

Advocacy and Ethics in International Arbitration: Ethics in International Arbitration

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I. Introduction

I am honored to have been invited to give the keynote address at this first ICCA Conference in South America. My topic is ethics in international arbitration advocacy. This is a topic fraught with many difficulties. I don't claim this presentation will solve all of the problems, but I will try to move the debate forward. So let me start with this:

"International arbitration dwells in an ethical no-man's land. Often by design, arbitration is set in a jurisdiction where neither party's counsel is licensed. The extraterritorial effect of national ethical codes is usually murky.... There is no supra-national authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far ... specialized ethical norms for attorneys in international arbitration are nowhere recorded. Where ethical regulations should be, there is only an abyss."

That is the way that Prof. Catherine Rogers began her 2002 article on Developing a Code of Conduct for International Arbitration.⁽¹⁾ And it is my thesis today that there is a current, compelling need for the development of a Code of Ethics in International Arbitration and for the adaptation of tribunals and institutions to the adoption of such a Code.

II. Insufficiency of Present Codes and Hypotheticals

Now it may be pointed out that there already exists a code of ethics for international lawyers. The International Bar Association (IBA) has published an International Code of  [page "383"](#) Ethics. But I would point out that this Code was last revised in 1988, and very importantly, is not specific to international arbitration. It simply does not address all of the issues that a Code for international arbitration needs to consider. Moreover, that Code begins with this first Rule:

"A lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted. He shall also observe all ethical standards which apply to lawyers of the country where he is working."

This is the very definition of double deontology — the situation in which a lawyer may be subject to more than one code of ethics. This may be workable when the rules are not in conflict, but what happens when they are?

Let's take two hypothetical situations. First, with respect to document production, what are the applicable ethical rules for an Italian lawyer handling an international arbitration in New York for an Italian client when the opposing side requests the production of certain documents that are harmful to his client's case? And to turn it around, in the same situation what are the ethical duties of an American attorney handling an international arbitration in Italy? Does it matter if the client is Italian or American? It is my understanding that the ethical rules for American and Italian lawyers in this situation may be in direct conflict.

Second, what ethical principles apply to the preparation of fact and expert witnesses for giving testimony for a British barrister representing an American company in an international arbitration in Washington, D.C., or to German and American attorneys representing opposite sides in an international arbitration in London?

In an article written almost two decades ago on Standards of


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Conduct for Counsel in International Arbitration, Jan Paulsson raised the obvious question: “in cases where counsel come from two different countries where standards are quite inconsistent on a given point, does the client whose lawyer is subject to the lowest standard have an unfair advantage?”⁽²⁾ In that article, Prof. Paulsson called for the development of a specific code of conduct for counsel in international arbitration, at least for fundamental or essential standards, but until now that call has gone unheeded. As one can readily see, the present IBA Code is not altogether satisfactory.

There is, however, another supra-national code that should be mentioned — the Code of Conduct for European Lawyers prepared by the Council of Bars and Law Societies of Europe (CCBE Code).⁽³⁾ But this Code has only three substantive provisions relating to a lawyer's conduct in an international arbitration. First, a lawyer should have due regard for the fair conduct of proceedings; second, a lawyer should maintain due respect and courtesy toward the tribunal and defend the interests of the client honorably; and third, a lawyer should never knowingly give false or misleading information to the  [page "384"](#) tribunal. Those provisions are fine as far as they go, but they do not resolve the many prickly problems that trouble many of us in practice, and thus, they simply do not go far enough. Now another provision of the CCBE Code attempts to fill this void by requiring a lawyer appearing before a tribunal to comply with the rules of conduct of that tribunal. But for international arbitration, this begs the question: what are the applicable rules of conduct for lawyers appearing before an international arbitration tribunal? Johnny Veeder posed this very question in the 2001 Goff Lecture:

“To the Q: What are the professional rules applicable to an Indian lawyer in a Hong Kong arbitration between a Bahraini claimant and a Japanese defendant represented by NY lawyers, the answer is no more obvious than it would be in London, Paris, Geneva and Stockholm. There is no clear answer.”⁽⁴⁾

III. Recent Developments

I propose next to look at three recent ICSID cases in which questions of counsel conduct arose to see how the arbitrators handled those issues in practice. We must (of course) be sensitive to the context of those cases. These are all ICSID cases governed by an international treaty — the ICSID Convention — and involving the application of international law. Nevertheless, investment disputes are an important part of international arbitration, and I believe these cases may be generally instructive.

1. *Hrvatska v. Slovenia*

In *Hrvatska v. Slovenia*,⁽⁵⁾ the tribunal was asked by the claimant that it “recommend to the Respondent that it refrain from using the services” of a British barrister who was a member of the same chambers as the President of the tribunal. The barrister had been added to the respondent's legal team after the case had begun and his involvement was only disclosed shortly before the final hearing.

The tribunal reasoned as follows: first, the ICSID Convention does not grant the tribunal any explicit power to exclude counsel, and there is a fundamental principle that parties may use the lawyers of their choice. But this principle is subject to an overriding principle of the immutability of properly constituted tribunals. In practice, what this means is that a party cannot amend its legal team after the constitution of the tribunal “in such a fashion as to imperil the Tribunal's status or legitimacy”.

The tribunal found that it had inherent power to take measures necessary to preserve the integrity of the proceedings. And on the basis of the fundamental principle of the immutability of tribunals, the tribunal disqualified the barrister from the case although it was quick to point out, of course, that there is no “hard and fast rule” preventing barristers from the same chambers from acting as arbitrator and counsel in the same case.

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It is clear that the tribunal was strongly influenced by the very late disclosure of the barrister's role in the case.

Comment — From this case, one might draw the conclusion that tribunals have inherent power to disqualify counsel in order to protect the integrity of the proceedings, but let's dig a little deeper.

2. *Rompetrol v. Romania*

In *Rompotrol v. Romania*,⁽⁶⁾ respondent asked the ICSID tribunal to disqualify counsel for the claimant who had been brought into the case after the case had begun – he had previously practiced at the same law firm as the arbitrator appointed by the claimant. In rejecting respondent's application, what stands out from the decision is that the tribunal was reluctant to endorse the view that tribunals have inherent power to remove counsel. In fact, without ever finding that it had such power, the tribunal said that if such power exists, and assuming such power, it can only be exercised rarely and in exceptional or compelling circumstances that would genuinely touch on the integrity of the arbitral process. Relevant to our purposes, the tribunal noted that "one would normally expect to see such a power specifically provided for in the legal texts governing the tribunal and its operation". But no such power is provided for in the ICSID Convention or Arbitration Rules. Absent such express rules, the tribunal found that "the only justification for the tribunal to award itself this power" is an overriding need to safeguard the essential integrity of the arbitral process. The tribunal distinguished counsel's role from that of the arbitrator and noted that counsel's role is to present his client's case "with diligence and with honesty, and in due compliance with the applicable rules of professional conduct and ethics". But having found that the ICSID Convention and Rules do not address this subject, the tribunal did not identify what rules of ethics are applicable or seek to address them. Instead, the tribunal then turned the question around to one dealing with the more familiar issue of arbitrator ethics to ask if the presence of claimant's counsel would cause the arbitrator to be biased and partial. The tribunal did not find that to be the case, and thus, decided that the integrity of the proceeding was not threatened and rejected the challenge.

Comment — Based on this decision, we might question whether there exists any inherent power of the tribunal to disqualify counsel, but conclude that if it does exist, it will likely be exercised only rarely and in exceptional circumstances.

3. Unreported Annulment Proceeding

The third case involves an unreported ICSID annulment proceeding in which claimant's counsel was challenged for having allegedly represented respondent in a related proceeding five years earlier. Claimant's counsel denied that he had represented Respondent or had ever received any confidential information.

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The Committee started its analysis very importantly by deciding that its duty to treat the parties fairly and equally necessarily includes the power to ensure that generally recognized principles of conflict of interest and the protection of confidential information is complied with by counsel. But it was quick to note that the Committee had no deontological responsibilities over the lawyers in their own capacities and had "no power to rule on an allegation of misconduct under any such professional rules as may apply". Its concern was limited to the fair conduct of the proceeding before it.

The Committee then reviewed the two national codes of ethics of the bar associations of which claimant's counsel was a member and also looked to the CCBE Code in order to find "common general principles which may guide the Committee," but it noted that as an international tribunal it was not bound by the national codes. It saw its task as finding "what general principles are plainly indispensable for the fair conduct of the proceedings". On the facts before it, the tribunal rejected the application to disqualify claimant's counsel.

Comment — This Committee had no trouble in finding not only the power but also a duty to resolve the conflict issue, which arose from its obligation to treat the parties fairly and equally, and to do so on the basis of general principles of ethics, but not on the basis of any specific national code.

In the Goff Lecture of 2001, Johnny Veeder noted that the fact that international arbitration practitioners do not usually share the same national legal culture "does not mean that international practitioners are pirates sailing under no national flag; it means only that on the high seas, navigators need more than a coastal chart".⁽⁷⁾

I fully agree. And extending this imagery to the three cases we just examined, I respectfully suggest that the arbitrators found themselves blown out to sea and ill- equipped with nothing more than a coastal chart. And therein lies the problem. The three tribunals – faced with similar issues – created three different solutions.

I do not criticize the tribunals at all; they did their job by using what they had before them, in our imagery: dead reckoning. But dead

reckoning is the last resort of a careful navigator, and many a ship piloted by dead reckoning has floundered on the rocks. Simply put, the arbitrators needed a sextant and a star chart – a Code of Conduct for Counsel.

IV. The Compelling Need for a Code

Let's pose the fundamental question directly: is there really a compelling need for a Code now? After all, the arbitrators in the three cases we just surveyed were able to muddle through and find a solution, however imperfectly. Why can't we just leave it to tribunals to intuit solutions using the coastal charts of national codes? Or we could increasingly invite national courts into arbitral proceedings to police counsel's conduct.

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Another solution is for arbitrators to continue using the assessment of costs as a means of controlling the conduct of the lawyers.

But all of these potential solutions are flawed. Cost assessments are a blunt instrument for policing counsel. They are indirect, do not fully address the problems and ultimately target the parties, not counsel. Additional court proceedings interfere in the arbitral process with attendant delays and extra costs. And leaving it to tribunals to devise their own – perhaps idiosyncratic – solutions, is less than ideal, and certainly does not satisfy the need for a uniform and transparent solution. Professor Rogers has characterized the lack of transparency of such solutions by referring to them as “the clandestine techniques by which arbitrators undoubtedly regulate proceedings before them”.⁽⁸⁾

Despite the many challenges, the international arbitration system has worked, and worked well, but while we have been busy arbitrating, the system itself has been growing and changing over the past many years. The stakes are getting larger – much larger. We now find arbitrations involving claims of billions of dollars – even tens of billions of dollars. And the involvement of States as parties in both investment and commercial cases has added a public interest factor to the equation, with increasing publication of investment awards and public scrutiny.

The lack of clarity as to which ethical rules apply, the existence of conflicting rules and obligations, the non-transparency and the increased size of many proceedings, combined with greater public scrutiny, creates a certain instability in the system that could result in a future crisis of confidence. It only takes one highly visible, public spectacle to shake confidence in the entire system. There are already critics of arbitration in various countries, and if a public spectacle does occur involving counsel, what easier target than to point to the fact that international arbitration does not even have a Code of Ethics for counsel.

The international arbitration system needs to be able to police itself. Public confidence is an essential element of the system, and as one commentator has noted, if that confidence is lost, it could take decades to rebuild.

I submit that a uniform, binding Code of Ethics is a necessary part of maintaining that public confidence. Such a Code can accomplish three major goals: first, it can clarify the applicable rules and reduce ambiguity; second, it can level the playing field so that conflicting obligations do not unduly benefit one party at the expense of the other; and third, it can provide greater transparency, thus building confidence in the system. Although there have been no catastrophes to this point, the international arbitration system is at least subject to reasonable criticism without its own transparent Code of Ethics, and we need to ensure the future integrity and legitimacy of the system

V

Enforcing a Code of Ethics

I want to pose one final question: how can the international arbitration system enforce a binding Code of Ethics? There are really two questions here: first, what is the legal basis for enforcement? and second, who will enforce the Code?

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To the first question, the legitimacy of international arbitration derives from the consent of the parties to arbitrate their disputes. Johnny Veeder has gone a step further and suggested that there is a duty to arbitrate in good faith, which is derived from the general

principle of law that parties must perform their contract in good faith. Based on the party's consent to arbitrate, and perhaps *sub silentio* relying upon a duty to arbitrate in good faith, at least two of the three ICSID tribunals concluded that they had the inherent power to enforce such rules as are necessary for a fair hearing – and that includes rules of conduct for counsel.

This might be a sufficient answer, at least for certain fundamental rules necessary to a fair hearing, but I would suggest there is a simpler answer — and that is for the major arbitral institutions to incorporate a uniform Code of Ethics into their Arbitral Rules, thus making the Code expressly binding as a matter of the parties' contractual consent.

Now for the second question: Who is to enforce a binding Code? There are only three possibilities: local courts and bar associations; tribunals; or arbitral institutions.

As we've seen, the application of national codes is unclear and at times even conflicting, and the involvement of courts is likely to lead to delays and extra expense. The *Hrvatska* tribunal found that for an international system, "it seems unacceptable for the solution to reside in the individual national bodies which regulate the work of professional service providers, because that might lead to inconsistent or arbitrary outcomes...".⁽⁹⁾ By the process of elimination that leaves tribunals and institutions.

My answer is that as international arbitration changes – handling enormous cases and with increasing public scrutiny – our institutions must adapt to this changing environment. Part of that adaptation will be to take on the role of enforcement of a binding Code of Ethics. This will undoubtedly make some people nervous, but many of the rules – for example dealing with relationships with the tribunal and opposing counsel – will likely pose few real difficulties in practice. Other issues dealing with relations with the parties – such as those arising in the three cases we surveyed like conflicts of interest and the possession of confidential information – may be distasteful for institutions and tribunals, especially for arbitrators appointed by counsel. But it is precisely in this most difficult area that parties may have expectations of transparent, equally applicable, and binding rules, with an acute need for quick decisions. These are not problems to which our system can turn a blind eye.

VI. The Way Forward

Margrete Stevens and I have put forward with our paper a draft Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals (see this Volume, pp. 408-420). Perhaps it can be simplified to fewer, essential rules, with other rules being considered secondary and perhaps unnecessary for an International Arbitration Code. This distinction between essential and secondary rules was made by Jan Paulsson in the [page "389"](#) paper I referred to earlier.⁽¹⁰⁾ To many people, portions of this Code may seem quite imperfect, but at least it can provide a starting point.

We suggest that an organization like ICCA, or perhaps the IBA, appoint a working group of lawyers from different legal systems and geographical areas, including representatives of the major arbitral institutions, to consider this proposal, perhaps along with others, with a view toward building a consensus around a Code of Ethics that will have widespread support and can be adopted.

We then suggest that the major arbitral institutions consider incorporating this Code into their Rules by reference. As we have seen, this would make the Code binding, creating uniformity and transparency. While there are difficult questions that might provoke a response that we should leave well enough alone – at least for now – I respectfully suggest that in the context of much larger cases and increasing public interest and scrutiny, failing to address and solve a real problem until it manifests itself in an embarrassing public spectacle creates much greater risks for the international arbitration system of which we are all a part. We all have an interest in the system, and we should all be vigilant to protect its integrity and legitimacy. And for that reason, I would suggest that we must take seriously and move forward – now and not later – the development and adoption of a uniform Code of Ethics for International Arbitration.

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¹ Catherine ROGERS, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration", 23 Mich. J. Int'l Law (2001-2002) p. 341.

² Jan PAULSSON, "Standards of Conduct in International Arbitration", 3 Am. Review Int'l Arb (1992) pp. 214-222.

³ Available at <www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf>.

⁴ V.V. VEEDER, "The 2001 Goff Lecture – The Lawyer's Duty to Arbitrate in Good Faith", 18 Arbitration International (2002, no. 4) p. 431.

⁵ *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24)

⁶ *Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3).

⁷ See fn. 4 above.

⁸ See fn. 1 above.

⁹ *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Tribunal's Ruling of 6 May 2008 Regarding the Participation of Counsel in Further Stages of the Proceedings, para. 23.

¹⁰ See fn. 2 above.

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