Confronting Ethical Issues in International Arbitration

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INTRODUCTION TO THE 20TH ANNUAL WORKSHOP OF THE INSTITUTE FOR TRANSNATIONAL ARBITRATION: “CONFRONTING ETHICAL ISSUES IN INTERNATIONAL ARBITRATION”

David D. Caron

I. INTRODUCTION

THE FOLLOWING transcript is drawn from the 20th Annual ITA Workshop Entitled “Confronting Ethical Issues in International Arbitration” held in Dallas Texas on June 18th, 2009. Over eight hours, more than 30 faculty members from some 10 nations through a mock arbitration brought to life and discussed various key ethical issues for arbitrators, counsel and experts in international arbitration. This is the record of that day’s proceedings.

Ethics in international arbitration is an area of great ferment over the past decades with numerous institutions preparing ethical guidelines for arbitrators and, more recently, considering similar guidelines for counsel and experts. The Annual Workshop starts a year before. In June of 2008, the Advisory Committee of the ITA selected the theme of ethics and the three very talented Co-Chairs of the 20th Annual Meeting memorialized in this issue. The three Co-Chairs worked hard and with imagination this past year. World Arbitration is very proud to publish the results of their efforts. The three Co-Chairs are, in alphabetical order: James Castello, whose firm has changed since he was asked to undertake this effort and who is presently with King & Spalding in Paris; Kenneth Reisenfeld, whose firm has changed since he was asked to undertake this effort and who is with King & Spalding in Washington D.C.; and Professor Catherine Rogers who is a member of the faculty at Penn State Law School which has recently been acquired by King & Spalding. (Laughter)

1 Chair, Advisory Board, Institute for Transnational, C. William Maxeiner Distinguished Professor of International Law, University of California at Berkeley.
The ITA membership is a community dedicated to advancing its profession. I note that for those who wish to view these proceedings that many ITA programs, along with various basic documents and study guides, are available on DVD from the ITA on its website (www.cailaw.org/ita).

II. THE MOCK SCENARIO

On January 1, 2006, the state-owned airline of the Republic of Buyerland (FlyBuy Airlines or Buyer), invited foreign companies to submit bids to supply 12 passenger jet airplanes. Only two companies submitted bids: Seller Inc. (Seller), based in the Republic of Sellerville, and Rival Inc. (Rival), based in another jurisdiction. Neither company lists its securities in the United States and hence, under these facts, the U.S. Foreign Corrupt Practices Act does not apply.

Prior to submitting its bid, Seller retained as a consultant Cora Upte, the former business partner of the Transportation Minister of Buyerland. The Minister is an *ex officio* member of FlyBuy Airlines' board and played an influential role in awarding the contract for purchase of the airplanes. Ms. Upte had no aviation or government contracting experience, but she introduced Seller's sales representatives to members of the Transportation Minister's staff.

The Consulting Agreement for Ms. Upte's services provided that she would receive a not insignificant percentage of the amount paid to Seller for the airplanes.

Seller offered to deliver the 12 airplanes in two installments of six (the first delivery to be by January 1, 2008) for a price of US$ 850 million. Seller's bid ultimately prevailed, even though it was essentially priced the same as Rival's and Seller had a worse reputation for timely delivery and repairs. Seller and Buyer entered into a purchase agreement (Agreement) that included an arbitration clause requiring that any dispute arising out of or in connection with their contract be resolved through arbitration before a tribunal of three arbitrators in Geneva under the rules of the International Chamber of Commerce International Court of Arbitration ("ICC"). The parties discussed the possibility of incorporating by reference the IBA Guidelines on Conflicts of Interest in International Arbitration. Ultimately, while the parties
never affirmatively decided against incorporating them, the parties failed to include a reference to the IBA Guidelines into their executed Agreement.

When Seller announced in 2007, that its first delivery of airplanes would be delayed by three months, Buyer cancelled the Agreement and awarded the bid instead to Rival. Seller asserted that Buyer cancelled the contract improperly and that it did so because Rival offered a reduction in its prior price, thus improperly circumventing the prior bidding procedure. Buyer responded by asserting that it had been justified in cancelling the Agreement because of Seller's delay. Neither party raised any allegations relating to bribery or influence peddling.

Influence peddling is essentially a form of lobbying in which nothing of value is exchanged with the governmental decision-maker but, as a result of personal relationships, influence may improperly be exerted over the official decision-making process. In order to prevent influence peddling with respect to public contracts, many countries, including Buyerland (and a number of real countries) make it illegal for a bidding entity to hire any agent or intermediary during the procurement bidding process. Under Sellerville law, Swiss law and U.S. law, retaining the services of an agent to assist in the bidding process is not generally illegal, unless it actually involves an exchange of something of value with governmental personnel. In that event, the exchange transforms the transaction into actual bribery, which is prohibited in all countries. Drawing the line between influence peddling and bribery, however, can require a highly fact-intensive inquiry.

Shortly before the date of delivery for the aircraft specified in the Agreement, an American-licensed lawyer who had been hired by Seller a year earlier (with some fanfare) to police the firm's ethics and anti-corruption compliance programs left his employment with Seller and returned to practice in the United States. Although details are murky, there is some speculation that this in-house counsel's departure was precipitated by a professional disagreement with management over fulfillment of his compliance mission in the company. This speculation has been accompanied by rumors that the former in-house counsel, at times, has spoken ill of his time in Seller's employ.
Seller has filed a Request for Arbitration with the ICC, asserting breach of contract and seeking lost profits and related damages. Neither the Seller/Claimant’s Request for Arbitration nor Buyer/Respondent's Answer raises allegations of influence peddling or bribery. We join the parties as they are beginning the process of selecting their party-appointed arbitrators. Notably, the parties have significantly different ideas about the nature and range of questions that are appropriate to ask during that selection process.