DAY 6: ETHICS IN INTERNATIONAL ARBITRATION

Professor Lucy Reed
Singapore International Arbitration Academy 2017
30 October 2017
Ethics: Think holistically

• Ethics issues feature in all aspects and at all stages of international arbitration
  – Counsel: party representation and conduct
  – Tribunal: selection and conduct

• Particular international challenge
The issue:

“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 New York lawyers?”

V.V.Veeder, 2001 Goff Lecture The Lawyer’s Duty to Arbitrate in Good Faith, 18 Arb. Intl. 431 at 433 (2002)
COUNSEL: IBA GUIDELINES


• Guidelines only
  – To be adopted case-by-case
  – By agreement of parties or at request of tribunal
Preamble:

“... inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.”
Guideline 3

“The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. ... also not intended to undermine either a Party representative’s primary duty of loyalty to the party whom he or she represents or a Party representative’s paramount obligation to present such Party’s case to the Arbitral Tribunal.”
Guideline 9

“A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal”.
Guideline 10

“In the event that a Party representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, [he/she] should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.”
Guideline 11

“A Party Representative should not submit Witness or Expert evidence that he or she knows to be false.”
The issues:

• For selection:
  – Impartiality and independence
  – Disclosure

• Ongoing obligations
IBA Guidelines on Conflicts of Interest in International Arbitration (2014)

Part 1: General Standards Regarding Impartiality, Independence and Disclosure
Part II: Practical Application of the General Standards

– Non-Waivable Red List
– Waivable Red List
– Orange List
– Green List
Issues in Investor-State Arbitration

- Repeat appointments
  - IBA Orange List 3.3.8: 3 or more appointments in 3 years by same lawyer/firm

- “Issue conflict”
  - Repeat rulings on same/similar legal issue
  - Risk of “double-hatting”
THE FRESHFIELDS ARBITRATION LECTURE 2016

In conjunction with Queen Mary and Westfield College
School of International Arbitration

(AB)USE OF DUE PROCESS: SWORD VS SHIELD

London, 27 October 2016

Professor Lucy Reed
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UNCITRAL Model Law, Article 18:

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.
ICC Rules, Article 22(4):

In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
1976 UNCITRAL Rules, Article 15 (1):

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
(Ab)use of Due Process

1985 UNCITRAL Model Law, Article 18:

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.
(Ab)use of Due Process

2010 UNCITRAL Rules, Article 17(1):

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.
(Ab)use of Due Process

New York Convention, Article V:

(1) Recognition and enforcement of the award may be refused ... if ...

(b) The party against whom the award is invoked was not given proper notice of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
Annulment grounds are limited to:

“.... that there has been a serious departure from a fundamental rule of procedure”
(Ab)use of Due Process

PROCESS

Tribunal decisions to:
- Grant an extension
- Accept an unsolicited brief
- Accept late evidence
- Admit late claims
- Reschedule hearing
(Ab)use of Due Process

**PROCESS**

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**DUE PROCESS**

- Refusal to hold requested hearing
- Failure to give notice of hearing or submission
- Hearing without a party
- Witness tampering/ intimidation
- Biased statements from arbitrator