA Guidelines on Party Representation in International Arbitration

These guidelines can be used in both institutional and ad hoc arbitration, but will only apply with the parties' agreement or pursuant to the tribunal's order.

Sometimes the arbitration agreement itself will refer to the guidelines – sometimes the guidelines will be referenced in 'procedural order no 1'. A reference alone does not make adherence to the guidelines mandatory – it is very common to refer to the guidelines as 'a guide' and subject to other orders made in the arbitration proceeding.

The Chartered Institute of Arbitrators (**CIArb**) also publishes Guidelines and Protocols on a range of topics. It separately contracts with all its members that they will comply with the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009) (**the Code**). The purpose of the Code (as explained in its preamble) is:

> *so that members may be reminded of the professional and moral principles which should at all times govern their conduct.*

The Code has two parts – the second is relevant to arbitrators – it contains a code relating to the conduct of

4 Gary B. Born *International Commercial Arbitration*, Wolters Kluwer 2nd ed, p 2852.

members when acting or seeking to act as a neutral. The Code, insofar as it relates to neutrals, provides that it *forms part of the rules of any dispute resolution process* and sets out standards in relation to behaviour, integrity and fairness, conflicts of interest, competence, information, communication, conduct of the proceedings, trust and confidence and fees.

The Code is not often expressly raised in arbitration proceedings, however it has wide application; the Chartered Institute of Arbitrators has over 15,000 members in over 133 countries around the world[5]. It is highly likely that at least one member of any tribunal and one or more counsel appearing before that tribunal is a member of the CIArb and bound by the Code.

Turning now, albeit briefly, to the IBA Guidelines on Party Representation in International Arbitration.

The discussion in the guidelines explaining their genesis and the work of the task force which was responsible for them contains some interesting and salient observations about the challenges in ethical standards in international arbitration. The diversity of rules and regulations which might apply to counsel in any international arbitration was one such issue, where the authors note:

> *The range of rules and norms applicable to the representation of parties in international arbitration may include those of the party representative's home jurisdiction, the arbitral seat, and the place where hearings physically take place. […] The potential for confusion may be aggravated when individual counsel working collectively, either within a firm or through a co-counsel relationship are themselves admitted to practise in multiple jurisdictions that have conflicting rules and norms.*

As an aside, a review of the guidelines discloses rather curiously that a statement in the guidelines itself highlighted the very 'confusion' to which the authors referred.

The following statement is in the preamble to the articles in the guidelines:

> *A Party Representative, acting within the authority granted to it, acts on behalf of the Party whom he or she represents. It follows therefore that an obligation or duty bearing on a party representative is an obligation or duty of the represented party, who may ultimately bear the consequences of the misconduct of its representative.*

It is true that where counsel engages in misconduct (which might also equate to a breach of ethical obligations), there may be consequences for a party who is represented by that counsel, but the ethical obligations of professionals are obligations of each individual, certainly in Australia under the Legal Profession Uniform Law[6]. So you see that even here (where, to be fair the guidelines make it clear that they do not seek to override or supplant local professional codes of conduct), there are ambiguities as to whether obligations belong to the counsel or the party on whose behalf the counsel acts.

In addition to providing clear guidelines in relation to a number of steps in the arbitral process (including detailed guidelines in relation to disclosure of documents), each of the guidelines is accompanied by explanatory notes. These notes are useful as a reference to identify where there may be differing standards of conduct amongst arbitration practitioners and what approach might be adopted to 'level the playing field'.

The application of the guidelines was the subject of observations of the English Commercial Court in *W Limited v M SDN BHD* [2016] EWHC 422. This involved a challenge to an award on the ground of serious irregularity affecting the tribunal; it was based on perceived (rather than actual) bias. The court observed that the guidelines did not bind the Court, but that they were valuable and it was appropriate to examine them at least as a check.

However, having noted that they made a distinguished contribution in the field of international arbitration, the Court found that there are weaknesses in the 2014 guidelines in two aspects relevant to the challenge.

> *First, in treating compendiously (a) the arbitrator and his or her firm, and (b) a party and any affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived. Second, in*

5 http://www.ciarb.org/about

6 *Legal Profession Uniform Law Application Act 2014* (Vic) and identical legislation in other States of Australia

this treatment occurring without reference to the question whether the particular facts could realistically have any effect on impartiality or independence (including where the facts were not known to the arbitrator).

The reference to this case is not to criticise the IBA guidelines, but to demonstrate that they are but guidelines which will not always provide the answers, particularly in circumstances where actual or perceived bias is a question of substantive law.

Institutional rules

Guidance as to ethical standards are included in the arbitration rules of many of the world's leading institutions. Their application is of course limited to arbitration proceedings which are conducted under the rules of the institution. The standards which consistently appear in arbitrations rules cover impartiality and independence of arbitrators, conduct of the proceedings, qualifications of arbitrators, communication with parties and confidentiality. Some of the arbitral institutions also set out what might be described as 'general obligations'.

For example, the International Chamber of Commerce (**ICC**) Note to Parties and Arbitral Tribunals published on 30 October 2017[7] states that:

Arbitral tribunals are expected to abide by the highest standards of integrity and honesty, to conduct themselves with honour, courtesy and professionalism, and to encourage all other participants in the arbitral proceedings to do the same.

A number of the arbitral institutions also impose obligations on arbitrators to promote efficiency.

For example, the Hong Kong International Arbitration Centre Rules (Art 13.5) require that[8]:

The arbitral Tribunal shall do everything necessary to ensure the fair and efficient conduct of the arbitration.

Similarly, the London Court of International Arbitration (LCIA) Rules 2014 (Article 14.4) provide that:

Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include: . . . (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.

Many of the rules also regulate specifically the conduct of counsel appearing in the arbitration proceedings (often by reference to other rules or guidelines).

For example:

The ACICA Rules provide (Art 8.2) that:

Each party shall use its best endeavours to ensure that its legal representatives comply with the International Bar Association Guidelines on Party Representation in International Arbitration in the version current at the commencement of the arbitration.

The ICC Rules (para 33) provide that:

Parties are encouraged to draw inspiration from and, where appropriate, to adopt the IBA Guidelines on Party Representation in International Arbitration.

The LCIA Rules go one step further. Article 18.5 of the Rules provides that:

18.5 Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.

The Annex is short and sweet; it comprises 7 paragraphs. Paragraph 1 sets out the purpose of the guidelines which is to *promote the good and equal conduct of the parties' legal representatives appearing by name within the arbitration*.

Note as an aside, that here you have an obligation on the parties to ensure their representatives behave in a particular way, and yet the focus in paragraph 1 is on the individual named (which it might be said reinforces the fact that individuals remain accountable for their own

7 https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf
8 http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf

ethical conduct).

The Annex specifically states that its guidelines are not intended to *derogate from any mandatory laws, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to a legal representative appearing in the arbitration*.

Again here, there is the acknowledgement that the guidelines do not cover the field – that they operate in conjunction with any other applicable ethical standards or codes.

The type of conduct prohibited by the Annex includes:

- Engaging in activities intended to unfairly obstruct the arbitration or jeopardise the finality of the award
- Making false statements
- Relying on false evidence
- Concealing documents

The Annex provides the arbitral tribunal with authority to decide when a breach has occurred and whether a sanction is necessary.

Finally, the Singapore International Arbitration Centre (**SIAC**) published a Code of Ethics for Arbitrators in 2015. The SIAC Code includes requirements regarding disclosure (as one would expect), but also obliges the prospective arbitrator to accept an appointment only where, amongst other things, the prospective arbitrator *is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect*. Specifically, the SIAC Code states that it *is not intended to provide grounds for the setting aside of any award*.

The arbitration agreement itself

As is well known, it is the arbitration agreement which establishes the scope of the arbitration and records the parties' agreement as to how the arbitration will be conducted. The incorporation of institutional rules into the arbitration agreement may well bring with it standards of conduct adopted by the relevant institution.

The arbitration agreement might also introduce an ethical code for arbitrators appointed by the parties if, for example, the parties agree that arbitrators can only be appointed if they are members of the Chartered Institute of Arbitrators. Similarly an agreement that the arbitration will be conducted by reference to the IBA Guidelines on Party Representation will incorporate the standards set out in those guidelines.

Party autonomy provides parties with an opportunity to go one step further – the author has long advocated that sophisticated arbitration users should consider setting out in the arbitration clause the expectations of the conduct of counsel in the arbitration proceeding. For example, the parties might specifically impose on the parties themselves and the arbitral tribunal, obligations similar to the overarching obligations which apply to litigants and counsel (and others) involved in civil litigation in Victoria (in accordance with the *Civil Procedure Act 2010* (Vic)). The incorporation of these obligations (appropriately adapted) would serve the following purposes:

- Provide the arbitrator or tribunal with support for any robust case management orders which might be required to ensure equality of the parties or to sanction a party or representative who is not acting in accordance with the obligations
- Make it clear from the outset the expectations of the parties about the way in which the arbitration will be conducted
- Rather unusually in relation to ethical standards (which are not usually actionable in civil proceedings), provide a party who suffers prejudice as a result of unethical behaviour to add a cause of action for breach of contract against the party engaging in that behaviour

In some respects this suggestion is an extension of the good faith obligation which in some jurisdictions is implied into commercial contracts and in other jurisdictions is reflected in an express term of a contract.

For completeness, it is noted that there may also be reference to guidelines or standards in any agreement executed by the parties with the tribunal members.

Ethical standards at the seat

The final source of ethical standards covered in this paper is standards which might apply by virtue of the seat of the arbitration or the lex arbitri.

Again, we turn to Gary Born, who considered this question and has expressed the following views:[9]

- It is difficult to conceive that all the professional conduct rules at the seat would apply to foreign counsel in a locally seated arbitration – one reason is that they tend to be designed with local circumstances in mind
- Further, rules of professional conduct tend not to address situations where there is a conflict between the rules of a lawyer's home jurisdiction and those of the foreign jurisdiction where the arbitration is taking place

He also reported on a survey taken by the IBA Task Force which showed that 63% of lawyers appearing in arbitration believed they were subject to their home jurisdiction's professional conduct rules but only 36% believed that the professional conduct rules of the seat would apply to them as well.

His conclusion is that the professional conduct rules of the seat *should rarely be applicable to counsel in a locally seated international arbitration*, but he acknowledges that where ethical considerations arise both in relation to the integrity of a professional and the conduct of proceedings (for example, in relation to conflicts of interest), there is scope for what he describes as *overlapping or concurrent regulation*.

The role of ethical standards in international arbitration – is there a need for further regulation

In the context of the discussion earlier in this paper, it is appropriate to raise briefly the question of the role of ethical standards in ensuring what has been described as 'an uneven playing field' in international arbitration. This is a common theme in the commentaries discussing international ethical standards. The paper also offers some very brief comments on the question of whether the arbitral tribunal itself should have the role of deciding (and even sanctioning) a breach of ethics by counsel appearing before them.

Consider for a moment arbitration proceedings where the ethical obligations imposed on one counsel in his or her home jurisdiction preclude that counsel from taking certain steps in the arbitration, steps which were available to the opposing counsel. And what if the Tribunal, familiar with both jurisdictions was aware of the restrictions which applied only to one party even though the parties themselves seemed unaware of the inequality.

This scenario shows how ethical obligations imposed on counsel can raise ethical issues for the Tribunal. Should the Tribunal take into account the restrictions on the first counsel when making procedural orders? Are the

9 Gary B. Born *International Commercial Arbitration*, Wolters Kluwer 2nd ed, p 2874

individual counsel's ethical obligations (irrespective of their source), a matter for the counsel alone. And should the counsel, recognising that his or her opponent has an advantage not being bound by the same ethical rules, disclose the potential inequity to his or her client?

Christopher Lau, international arbitrator based in Singapore and London, considered the question of whether rules and guidelines level the playing field and do they properly regulate conduct?[10]

One of the conclusions Mr Lau reached in a recent publication was that the answer to this question *may be more a matter of perception* and that it might be that the various rules, guidelines or codes available through the institutions and associations are all merely tools which contribute to a more even playing field.

Professor Catherine Rogers, who has written widely on the topic of ethics in international arbitration, advocates that the absence of international ethical standards and therefore the absence of any real sanctions for this type of conduct encourages misconduct by *facilitating unbounded creativity in pursuing client interests and, when called out, allows plausible deniability that particular conduct was unethical.*[11]

The contrary view propounded by Felix Dasser of Homburger in Switzerland, is that *equality of arms and fairness do not require global standards*.

As to who decides what constitutes a breach …

Elliott Geisinger of Schellenberg, Wittmer expresses the clear view that the arbitration hearing is not the place for determining whether a party representative has acted in breach of ethical standards – what is important in that forum is the determination of the merits of the dispute falling under the arbitration clause. Mr Geisinger says further that allowing one party representative to make a complaint about another during the evidentiary hearing brings *boundless potential for disruption of arbitral proceedings because by placing the issue in the hands of the arbitral Tribunal, one actually increases the danger of the very misconduct one is seeking to avoid. Unscrupulous lawyers are handed a potent weapon first to attack opposing counsel and thereby to create sideshows and delay the proceedings, and then to turn on the arbitral Tribunal if its ruling does not satisfy them.*[12]

Conclusion

Jeff Waincymer identifies[13] in one single paragraph, the competing views as to the need for defined ethical standards for arbitrators, observing that:

> *There is a reasonably vigorous debate as to whether there ought to be ethical rules imposed on arbitrators and if so what they should contain. Some academic commentators will typically call for such standards. Some institutions will attempt drafts, or at least establish working parties aiming to do so. Conversely, some leading practitioners will question the need, arguing that the system ultimately depends on the personal integrity of leading individuals.*

The true position seems to be that the jury is still out as to whether an international code of ethics would change the nature of international arbitration. Whilst at some time in the future we may see an international code, in the interim, the integrity of the arbitral process (which is what we are protecting through the application of ethics) is significantly enhanced by:

– The many resources available to parties at the time they enter into their arbitration agreement to ensure that their arbitration proceedings are conducted according to settled standards – if they turn their mind to it.

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10 Christopher Lau 'Do rules and guidelines level the playing field and properly regulate conduct? – an arbitrator's perspective' in Andrea Menaker (ed.) *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series No. 19 559, 2017

11 Catherine Rogers '*Guerrilla tactics and ethical regulation*' in Stephan Wilske and Guther J. Horvath (eds) Guerrilla Tactics in International Arbitration, Kluwer Law International, 2013, p 314

12 Elliott Geisinger '"Soft Law" and hard questions: ASA's initiative in the debate on counsel ethics in international arbitration' in Daniele Favalli (ed) *The Sense and Non-Sense of Guidelines, Rules and other Para-regulatory Texts in International Arbitration*, ASA Special Series No. 37, 2015, p 24

13 Jeffrey Waincymer *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, p 110.

- The significance of the personal reputation of arbitrators and party representatives which relies on those persons adhering to the highest ethical standards (whether mandatory or guiding)
- The need within the arbitration community to do everything possible to reinforce integrity in the arbitration process if arbitration is to maintain its position as the preferred means of dispute resolution for cross border disputes.

And finally, a reference to the consultation draft prepared earlier this year of SIAC's proposed guidelines for party representative ethics. The proposed guidelines are described as reflecting *the minimum standard for ethical conduct as recognised between all or the majority of the different jurisdictions under study and as providing only guidance as to ethical conduct … rather than a proscriptive set of mandatory rules*., and the authors observe:

International arbitration is to a certain extent an amalgam of civil and common law legal traditions, and both these traditions share core values with regard to professionalism and integrity. But the way these values are interpreted and put into practice across jurisdictions varies enormously, making it difficult to identify consensus on many specific ethical issues. International arbitration is also, equally, an institution with its own character and values. Domestic standards for ethical conduct cannot be imported wholesale, as that risks overlooking international arbitration's unique qualities.

Australian Centre for International Commercial Arbitration

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's only international arbitral institution. A signatory of co-operation agreements with over 50 global bodies including the Permanent Court of Arbitration (The Hague), it seeks to promote Australia as an international seat of arbitration. Established in 1985 as a not-for-profit public company, its membership includes world leading practitioners and academics expert in the field of international and domestic dispute resolution. ACICA has played a leadership role in the Australian Government's review of the International Arbitration Act 1974 (Cth) and on 2 March 2011 the Australian Government confirmed ACICA as the sole default appointing authority competent to perform the arbitrator appointment functions under the new act. ACICA's suite of rules and clauses provide an advanced, efficient and flexible framework for the conduct of international arbitrations and mediations. Headquartered at the Australian Disputes Centre in Sydney (www.disputescentre.com.au) ACICA also has registries in Melbourne and Perth.

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