An American Critique of the IBA's Ethics for International Arbitrators

Robert Coulson(*)

The rules governing the ethics of international arbitrators recently issued by Committee D of the Section on Business Law of the International Bar Association state that they reflect "internationally acceptable guidelines developed by practicing lawyers from all continents." The drafting group included well known lawyers specializing in international arbitration: J. M. H. Hunter (England), J. A. S. Paulsson (France) and Dr. A. J. van den Berg (Holland).

Since I respect the draftsmen, I trust that they will endure this critique in good spirits. Many of their rules are in harmony with U. S. practice, but in one important respect there is a difference of perception on this side of the Atlantic. Except for maritime arbitrations, often held under the rules of the Society of Maritime Arbitrators, U.S. parties tend to be skeptical about the impartiality of party-appointed arbitrators. In domestic cases, party-appointed arbitrators seem ambiguous, likely to be friendly to the interests of the party that appointed them. In this regard, the IBA rules of the Code of Ethics for Arbitrators in Commercial Disputes developed jointly by the American Arbitration Association and the American Bar Association in 1977, appear to be in conflict.

It is interesting to compare the nine IBA rules with the provisions of the AAA-ABA Code. For example, the definition of bias is similar, covering situations where an arbitrator favors one of the parties, or is prejudiced against one of the parties, or has relationships with one of the parties or "someone closely connected with one of the parties" such as to create a "dependence" upon that person.

IBA Rule 4 imposes a duty upon all arbitrators to disclose any facts or "103" circumstances that may give rise to justifiable doubts as to impartiality or independence.

The AAA-ABA code contains more concise language in Cannon li: "An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias." An introductory note describes various kinds of information that should be disclosed, citing the leading United States Supreme Court case, Commonwealth Coatings Corp. v Continental Casualty Co., 393 US 145 (1968). In that case, the neutral arbitrator, selected by the party-appointed arbitrators, failed to tell the petitioner that he had occasionally consulted for the respondent. Although no actual bias was shown, the court vacated the award on the basis of an appearance of bias.

So far so good: neutral arbitrators should be independent and impartial. Facts that might lead to reasonable doubts about their impartiality should be disclosed. The IBA rules require disclosures about present business relationships with a party and or "potentially important" witnesses. The AAA-ABA code goes further, including "existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias." The AAA-ABA code extends to relationships with any party's "lawyer, or with any individual whom they have been told will be a witness" (emphasis added). Except for the specific reference to lawyers, the difference seems slight. Perhaps the IBA draftsmen felt that "family or social relationships" were too trivial to mention. In the United States, however, courts have been asked to rule on family relationships and common memberships in organizations in motions to vacate arbitration awards. The IBA's prohibition against "continuous substantial social or professional relationships" probably covers family connections.

The AAA-ABA code states that when all parties request an arbitrator to resign, the arbitrator should do so. Where one party makes such a request, the arbitrator should withdraw, unless the parties' agreement contains a procedure for determining challenges, as would be the case under most administrative systems, or the arbitrator decides that the 'reason for the challenge is not substantial' and that 'withdrawal would cause unfair delay or expense to another party and would be contrary to the ends of justice.'

The IBA rules contain no such procedures, seemingly leaving such an arbitrator in an uncomfortable quandary.

The "party-nominated" arbitrator seems particularly at risk under the IBA rules. Many international contracts specify that each party will "104" "nominate" or "appoint" an arbitrator, the two arbitrators being selected by a "presiding" arbitrator. When a prospective party-nominated arbitrator is approached by one of the parties, the IBA rules instruct such a candidate to "make sufficient enquires in order to inform himself whether there may be any justifiable doubts regarding his impartiality or independence, whether he is competent to determine the issues in the dispute, ..." He may also "respond to enquiries from those approaching him... provided that the merits of the case are not discussed."

But would such a conversation oblige the prospective arbitrator to discuss the merits of the case? How can a potential arbitrator determine impartiality or competence without discussing the issues? Indeed, the candidate is directed by the rules to enquire about the "issues in the dispute." This initial interview is not the only time that party-appointed arbitrators must communicate directly with the party that nominated them. If required to participate in the selection of the presiding arbitrator, as is generally the case, a party-appointed arbitrator is a designated by the rules to obtain the views of the appointing party as to the acceptability of candidates being considered. Can such a conversation be held without mentioning the issues in dispute?

The party-appointed arbitrator is instructed to avoid unilateral communications about the case with parties or their representatives. If such a communication should occur, the arbitrator is to inform the
other parties and arbitrators of its substance.

If an arbitrator learns that a fellow arbitrator has violated the rule against unilateral communications, "normally, the appropriate initial course of action is for the offending arbitrator to be requested to refrain from making any further improper communications with the party." If unilateral communications continue, the remaining arbitrators may inform the "innocent party".

How often in international arbitration does that happen? Is the IBA's vision of the behavior of party-appointed arbitrators an accurate picture of current practice? How many party-appointed arbitrators have resigned because of unilateral communications? How many have been challenged and disqualified by administrative agencies?

The AAA-ABA code reflects a more pragmatic approach. It is known that in the United States some party-appointed arbitrators are expected to favor their appointing party's point of view. They are not strictly neutral. Their party appointed them because of a prior relationship, or because they came from a familiar branch of the industry, or because of their reputation, nationality or whatever. In *Vantage S. S. Corp. v Commerca Tankers Corp.* 342 NYS 281 (1973), the party-appointed arbitrator was an attorney for the party, a stockbroker for the party, related to the president of the corporation and had "105" advised on the contract. However, the court held that there was no misconduct and upheld the arbitrators' award. Some systems of arbitration in the United States assume that party-appointed arbitrators serve as advocates during the arbitrators' deliberations, making certain that their party's point of view is fairly understood by the neutral arbitrator.

The AAA-ABA code does impose certain minimum obligations upon non-neutral arbitrators. A party-appointed arbitrator can be predisposed towards a party, but is obliged to act in good faith, with integrity and fairness. The party-appointed arbitrator's disclosures need to be sufficient only to describe "the general nature and scope of any interest or relationship." Party-appointed arbitrators can consult with their appointing party about the acceptability of a candidate for neutral arbitrator and can communicate with their party about "any other aspect of the case, providing they first inform the other arbitrator and the parties that they intend to do so."

The AAA-ABA code recognizes that various degrees of neutrality are imposed upon party-appointed arbitrators. It encourages the parties to discuss their mutual understanding of the relationship. The AAA-ABA code explains the choices available to parties who elect the tripartite model, but want to protect themselves against having an arbitrator who is more "neutral" than their adversary's, or against an arbitrator who might indulge in delaying tactics or other unfair procedures.

Whereas the IBA rules state that no unilateral arrangements should be made for arbitrators' fees or expenses, the AAA-ABA code allows party-appointed arbitrators to negotiate compensation with their party. Arrangements for compensation may include the establishment of a per diem rate, the amount of which the fee will be paid, and whether payment will be made to the individual arbitrator, to a corporate account or to a professional firm. These questions arise in other personal service contracts. Why do the IBA rules require that they be discussed with the other arbitrators and with the non-appointed party? The parties may agree to share equally in compensating all members of the panel. But is that always the case? The time spent by each arbitrator may vary, particularly in international arbitration where arbitrators must come to the hearing from countries with different economic systems. Uniform rates and conditions of payment can have unfortunate tax consequences.

Another difference between the IBA rules and the AAA-ABA code concerns arbitrators' participation in settlement discussions. The IBA rules say that when the parties request such participation from the arbitrators, the tribunal or the presiding arbitrator may make "proposals for settlement" to both parties, "preferably in the presence of each other." The rules indicate, "106" however, that an arbitrator who discusses settlement terms unilaterally with a party should "normally" be disqualified from any future participation in the arbitration. This, presumably, also applies to party-appointed arbitrators.

The AAA-ABA code, on the other hand, directs arbitrators not to suggest involvement in such discussions. An arbitrator should not exert pressure on parties to settle, or participate in settlement discussions. Only if requested to do so, should an arbitrator act as a mediator or conciliator.

What is the difference? A neutral arbitrator under the AAA-ABA code should not initiate proposals for settlement, discuss settlement with one party in the absence of another, but may act as a mediator or conciliator if asked to do so by the parties. Party-appointed arbitrators, on the other hand, are free to discuss possible settlements with their party, unless the parties agree otherwise. In the United States, a party-appointed arbitrator may initiate settlement discussions. As arbitration hearings open towards a conclusion, a party-appointed arbitrator may point out opportunities for settlement. This practice can produce advantageous settlements. The IBA rules, where party-nominated arbitrators are forbidden to discuss the case with their parties, would inhibit such compromise settlements.

Here, the contrast between the IBA rules and AAA-ABA approach is laid bare. The IBA rules would force party-appointed arbitrators to act as neutrals, with minor exceptions. The AAA-ABA code leaves that issue to the parties. Do they want their party-appointed arbitrators to be neutral, or do they want them to serve a more partisan role? If there is a "worldwide consensus" that party-appointed arbitrators in international arbitration should be impartial, detached from the party who selected them, this aspect of the IBA rules may be realistic. But is there such a consensus? Is the "neutral" party-appointed arbitrator an unreliable myth? Further research may be necessary.

The IBA rules omit other provisions found in the AAA-ABA code. Only the draftsmen can say whether such omissions were intentional. For example, the rules do not define an arbitrator's loyalty to the process of arbitrating or to the public. The AAA-ABA code instructs arbitrators not to be swayed "by outside pressure, by public clamor, by fear of criticism or by self interest." The AAA-ABA code tells arbitrators to be "patient and courteous to the parties, to their lawyers and to the witnesses", a provision not found in the IBA rules. Perhaps international arbitrators are so uniformly polite that such a provision was thought unnecessary. Nor do specific provisions deal with the parties' right to be represented by counsel, their right to appear in person at hearings or their

right to have reasonable advance notice of hearings. "107"

The AAA-ABA code in Canon V requires arbitrators to make decisions in "a just, independent and deliberate manner," explaining in some detail what that involves. In contrast, the IBA rules say nothing about the arbitrators' decision. The AAA-ABA code, for example, warms arbitrators not to "delegate the duty to decide to any other person." Surely this is an important point.

Both the IBA rules and the AAA-ABA code impose a duty of confidentiality upon the arbitrators, during and after the arbitration. The AAA-ABA code cautions arbitrators not to use confidential information acquired during the arbitration to gain personal advantage for themselves or for others.

Arbitrators are directed not to assist in post-arbitration proceedings. The IBA rules put that prohibition in terms of giving information "in any proceedings to consider the award." Situations where one of the arbitrators has engaged in misconduct or fraud are excepted, whereas the AAA-ABA code excludes situations where the arbitrator's involvement is "required by law." The difference in practice may be minor.

One additional comment relates to style. The draftsmen of the IBA rules have chosen to inject gratuitously the male gender into their work, 36 times by my count. Rule 2.1, for example, states that "a prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias." Having recently reviewed a book which did exactly the opposite, consistently assigning she and her to unidentified individuals, my sensitivity about gratuitous gendering may be unique.

This critique is not intended to detract from the importance of Committee D's contribution. These rules will encourage practitioners to think about ethical questions. Questions of disclosure, fairness and acceptable behavior are dealt with in clear, definitive terms.

Will these rules encourage litigation against arbitrators? The IBA, in its introduction, confirms the generally held view that arbitrators should be immune from suit under national laws, except where they act in "wilful or reckless disregard of their legal obligations," going on to say that "the normal sanction for breach of an ethical duty is removal from office, with consequent loss of entitlement to remuneration." Removal by whom? Must one of the parties go to a domestic court? Are the agencies that provide international case administration prepared to remove arbitrators who violate the IBA rules? What obligations do international arbitrators owe to such agencies? How will the rules be enforced?

The questions raised by this paper will be answered only through experience. It will be interesting to observe whether the "fiction" that party-appointed arbitrators are totally impartial will survive in practice: a few nasty experiences with partisan party-appointed arbitrators may lead to increased skepticism. Will additional provisions be added to the IBA rules as experience accumulates?

109

110

* President of the American Arbitration Association.

© 2006 Kluwer Law International. (All Rights Reserved)