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Possible future work

Proposal by the Government of Algeria: possible future work in the area of international arbitration between States and investors — code of ethics for arbitrators

Note by the Secretariat

1. In preparation for the forty-eighth session of the Commission, the Government of Algeria submitted to the Secretariat a proposal in support of future work in the area of international arbitration between States and investors. The proposal was submitted to the Secretariat on 25 May 2015. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

At the sixty-second session of Working Group II (Arbitration and Conciliation) of the United Nations Commission on International Trade Law, Algeria, through its representatives, issued to the Secretariat the proposal to discuss the establishment of a code of conduct or ethics for arbitrators in the area of arbitration between States and investors.

This proposal is a natural outcome of the continuing recognition that, over the years, international arbitration has become a real public service, especially when it is conducted under the auspices of reputable institutions and independent, experienced lawyers.

This public service is of course a paid service, as the parties must not only remunerate their counsel, but also cover the costs of arbitration, and, insofar as it is essential to the proper exercise of global trade and where there are no other options for continuing to develop investment in all areas, arbitration should be encouraged regardless of the applicable regulations, provided that it meets mandatory quality requirements.

In reality, the entire practice is founded on the will of the parties expressed, of course, in the form of a contract.

As international commercial arbitration is an expression of the principles of a free world and also represents freedom of choice as regards dispute settlement method, it should not be set up against State justice but simply be understood as a form of legal settlement of disputes that respects the freedom of societies and individuals, allowing them, inter alia, to choose a judge, a key element of the trust that will subsequently determine whether the award will be accepted and enforced.

There is no international monopoly on arbitration in a world where the economy must move forward and where innovation is at the fore; competition between different forms of arbitration is a way to improve quality, to eliminate bureaucracy, and to increase the efficiency and effectiveness of arbitration procedures.

It is well known that money and morality do not often mix well; arbitration is often associated with business, interests, confidentiality and networks and implies flexibility, pragmatism, realism and compromise, whereas ethics require a certain impartiality, transparency, detachment from material contingencies, a degree of intransigence and an ability to clearly and simply discern the acceptable from the unacceptable.

The topic to be addressed here relates more fundamentally to the procedural conduct of arbitration actors, their mutual relationships, and the values that they are expected to share and even convey in accordance with what might be called a philosophy of arbitration, an alternative justice to State justice and litigation, where hearings should be conducted under ideal conditions of mutual respect and general harmony despite the cultural differences and heated atmosphere which are inherent to any dispute.

Regarding arbitration, one might say that arbitration ethics must bring together a set of values and behaviours that the various actors involved in proceedings should respect or ensure respect for in order to safeguard the arbitration of their disputes,

that is, an integrated and sustainable alternative justice mechanism in which those who have recourse to it may place their trust.

It is not simply a matter therefore of establishing which lines should not be crossed, or even less so of compiling an exhaustive list of behaviours that might be considered immoral, deviant or unfair.

Ethics are thus necessary not simply in order to better conduct arbitration proceedings, but because they appear essential to arbitration proceedings and the success thereof.

Ethical guidelines would be independent and would impose no sanctions but act as the voice of conscience; arbitration law has gone beyond mere sanctions — if indeed there are sanctions — and now needs ethics in order to find its bearings again and a new lease of life.

The arbitrator should leave no stone unturned and should strictly refrain from speaking unilaterally to one party's counsel, even in contexts unrelated to the arbitration proceeding.

It is of prime importance to know when conduct may be considered not the result of a pre-existing legal obligation but as the manifestation of a moral duty incumbent upon us without it being set in stone.

While the arbitrator's task is to make a decision, the way in which the decision is rendered, which should be beyond reproach, is also subject to scrutiny, not only by the parties.

Upon careful consideration, the ethical duty of arbitrators seems an inherent component of their legal, and even contractual, mission. Do we not also impose a duty of good faith on co-contractors in the performance of their contracts? Even though, as judges, they do not in principle make decisions according to equitable principles but with reference to the law, arbitrators are duty-bound to render fair decisions independently and impartially after due process has been carried out in accordance not only with the principles of participation and equality of the parties, but also with the mission entrusted to them. The arbitrator is, as we know, both a legal and a contractual person, which leads him or her to be constantly faced with issues of conscience and inevitable tension between, on the one hand, the need as a judge to remain above partisan discussions and the contingencies of the dispute and, on the other hand, the desire to please and give satisfaction as a contractor, that is, as a service provider who hopes that his or her contract will be renewed and that his or her fees will be paid.

Although they are not legal regulations strictly speaking and therefore devoid of any sanctions, the fact remains that a breach by an arbitrator of one of his or her duties may have legal consequences. While the setting aside of an award does not currently appear to be the most natural sanction, there are a range of solutions that would neither ignore nor leave without consequence the arbitrator's non-compliance with the ethical framework of arbitration. These include removal of an arbitrator from proceedings, reduction or non-payment of fees, civil or criminal liability, and the ultimate and effective sanction of non-appointment to further arbitration cases. An unethical arbitrator destroys his or her reputation which itself represents the basis of his or her business.

In conclusion, we propose that a code of ethics for arbitrators in the area of arbitration between investors and States be established in keeping with the spirit and articles of the UNCITRAL Arbitration Rules.