corporate disputes

E D I T E D V E R S I O N

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AN INTERNATIONAL CODE OF CONDUCT FOR ARBITRATORS: BUILDING ON EXISTING RULES AND ACCREDITATION SYSTEMS

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In what has been described as a 'golden age' of international arbitration, present international arbitration practices have for some time enjoyed an unparalleled period of growth and proliferation. With the growing uptake of the UNCITRAL Model Law by states, the legal environment in which arbitrations take place has also become increasingly accommodating. Courts around the world are according greater tolerance and respect to arbitration, by treating arbitration as a natural and necessary adjunct to a state's dispute resolution processes, rather than as a usurper of judicial authority.

Notwithstanding these positive trends, it is important that we continue to examine the areas in which there is still room for reform and development. One such area is arbitrator conduct in international arbitrations and this article discusses the existing framework on which further development can be made.

A code of conduct for arbitrators

As a starting point, it is worth mentioning that the overwhelming majority of arbitrators perform commendably in navigating through the procedural minefield often created by the parties, and arriving at the correct destination on the merits of the dispute. Evidently, growth in arbitration is, at its heart, party-driven. Changes to the legislative regimes, and more permissive attitudes by courts no doubt play a role in making arbitration more attractive to contracting parties. However, there are more arbitrations because more parties have *chosen* arbitration as their preferred dispute resolution mechanism, which speaks volumes as to the quality of justice that is delivered and commercial parties' faith in the arbitration profession.

However, in the absence of judicial appeals, there is a need for arbitrators to get it right the first time. The disputes that find their way to arbitration are increasingly high value and complex, especially as institutions develop procedures to enable consolidation of disputes arising out of related contracts or involving multiple parties. Principles of natural justice can also compel arbitrators to give more attention to seemingly unmeritorious applications than would a judge. There is indeed a heavy responsibility that rests on the shoulders of arbitrators.

Against this background, concerns regarding the perception of bias and conflicts of interest are of vital importance. Ensuring that *all* arbitrators abide by the same standards can only improve the regard and calibre of the profession as a whole. The *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004) came into existence in this context, providing a general standard of best international practice for managing conflicts of interest. A standardised set of expectations for arbitrators makes it easier for arbitrators to ensure they do not fall foul of ethical standards, and less likely that recalcitrant parties will be able to make procedural hay out of a non-issue. In this way, the guidelines have a useful role to play both as protectors and moderators of challenge to arbitrators by the parties.

Based on these principles and real-life examples, Part II of the *IBA Guidelines* lists the various situations of potential conflicts into three colour-coded categories:

Green list – no conflict of interest; no need for disclosure.

Orange list – the circumstances *may* give rise to justifiable doubts in the eyes of the parties as to the independence and impartiality of the arbitrator. Disclosure should be made in order to evaluate any potential conflict of interest, however disclosure will be purely to open the discussion and will not raise any presumption of disqualification.

Red list – the circumstances *do* give rise to justifiable doubts in the eyes of the parties as to the independence and impartiality of the arbitrator. Situations are divided into 'waivable' (where the party may waive the right to challenge if certain considerations are met, but must do so explicitly) and 'non-waivable' (actual conflicts, where parties have no right of waiver).

Whilst the lists of situations enunciated in the *IBA Guidelines* are by no means exhaustive, they do provide a good starting point for the identification and management of conflicts. The guidelines also stress (at p. 18) that the mere fact of disclosure will not lead to disqualification of the arbitrator, thereby shifting the focus from the revelation of actual conflicts, to the evaluation of potential conflicts.

A system of accreditation for arbitrators

It then follows that there is also a need for an international governing body to establish and implement a system of accreditation by which arbitrators are recognised and regulated. One such international organisation worthy of mention is the Chartered Institute of Arbitrators (CIArb).

With over 12,500 members from 120 countries and branches in 35 countries, the membership of the Chartered Institute and its grades of arbitrator rankings are recognised throughout the world as the 'gold standard' for arbitrators, and the qualification of membership adorns the letterheads of many of the world's leading international arbitrators. Membership grades range from Associate, Member, Fellow, to Chartered Arbitrator, each with stringent examination requirements. At the level of Fellow and Chartered Arbitrator, it is also necessary to demonstrate that one has sufficient and relevant experience in the field.

The Chartered Institute uses its position to promulgate and enforce a *Code of Professional and Ethical Conduct*. The principles set out in the code are intended to set out principles for arbitrators to refer to in their practice, as well as to help end users understand what they can expect from arbitrators. It also works to promote public confidence in arbitration more generally, and is no doubt part of the reason why membership of the Chartered Institute is held in high esteem by end users.

All members are contractually obliged to comply with the *Code of Professional and Ethical Conduct*. The ethical standards contained in the code are the subject of rigorous enforcement by way of disciplinary proceedings, which are overseen by the Practice and Standards Committee and ad hoc disciplinary tribunals that are appointed to deal with complaints.

The Chartered Institute also makes a concerted effort to instil its core values in young 'up and coming' arbitration practitioners so as to ensure the quality of arbitrators long into the future. There are a variety of rewarding ways in which young practitioners can be involved in the institute. As an example, young members of the Chartered Institute have established the Young Members' Group (YMG) and contribute in many ways, such as by working actively within the institute to create standards and by debating best practice in ADR. The Chartered Institute also offers real value to young practitioners, as many law firms will look to a Chartered Institute qualification as a distinguishing feature when recruiting practitioners in dispute resolution.

Conclusion

In light of calls for developing an international code of conduct and regulatory framework, it can be seen from the above discussion of the *IBA Guidelines* and the Chartered Institute of Arbitrators that there are already in place some arrangements to this effect. There is of course the need for further discussions, however, it is important to build on what has already been done. Fortunately, there is a healthy culture of critical introspection within the international arbitration community, and a desire for ongoing reform and development. By leveraging the professional memberships that many, if not most serious arbitration practitioners possess, international arbitration practice can benefit from creating an environment that is conducive for the efficient and effective resolution of commercial disputes.

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