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Conflicts with conflicts: threats to self-regulation in international arbitration

James Clanchy, FCI Arb

CI Arb European Branch, YMG event

Futurama of International Arbitration and the Emerging Need for Ethical Rules

Lisbon 28 April 2018



Calls for self-regulation in international arbitration

- *Winter is coming*
Gary Born, in a lecture in New York, May 2016
- *Is it the beginning of the end?*
Sundaresh Menon, ICCA 2012 opening address, Singapore
- *A cosy community transformed into an ethical no-man's land*
Catherine A Rogers, *Ethics in International Arbitration*, OUP 2014
- *On the high seas, navigators need more than a coastal chart*
V V Veeder QC, Goff Lecture 2001



Regulation: a definition

A sustained and focused attempt to ensure that the conduct of arbitrators, attorneys, experts, and third-party funders comports with ethical standards in order to ensure the fairness of arbitral outcomes

Catherine A Rogers, *Ethics in International Arbitration*, OUP 2014



Legislitis: a definition

A virulent affliction which manifests itself in an involuntary urge to publish A6 booklets of rules, guidelines or principles

Toby Landau QC, *A Pause for Thought in International Arbitration: The Coming of a New Age?* ICCA Congress Series 17



International commercial arbitration: an inclusive definition

- UNCITRAL Model Law Article 1
 - ‘commercial’:
 - should be given a wide interpretation - all relationships of a commercial nature, whether contractual or not
 - ‘...any trade transaction for the supply or exchange of goods or services...carriage of goods or passengers by air, sea, rail or road.’
 - ‘international’:
 - parties’ places of business are in different states or
 - the place of arbitration is in a different state or
 - performance of the contract takes place in a different state

Misconception: an exclusive game for international lawyers

- *International arbitration was founded by members of what Oscar Schachter called the 'Invisible College of International Lawyers'.*
Catherine A Rogers, *Ethics in International Arbitration*, OUP 2014
- *If James Bond practiced law, it would be international arbitration.*
Catherine A Rogers, *The World is Not Enough*, Kluwer Blog 6.11.2016
- *The national members of this new international elite, a noblesse de robe, by exercising their talents in the major transnational entities...help to bring juridical forms to a higher level of universalization ...*
Pierre Bourdieu in the Foreword to Dezalay and Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago 1996



Ethics and size

- *It was ultimately agreed that BTE insurance should not be included in the definition of [third party funding in] this Chapter. The primary reason was practical – it is rarely if ever involved in large commercial arbitrations (apart from maritime arbitrations, which are expressly excluded from recommendations of this Report).*

ICCA-QMUL Task Force on TPF in Arbitration report, April 2018

- *The reality is that even a funder of our size (of around £410m in funds) only funds around 25-30 cases a year in 13 jurisdictions and a range of arbitral forums – our average budget nowadays is £4-5m and our minimum claim size is £10m – of which around 10 per cent are arbitrations at the moment. The numbers we fund are tiny relative to the total of litigation and arbitrations.*

Susan Dunn, Harbour Litigation Funding



“Third-party funding raises a host of ethical issues...”

ICCA – QMUL Task Force established in mid-2013, report published at ICCA Congress in Sydney on 17 April 2018





Ethics of regulation

- Failures of representativeness on commissions, working groups, and task forces
- Lack of transparency about composition, membership and support
- Failures of diversity, inclusiveness, engagement and consultation
- Excess of mandate and *ultra petita*, eg ICCA-QMUL Task Force's definitions of tpf extend to insurance
- Conflicts of interest: universities' drive for publications and impact
- Exaggeration and hyperbole: *The law and practice surrounding third-party funding has been called the "climate change" of international arbitration.* (Catherine A Rogers, ICCA press release)
- Treating tradition as a reliable guardian of ethics and as having nothing to teach us: *funding in the maritime context exists within a historical tradition and subject to... norms that were beyond the scope of the Task Force's work* (ICCA-QMUL Task Force report)



Revisions to IBA Guidelines on Conflicts of Interest 2014

- General Standard 6(b):

If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.

- Explanation to General Standard 6(b):

...the terms ‘third-party funder’ and ‘insurer’ refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration

- Excludes ATE insurance: it doesn't contribute funds or material support
- Excludes BTE insurance: it doesn't have an interest or duty to indemnify



IBA Guidelines: not universally accepted

- A Portuguese administrative court's view: caution should be exercised when applying the IBA Guidelines to '*avoid unjustified comparisons and uncritical importations of private foreign theories and usages, maxime, those from economies of common law countries.*'

Central Administrative Court South, 16 Feb 2017, 20011/16.3BCLSB

- English Commercial Court: the IBA Guidelines do not represent the English law of apparent bias and the Non-waivable Red List is waivable

W Ltd. V M Sdn Bhd [2016] EWHC 422 (Comm)

- English Court of Appeal: Orange List disclosure should be made but overlapping appointments don't themselves give rise to justifiable doubts as to impartiality

H v L (Halliburton v Chubb) [2018] EWCA Civ 817 (19 April 2018)



Repeat appointments: pros and cons

- Benefits

- Confidence
- Efficiency
- Consistency
- Building communities of trust

- Disadvantages

- Suspicion
- Reliance
- Expectations
- Complacency



Repeat appointments: the ‘small pool of arbitrators’ myth

- IBA Guidelines footnote 5:

It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.

- In 2017, the LMAA saw 2,533 appointments of arbitrators. (For comparison, SIAC saw 263 appointments in the same year.)
- ICMA 2017 in Copenhagen had 250 delegates from 35 countries

Networks of trust

- *'...arbitrator appointment in international commercial arbitration occurs via transnational networks of community comprising relationships of interpersonal trust between individuals, who are dealing in power over subjective arbitrator information.'*

Magdalene D'Silva, *Dealing in Power: Gatekeepers in Arbitrator Appointment*, *Journal of International Dispute Settlement*, 2014 5, 605

- CIArb is a network of community and its European branch is transnational
- From the beginning, CIArb has been open to non-lawyer professionals and its members deal with arbitrations of all shapes and sizes. As this network continues to expand and diversify, maintaining trust must be a priority.



Thank you

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