Young Arbitration Practitioners Symposium
Young ICCA Report
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THE ROLE OF ETHICS IN INTERNATIONAL ARBITRATION

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On 6 October 2013, Young ICCA, in collaboration with the IBA Arbitration Committee, ICC YAF, ICDR Y&I and YCAP, co-organised in Boston a remarkable symposium for young practitioners on "The Rule of Ethics in International Arbitration". K&L Gates hosted the event, which was introduced by the keynote speaker, Professor William Park, President of the London Court of International Arbitration.

A panel discussion about the different perspectives on ethical issues in international arbitration immediately followed. The panellist included Mr. James Duffy (K&L Gates), Ms. Victoria Orlowski (Gibson Dunn), Ms. Caroline Richard (Freshfields Bruckhaus Deringer), Professor Marie-Claude Rigaud (University of Montreal) and Mr. Marc Veit (Walder Wyss). Ms. Noradèle Radjai (Lalive) moderated the symposium.

1. Keynote speech: Arbitrator Ethics - Between the Pernicious and the Precarious

Professor Park started his speech remarking the importance of following ethical guidelines in international arbitration. Ethics are the basis on which the parties build confidence in the arbitration as an effective mechanism of disputes resolution. However, as professor Park pointed out, unrealistic guidelines are not useful and could lead to a precarious system. In other words, ethical guidelines must be balanced, not being too strict or too lax; *i.e. la juste measure* would be the desired standard.

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There is consensus in the assertion that arbitration is booming as a dispute resolution mechanism. In Professor Park's opinion, to continue this path, arbitration must generally represent a levelled playing field for parties to international disputes, in which due process and impartial arbitrators must be assured.

Besides, we should take a closer look at the legal framework in which arbitration proceedings take place to preserve their quality and effectiveness as a dispute resolution mechanism. First, the parties' agreement to arbitrate must be enforced (for instance, through the successful enforcement of the award). Second, the integrity of the proceedings should be monitored, paying special attention to the interaction between the arbitration law (statutes, cases and treaties) and the so-called soft law (arbitrator ethics and professional guidelines issued by the main arbitral institutions, such as the AAA, the ICC or the LCIA).

For our reputed guests, the ‘devil’ may be in the detail. For instance, the debate may arise when discussing whether or not the waiver on independence or impartiality should be allowed. In this regard, the IBA rules (red list) provide for certain circumstances that may call into question the impartiality of the arbitrators. From that list, according to the professor, some issues may be waived but some may not. The *Shorksman* case tested how arbitrator integrity can be waived in an international contest. The dispute arose out of a distribution relationship involving fruit used in a Jewish festival. A US distributor refused to pay for the imported fruit on the basis that the Israeli farmer had also sold the fruit to third parties (*i.e.* the farmer would have breached the exclusive distributorship). The controversy was submitted to arbitration before a Christian priest who found in favour of the Israeli farmer. When the farmer tried to enforce the award in the US, the distributor objected, challenging the impartiality of the arbitrator on the basis of a previous relationship between the farmer and the arbitrator. The court rejected the challenge and concluded that the distributor was aware of the denounced relationship during the arbitration and thus waived its right to complain.

Professor Park referred to an additional ‘hot topic’, the appointment of arbitrators. Some critical voices object the possibility of arbitrators being appointed by each party and the president through common agreement.

According to the Professor, parties’ agreements on the appointment of arbitrators are on occasions difficult to accomplish. In *Jivraj v Hashwani*, the English Court of Appeal struck down an arbitration agreement requiring the three arbitrators to be Muslims and declared that it was a violation of fundamental fairness for establishing a religious qualification for a job. However, the Supreme Court of the United Kingdom reversed the judgment in 2011, holding that it was legitimate to select a person of a particular religion to be an arbitrator because arbitrators are not "employees" within the meaning of UK and EU discrimination legislation.

The crucial point in this regard lies on the arbitrators' integrity. Professor Park warned us that the most natural consequence of an arbitrator's failure on integrity is that he will likely lose the confidence of the other members of the tribunal.

Usually, arbitrators face a dilemma managing this issue, as they do not desire to compromise their own reputation. Professor Park provided two great examples in this regard.

On the one hand, he referred to the triviality of the connections. On occasions, the standard required to arbitrators regarding their previous connection with the parties is set ridiculously high. A proportionality degree is needed in which a minimum contacts standard may be acceptable.

On the other hand, the professor mentioned the particular relationship existing between barristers of the same chamber. Generally, barristers defend that they would not be biased to serve as arbitrator in a case in which a barrister of her same chamber represents one of the parties as counsel. For Professor Park this particular matter should be analysed on a case-by-case basis, paying attention to the regime governing the particular chamber (in terms of shared profits, expenses and, particularly, reputation).

As a final remark, Professor Park warned us that sometimes "perception is reality". In this regard, the perception of what is reasonable must be handled with care. The world is absolutely interrelated, and we need to be in the business of drawing fine lines in this sensitive issue.

One of the attendants asked Professor Park about the role played by ethics in the perception of reputation's debate. How should we reconcile the real bias and the perceived bias?

To answer this question, Professor Park referred to a US case, *Commonwealth Coatings Corp. v. Continental Casualty Co*. (1968). In this case, the plaintiff sought the annulment of an arbitral award on the basis of one of the arbitrators' bias, who had received a fee amounting to more than $10,000 from one of the parties several years before the arbitration started. The US District Court and the Court of Appeals rejected the petition, on the basis that the amount was not that high (when compared to the arbitrator's remuneration) and that the award had been unanimously rendered (*i.e.* the outcome would not have been affected by a different decision from this arbitrator). However, the United States Supreme Court reversed the decision and annulled the award. For the Court, "*any tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of*

bias."[3]

2. Panel discussion and Q&A: Different Perspectives on ethical issues in international arbitration

During the panel discussion, several interesting topics were addressed by the panellists from an ethical perspective: (1) The written submissions; (2) the production of documents; (3) the preparation and examination of witnesses; (4) the arbitrators' empowerment to enforce decisions and punish certain conducts (in particular, the counsel's conduct); and (5) the third party funding.

Ms. Noradèle Radjai introduced the first topic, *i.e.* the **written submissions** and how to balance the duties owed by the lawyers to the tribunal and the clients in this respect. In general, the panellists agreed that when submitting briefs to the arbitral tribunal, certain guidelines should be followed (for example, the IBA Guidelines). The debate focused on whether a duty of candour and honesty is owed to the arbitrators. While some panellists considered that this duty generally exists, consisting in an honest and true behaviour, in Mr. Marc Veit's view, there is no basis to consider that lawyers owe this duty to the arbitrators, but to the clients.

The common point was met on the reputation issue. Undoubtedly, no lawyer desires to compromise her own reputation by submitting briefs containing false statements or inaccurate assertions.

Ms. Radjai then gave the floor to Ms. Caroline Richard to discuss about the **production of documents**. Ms. Richard pointed out that common law lawyers are obliged to instruct their clients to preserve documents. Moreover, they have to take affirmative steps to ensure that they tried to collect those documents from clients. However, there are certain jurisdictions in which the destruction of documents is mandated. To what extent is there an obligation to hand in documents which production has been requested in an international arbitration?

In Mr. James Duffy's opinion, the tribunal must consider the materiality of the documents in order to decide. Several issues may play a role here, for instance, the party's right to preserve the confidentiality of certain documents.

For Ms. Marie Claudie Rigaud, when attempting to provide a standard rule on this matter, it becomes mandatory to analyse the solutions offered and the way in which the documents are treated in each jurisdiction. Ms. Rigaud raised the question of whether we are ripe for having clear ethical rules on evidence in international

[3] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968).

arbitration. She pointed out that the IBA Guidelines may not strike the right balance and additional time may be needed to build a solid and common path in this regard.

On occasion, arbitration clauses provide certain rules regarding the document production phase, in an attempt to restrict a "common law discovery". Ms. Victoria Orlowski called attention to the fact that a very long arbitration clause might be risky. The more sophistically drafted the clause is, the more complicated may be to conduct the arbitration. Additionally, a very detailed clause may jeopardise the enforcement of the award on the basis of a breach of the parties' agreement on the procedure to be followed.

The panellists briefly addressed the possibility of involving the litigation attorneys in the drafting of certain provisions of the contract. Some of the speakers highlighted the increasingly common practice of implicating the arbitration attorneys in the negotiation of the contractual dispute resolution clause.

Ms. Radjai then gave way to the following topic, *i.e.* the **preparation of witnesses**. Ms. Rigaud emphasised the key role played by ethics in certain situations that may arise during the preparation of witnesses. As she recognised, sometimes there are no clear answers, because ethics is about the process. Lawyers' behaviour is not as objective as we think. On the contrary, some risks exist when trying to combine the lawyer's role as partisans and objective parties. The starting point should be to realise that we are not objective and, on that basis, rules must assist us in the decision-making process.

Mr. Duffy referred to the fact that US lawyers are less restrictive with the preparation of witnesses than in other jurisdictions, for example, in the UK. In this regard, some lawyers may see the IBA rules on the preparation of witnesses as a more generous and broad pattern than rules on their own jurisdiction.

At this point, an interesting debate arose about which ethical rules lawyers admitted in two different jurisdictions are abide by. For the panellists, different criteria may be applied, such as the rules of the place of the arbitration or the most restrictive rules.

In the opinion of one of the attendants, lawyers are like turtles, "you carry on ethical duties from any jurisdiction in which you are admitted to practice law".

The discussion then turned to the empowerment of arbitrators to **sanction the unethical conduct** of counsels. It seems that losing the case on the basis of the merits, disregarding the unethical conduct, is not enough punishment. In the panellists' opinion, we should all think about where unethical behaviour and the arbitrators' (in) ability to punish the parties lead international arbitration.

Likewise, panellists seemed to be in agreement that a decision on costs might not be enough to punish unethical behaviour. In this regard, the distinction between party misconduct and counsel misconduct was emphasised and the issue of whether an arbitrator may sanction the parties on the basis of the counsel's misconduct was raised. In fact, IBA rules allow this sort of ‘punishment.’

Finally, the speakers discussed about **third party funding**. Mr. Duffy directly addressed the subject, by stating that whether the third party has an interest in the arbitration and its relation with the tribunal should be analysed and disclosed in order to assure the impartiality and independence of the arbitrators.

On occasion, the financed party to the arbitration may request that the third party’s identity remains confidential. Even if in Mr. Duffy’s opinion the funder's identity must be disclosed, it should be brought into consideration who is running the case and the interest and implication of that third party in the procedure. In the end, part of the resulting amount may go to the third party funder.