Ethical obligations in arbitration

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Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.
— Aristotle

While today one may argue that notions of fairness and equity do in fact inform judicial decision-making, Aristotle's rationale for preferring the arbitral process of his day serves to highlight the continuous development of both arbitral and curial decision-making across the millennia. We are also reminded that the foundations of ethical enquiry are drawn from ancient Greece.

The school of Aristotelian ethics remains a practical wisdom: an ability to see the right thing to do in the circumstances and to do it: "We are not enquiring in order to know what virtue is, but to become good, for otherwise there would be no profit in it."

In the context of arbitral processes and procedures, one Aristotelian "profit" from conducting arbitrations ethically is the continued confidence of the commercial world in a fair and impartial dispute resolution process. It is this commercial confidence that has remained central to the success of arbitration as a determinative process dating back to ancient Greece, China, Egypt and Rome.

Given its historical success, why would we concern ourselves with the nuances of ethical obligations in arbitrations today? In answering this question, our starting point must be that ethics in arbitration, as with all ethical frameworks, is not a set-and-forget proposition. Proper ethical conduct, which produces a fair and transparent process, is something that needs thinking about. Moreover, the rise and rise of transnational trade disputes and the consequential growth in

international arbitrations make it all the more important for practitioners to understand the jurisdictional and ethical issues that can arise.

The ancient Greeks and others may have arbitrated cross-border disputes, but the scope of the ethical dilemmas that arose seems unlikely to eclipse the complexities of transnational disputes today. For arbitrators and legal representatives to effectively manage multi-jurisdiction complexities, it is of fundamental importance to understand the ethical principles that apply.

Growth in arbitration and its ethical challenges

In 2013, a joint Pricewaterhouse Coopers (PwC) and Queen Mary College Survey found that major corporations continue to affirm the benefits of arbitration to resolve transnational disputes.

While the numbers of arbitrations, both domestic and international, show no sign of slowing, a critical indicator for the continued growth of this determinative process is the level of support that arbitration enjoys from the courts. Speaking at the Asia Pacific Regional Arbitration Group's conference in March 2014, Chief Justice James Allsop noted the significant growth in transnational arbitration in the Asia Pacific and observed that:

Following the recent widespread changes made by Australian legislatures to both international arbitration legislation and domestic arbitration legislation, Australian courts are moving to a significantly more positive, pro-arbitration, position.

Thus, for corporations, governments and others who seek fair, timely, confidential and cost-effective resolution of their disputes in a neutral venue, arbitration in Australia is increasingly regarded as a successful dispute resolution mechanism.

Nevertheless, the 2013 PwC and Queen Mary College Survey highlighted a number of growing corporate concerns:

Some interviewees have expressed concerns over the "judicialisation" of arbitration, the increased formality of proceedings and their similarity with litigation, along with the associated costs and delays in proceedings. This trend is potentially damaging to the attractiveness of arbitration. In-house counsel value the features of the arbitration process that distinguish it from litigation.

While corporations voice their concerns about the judicialisation of arbitration, Chief Justice Tom Bathurst has noted an increasing concern for justice "being seen to be done" in the arbitral process. In his Address to the Annual Dinner of the Diploma in International Commercial Arbitration in 2012, he highlighted the need for arbitrators to consider the judicial qualities required:

As arbitration becomes an integrated part of the justice system, and in the international commercial realm, establishes itself as the primary justice system, so public faith in and recognition of the fairness and legitimacy of arbitral processes and institutions becomes essential to faith in the wider justice system, and ultimately to the strength of the rule of law itself. Thus, I suggest, your duties as arbitrators now extend that extra measure to the judicial

duty to be concerned with the appearance of justice. This is not only because it will enhance your reputation as an arbitrator and strengthen your industry (though, these are of course good ends in themselves) but because you now play a role in ensuring the strength of the rule of law internationally. That is no small thing.

What corporations observe as "high costs and delays" reflect an increasing number of challenges to the arbitration process and to arbitral awards, particularly in international disputes. Regrettably, these challenges may be the consequence of real or perceived misconduct in the process. Addressing this issue in 2013, Professor Doug Jones AO grouped threats to the integrity of arbitration under three broad issues: arbitrator misconduct; counsel misconduct; and parties approaching the proceedings in bad faith.

Ethical conduct is the responsibility of everyone in the process and it is central to managing effective proceedings and ensuring enforceable awards. Adherence to the relevant rules, codes and guidelines of ethical behaviour, during all stages of the arbitral process, limits the potential for protracted procedural machinations and challenges, while safeguarding those arbitral objectives of a fair, just, timely, confidential and cost-effective process.

Arbitral organisations involved in both domestic and international matters have long been concerned with promoting the integrity of the arbitral process, and across the globe participants have been provided with ethical guidelines and rules. The challenge for all those involved is to understand precisely which rules, codes and guidelines to use.

Guidance and rules on ethical conduct

Arbitrators are appointed from a range of professional groups. Initial direction on their general professional conduct and ethical obligations comes from the codes of conduct and guidelines promulgated by their primary professional membership organisations. For example, in domestic arbitrations, the legal practitioner will, as a starting point, rely on the standards of their relevant bar association or law society.

More specific requirements are found in the Australian legislation governing both domestic and international arbitrations: the International Arbitration Act 1974 (Cth) (IAA) was amended in 2010 to give effect to revisions made in 2006 to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law), and nearly all state and territory uniform Commercial Arbitration Acts (CAAs) have since followed the IAA to bring welcome consistency to the Australian legislative framework.

The IAA and CAAs adopted Art 12 of the Model Law, which deals with conflict of interests and disclosure by the arbitrator. Article 12 sets out the requirements relating to the grounds for challenge. It requires an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. If circumstances exist that give rise to justifiable doubts as to impartiality, the arbitrator may be challenged. The IAA and CAAs then go a step further than the Model Law in clarifying "justifiable doubts" as to the impartiality or independence of an arbitrator. For the purposes of Arts 12(1) and 12(2) of the Model Law, "there

are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration".

In Australia, the Chartered Institute of Arbitrators (CIArb) Australia Branch provides guidance through its Code of Professional and Ethical Conduct for Members (October 2009). The Australian Centre for International Commercial Arbitration (ACICA) also has a strong focus on the application of high and consistent ethical standards. Most recently, it has commenced engagement with the Asia Pacific Arbitration Group on harmonising regional arbitration rules and procedures, which support a focus on ethical standards. The Institute of Arbitrators & Mediators Australia (IAMA) provides its Practice Note on arbitrator conduct. In releasing new rules on 2 May 2014, the IAMA responded directly to perceived concerns about costs and delays by requiring that the "arbitral tribunal shall use its best endeavours to deliver all awards within 365 days" and by including a cap on arbitrator and legal fees.

Internationally, the International Bar Association (IBA) has invested considerable time and interest in promulgating various rules and guidelines with the aim of bringing consistent ethical standards across all jurisdictions. The IBA published Rules of Ethics for International Arbitrators in 1987. These rules still apply, albeit that the IBA Guidelines on Conflicts of Interest in International Arbitration (2004) have now superseded the earlier rules of ethics relating to conflicts.

The IBA has more recently published Guidelines on Party Representation in International Arbitration (2013). The guidelines include standard ethical obligations, such as the representatives being required to act with integrity and honesty. Moreover, the guidelines respond to what may be considered "arbitral chestnuts" by invoking representatives not to engage in activities designed to produce unnecessary delay or expense, or use tactics aimed at obstructing the arbitration proceedings.

The issue of disclosure and communication with witnesses is approached quite differently by common law and civil law jurisdictions and it can cause significant ethical dilemmas for representatives working cross-jurisdictionally. The IBA's 2013 guidelines highlight issues that may arise, for example:

It is common for Party Representatives in the same arbitration proceeding to apply different standards. For example, one Party Representative may consider him- or her-self obligated to ensure that the Party whom he or she represents undertakes a reasonable search for, and produces, all responsive, non-privileged Documents, while another Party Representative may view Document production as the sole responsibility of the Party whom he or she represents. In these circumstances, the disparity in access to information or evidence may undermine the integrity and fairness of the arbitral proceedings.

The guidelines intend to address these difficulties by suggesting standards of conduct, while recognising that the standards may not be necessary "in cases where the representatives share similar expectations in relation to document production or in cases where document production is not done or is minimal".

The IBA guidelines also provide further direction to practitioners on issues such as submissions to arbitral tribunals, communication with arbitrators, and remedies for misconduct. IBA guidelines 26 and 27 set out potential remedies for misconduct, which range from an admonishment to apportionment of party costs and then more generally to the tribunal taking "any other appropriate measure in order to preserve the fairness and integrity of the proceedings". The guidelines do not replace professional domestic obligations, but they do provide legal practitioners, across multiple jurisdictions, with a set of accepted practice standards, which will apply when the parties agree to adopt them or the arbitral tribunal decides to apply them, should it determine that it has this authority.

At the IBA's recent 17th Annual Arbitration Day, delegates discussed the Guidelines on Party Representation. Success may be too soon to gauge, and the panel discussion was divided over the question as to whether too much soft law can act as a distraction to arbitrators, but Toby Landau QC was unequivocal in commenting:

The core issue is not "is there a problem with conflicting ethical conceptions?", argued Landau. "Do they get resolved firstly by the implementation and imposition of one all-purpose harmonized global single standard? Or do they get addressed and resolved by way of a more organic local variable solution, which is dependent upon the particular circumstances of the parties, of the case, of the tribunal and of the issue itself? "What I suggest in fact we need … is a framework in order to provide assistance and support for that individual answer."

More recently, the London Court of International Arbitration (LCIA) has circulated the final draft of its new rules, with the view that they will be promulgated shortly after a meeting of the Court held in May 2014. A key amendment to its earlier rules responds to issues arising when parties change a legal representative mid-arbitration, and this change has created real or perceived conflict with a tribunal member, as occurred in the case of Hrvatska Elektroprivreda DD v Republic of Slovenia. Under Art 18.3, parties must notify all other parties, the arbitral tribunal and the registrar of any changes or additions to their legal representatives and the changes are conditional on the tribunal's approval.

The updated LCIA rules also include an Annex, which sets out the required general conduct for all representatives appearing by name before the tribunal. Of relevance to all parties, under the LCIA rules the arbitral tribunal now has express power to take the parties' conduct into account when awarding costs. The revised LCIA rules and IBA guidelines, the Australian rules and guidelines provided by CIArb, ACICA and IAMA, and the guidance provided by very many other arbitral bodies across the globe demonstrate how keenly focused arbitral organisations are on the appropriate conduct of arbitrators and all those involved in the process. Nevertheless, given the complexities of transnational disputes and the numerous rules and guidelines that may apply, there is still no one-size-fits-all view on what is "appropriate". Greater clarity comes in the domestic sphere. Yet, until uniform rules or guidelines are adopted for all arbitrators, representatives and the parties, it remains the responsibility of those engaged in the process to appreciate the complexities of the ethical framework of arbitrations and act accordingly.

In understanding and upholding the ethical principles that guide a specific arbitral process — that is, seeing the right thing and doing it — arbitrators and legal representatives are reminded that

consistent application of proper conduct is needed to produce — and in being seen to produce — fair, equitable, timely, confidential and cost-effective resolutions of disputes. These outcomes remain central to commercial confidence in the efficacy of the arbitral process and in maintaining its Aristotelian esteem into the next millennium.