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Introduction

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Parties to international arbitrations may – and often do – choose counsel to represent them based on the specific needs and features of the case. As a result, it is not uncommon for the parties' representatives to be qualified or resident in different jurisdictions, none of which is the arbitral seat. In these circumstances, a highly pivotal, yet seldom discussed, question is what ethical rules and standards of professional conduct should apply to the parties' representatives. Different jurisdictions take very different substantive approaches to various ethical issues such as witness preparation, fee arrangements, conflicts of interest and privileges. Any traditional choice-of-law approach – attempting to determine the set of national rules that should apply to those questions – is unsatisfactory, and the best resolution would be the development of uniform international rules of professional conduct.

The parties' right to representation in international commercial arbitration

As a practical matter, a party's right to representation in international arbitral proceedings, by lawyers or others, is of fundamental importance: the quality and vigour of a party's representatives can have substantial consequences for the party's opportunity to present its case, for the outcome of the arbitral process and for the parties' perceptions regarding the fairness and legitimacy of the process.

Although most international arbitration conventions and many national arbitration statutes contain no express guarantees of the parties' right to select their representatives in an international arbitration, recognition of this right is implied: that freedom has historically been acknowledged in the arbitral process, represents an inherent aspect of a party's internationally guaranteed opportunity to present its case, and is what commercial parties expect when agreeing to arbitrate. Most leading institutional rules recognise the parties' rights of representation in the arbitral proceedings, either expressly or implicitly providing that a party is entitled to be represented by persons of its own choice (see, eg, UNCITRAL Rules, article 4; ICC Rules, article 21(4); LCIA Rules, article 18(1); ICDR Rules, article 12; WIPO Arbitration Rules, article 13(a); ICSID Arbitration Rules, rule 18(1)). These rules reflect the overwhelming practice in international arbitration, which is to leave the parties almost entirely free – for better or worse – to select their own representatives and advisers.

There have historically been some deviations from the foregoing principle recognising the parties' freedom to be represented by counsel of their choice in international arbitral proceedings. At various times, Japan, China, Singapore, Turkey, Portugal, Thailand and the former Yugoslavia have all forbidden foreign lawyers from appearing in arbitrations sited locally – even in international arbitrations. These restrictions were sometimes defended on the grounds that they were aspects of local bar regulations, aimed at ensuring the integrity and quality of legal advice. In reality, the restrictions were largely the product of parochial protectionist lobbies, aimed at excluding foreign competition. As a result, in most cases, these sorts of restrictions have been relaxed or abandoned in the face of sustained international (and domestic) criticism, and virtually all developed states now recognise – either expressly or implicitly – the parties' autonomy to select counsel to represent them in international arbitral proceedings.

Professional conduct of legal representatives in international commercial arbitration

Bringing together counsel from various legal backgrounds, international arbitration – like national court litigation – raises issues of professional conduct by legal representatives during the arbitral proceedings, including conflicts of interest and obligations of competence, zealousness and integrity. In national court proceedings, the rules of ethics and professional conduct for legal representatives are ordinarily prescribed by local statute or regulation, and are ordinarily enforced by the local judiciary or the local legal professional organisation or regulatory body (such as a bar association, bar society, *barreau*, or other organisation).

These customary approaches to standards of professional conduct are ordinarily not readily transposed to international arbitration, which by definition involves multiple jurisdictions and is not easily supervised by local professional bodies or courts applying local rules. As a consequence, this gives rise to important substantive and procedural issues regarding the standards of professional conduct for legal representatives in international arbitrations, which can have significant practical consequences for such proceedings, but which as yet remain inadequately explored.

Different jurisdictions may take very different substantive approaches to various ethical issues. For example, the subject of witness interviews, 'familiarisation,' or 'preparation' was historically one of some controversy. In most common law litigation settings, lawyers will as a matter of course carefully interview potential witnesses and will subsequently assist them in preparing for testimony. In contrast, in some civil law jurisdictions, it is unethical (and in some cases potentially criminal) to either contact or attempt to affect a witness's testimony in local judicial proceedings. Although the general trend over recent decades has been towards greater involvement by counsel in the development and presentation of facts, rules of professional conduct governing lawyers in France, Belgium, Switzerland and Italy prohibit lawyers from interviewing witnesses in national court litigations. Much of that controversy appears to have subsided, through the development of international arbitration standards in addressing the subject (see, eg, article 4(3) of IBA Rules on the Taking of Evidence), but there remains some underlying uncertainty in local rules of professional conduct in some jurisdictions.

Similarly, jurisdictions may take very different substantive approaches to issues regarding fee arrangements. In some countries, such as in the United States and the United Kingdom, contingent or conditional fee arrangements are permitted and

sometimes considered essential to ensuring adequate legal representation for parties with limited resources. Under some such arrangements, a lawyer is only compensated if he or she is successful in obtaining a recovery for the client (in which case a fee based on the amounts awarded to the prevailing party, or a multiple of the lawyer's usual charge, is generally payable). In contrast, in many other jurisdictions, contingent fee arrangements are either flatly prohibited or stringently regulated (eg, to limit the size of the contingency fee or the circumstances in which such arrangements may be used).

Other examples of important substantive and procedural differences regarding the standards of professional conduct for legal representatives in international arbitrations include matters such as conflicts of interest, privileged character of lawyer–client communications, as well as duties of candour and competence. It is therefore essential for counsel involved in international arbitrations to be familiar with the various possible ethical requirements and expectations of foreign or international tribunals, adversaries and co-counsel.

Choice of law governing professional conduct issues

Given the sometimes substantial differences in the treatment of ethical and professional conduct issues in different jurisdictions, the question of what law applies to such issues in an international arbitration is of practical importance. There is little commentary or authority on this issue. On the one hand, a particular set of national rules of professional conduct might apply to the activities of lawyers admitted to practice under those national rules regardless of where the activities occur, essentially meaning that every lawyer would be subject to his or her own rules of professional conduct (as some arbitration practitioners assume). On the other hand, a single set of rules of professional conduct might apply to all counsel in an arbitration, depending on the arbitral seat and the tribunal before which a lawyer appears (as provided by the American Bar Association's Model Rules of Professional Responsibility, at rule 8.5).

Neither of these analyses is attractive. On the one hand, it is anomalous, and potentially unfair, for different counsel to be subject to different standards of professional conduct in the same proceeding (for example, with regard to witness preparation or use of settlement communications). That argues strongly against counsel being subject, or subject only, to the rules of professional conduct of the bar association in their home jurisdiction. On the other hand, it is impossible (or very difficult) to 'relieve' a lawyer of mandatory obligations under the ethical code of the professional organisation (eg, bar association) under which he or she is qualified to practice law. Most jurisdictions (rightly) consider it important to regulate, at least in certain respects, the conduct of locally-admitted lawyers when they practice abroad; that objective is of even greater importance in the increasingly globalised context of contemporary dispute resolution, where 'local' lawyers appear before tribunals seated around the globe.

At the same time, it is also ill-advised to apply the local rules of professional conduct, applicable in litigations at the arbitral seat, to locally-seated international arbitrations. This is because an international arbitral tribunal often has only an attenuated connection to the arbitral seat and because the local rules of professional conduct for domestic litigation are usually no better suited for international arbitrations than local rules of civil procedure.

Rather, in considering the applicable standards of professional conduct in international arbitral proceedings under existing national rules, it is useful to distinguish between two types of rules of professional conduct. The first is composed of the rules of professional conduct imposed by each lawyer's respective 'home' jurisdiction, designed to satisfy mandatory local regulatory requirements (eg, with regard to conflicts, basic relations with clients and tribunals, solicitation and compensation). These rules could continue to apply to the conduct of counsel engaged in international arbitrations seated abroad, in accordance with their terms, and it would be the responsibility of the lawyers' respective bar associations to enforce these as matters of local public policy. They would apply to prevent lawyers from a particular jurisdiction from engaging in conduct abroad that violated fundamental principles of ethical and proper professional behaviour, as defined by the lawyer's home jurisdiction.

The second category of rules of professional conduct would be imposed on all counsel participating in the arbitration, as procedural standards designed to ensure the fairness and integrity of the arbitral proceedings and arising from the tribunal's mandate to conduct the proceedings in a fair manner. These rules would be formulated and enforced by the arbitral tribunal, typically through directions to the parties, costs awards and similar decisions. These rules would concern matters such as disclosure obligations, confidentiality, candour towards the tribunal, witness preparation and sequestration, and other aspects of presentation of the parties' cases to the tribunal; these matters are intimately linked to the arbitral procedure, and are best subject to the control of the arbitral tribunal (rather than a national regulatory body).

Towards uniform international rules of professional conduct

The best resolution of this subject, however, would be through the development of uniform international rules of professional conduct, applicable to counsel in international arbitral proceedings. This would provide both ethical guidance, and constraints, for counsel, which would apply equally and uniformly to all lawyers in a given proceeding. Accompanied by enforcement mechanisms, this approach would be significantly more effective than current law, in which there is both uncertainty as to the content of the ethical rules applicable to lawyers' conduct and an absence of any consistent enforcement activities.

A code of conduct would help safeguard the integrity and fairness of the arbitral process against abuses by counsel, through providing objective, neutral standards to guide counsel's conduct and for the tribunal to apply. As increasing numbers of new 'players' from diverse legal traditions are involved in international arbitration the development of objective, transparent standards of conduct becomes all the more important.

Uniform standards for professional conduct in international arbitrations could be tailored to the international arbitral process, applicable equally and neutrally to counsel from all jurisdictions. These standards could be applied and enforced by arbitral tribunals themselves (or arbitral institutions), rather than by national courts, thereby preserving the parties' desire for a centralised, internationally-neutral forum for resolving their disputes, while also allowing the tribunal most familiar with counsel's conduct and the arbitral procedures to consider alleged violations of standards of professional conduct. The ability of arbitral tribunals to interpret and apply standards of professional conduct would be greatly enhanced if there were international standards designed specifically for international arbitration; while it is difficult for arbitrators to apply foreign rules of professional conduct (often formulated for an unfamiliar legal system), arbitrators should be in a position to apply international standards designed for the arbitral process.

At the same time, national courts (presumptively unfamiliar with the arbitral process and underlying dispute) would be spared the trouble, and denied the temptation, of intervening in the arbitration. Such a solution, tailored to the international arbitral process (and, where appropriate, to specialised industries or geographic regions), is consistent with the historic traditions of international arbitration and substantially more desirable than parochial or conflicting national regulatory measures. This would be a useful step in improving the quality and predictability of international arbitration.

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WilmerHale offers one of the world's premier international dispute resolution practices. Our international arbitration group – based in our London office – is one of the most successful, experienced, and varied of its kind.

Our practice covers virtually all forms of international arbitration and our lawyers have recently handled disputes governed by the laws of more than 30 different legal systems in arbitrations seated in Europe, Asia and the Americas. We have recently served as counsel in more than 350 international disputes – a significant number involving amounts in dispute exceeding $50 million – and we are handling disputes under all leading rules (including ICC, LCIA, ICSID, AAA, UNCITRAL, Vienna Centre, and DIS) and in all leading arbitral situses.

Among other things, we successfully represented clients in four of the largest, most complex international arbitrations to arise in the past decade as well as several of the most important ad hoc arbitrations in recent history. Our team also has broad experience in matters involving foreign states and state-owned entities and public international law, and has advised clients based in Central Europe and other states in their arbitration legislation.

About the Authors

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Gary Born is one of the world's leading authorities on international arbitration and litigation. Mr Born has handled disputes under all leading arbitral regimes, including ICC, LCIA, UNCITRAL, AAA, ICSID and Stockholm Arbitration Institute rules. He has particular experience in joint venture, technology licensing and transfer, investor-state, M&A, construction, oil and gas, intellectual property and insurance matters. Mr Born has served as counsel in several of the largest arbitrations in ICC history and has appeared in more than 500 other arbitrations, in the leading arbitral situses. He has also served as arbitrator in more than 60 disputes.

Mr Born has been repeatedly recognised as one of the world's pre-eminent international arbitration practitioners, including by Legal Media Group ('world's best international litigator'), *Global Arbitration Review* ('super-arbitrator'), *Chambers Global* (one of three leading arbitration practitioners in London) and *Global Counsel* ('world's top ten international arbitration lawyers'). He is also chair of Wilmer Cutler Pickering Hale and Dorr LLP's international arbitration practice.

Mr Born has served on the executive council of the American Society of International Law, and as co-chair of the ABA international section's committee on international aspects of litigation. He is the author of several leading treatises on international arbitration and litigation and is a graduate of Haverford College (BA 1978, summa cum laude, Phi Beta Kappa) and the University of Pennsylvania (JD 1981, summa cum laude). He clerked for Judge Henry J Friendly and for Justice William H Rehnquist.

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Maxi's practice focuses on complex multi-jurisdictional disputes. She has acted in arbitrations under all major arbitral rules and a wide variety of substantive laws. Additionally, Maxi counsels clients on conflict of laws and international jurisdiction issues.

Before joining the international dispute resolution department in London, Maxi practised international arbitration and general commercial litigation in Paris. She has been involved in a wide variety of proceedings concerning the enforcement and challenge of arbitral awards before the French courts.

Since 1999, Maxi has been a permanent lecturer on private international law at the University of Paris I Sorbonne. She has also taught European civil procedure at the University of Paris X Nanterre as well as comparative law at the University of Basel, Switzerland and at Pepperdine Law School, London. She has published articles on a variety of issues of international and arbitration law.

Maxi is a graduate of the University of Paris I and has an LLM degree from the University of Cologne. In 2001, she obtained her PhD at the University of Paris I. She is a member of the Paris Bar.