Aufsätze

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"No Risk, No Fun" – A Counsel's Remarks on Integrity[1]

How can we guarantee integrity of counsel in international arbitration – and how can we do this in light of the differences in applicable ethical rules? It is the author's proposition to give up abstract rules that are to apply in every arbitration and to every counsel. Instead, the arbitral tribunal should assess the differences and then treat the parties according to these differences – in an effort to effect a fair treatment that way. In this context, the arbitral tribunal is not called upon to sanction counsel if they transgress the rules; instead, the tribunal should compensate for the disadvantages suffered from the transgression by the other side by taking countermeasures when conducting the arbitration.

Wie stellt man sicher, dass sich die Prozessbevollmächtigten in internationalen Schiedsverfahren integer verhalten – und wie soll das insbesondere angesichts der Unterschiede in den anwendbaren Berufsregeln gehen? Der Autor rät davon ab, auf allgemeingültige Regelungen zu vertrauen, die jedes Schiedsverfahren erfassen und für jeden Anwalt gelten sollen. Vielmehr soll das Schiedsgericht sich von den Unterschieden ein Bild machen und dann die Parteien entsprechend behandeln, um auf diese Weise ein faires Verfahren zu gewährleisten. Dabei soll das Schiedsgericht bei Überschreitungen der auf den jeweiligen Anwalt anwendbaren Regeln dem betroffenen Anwalt keine Sanktion auferlegen, sondern stattdessen die Nachteile, die der anderen Seiten entstehen, durch Gegenmaßnahmen ausgleichen.

I. Introduction

In the program leaflets for the DIS Autumn Conference, one will see that this Section runs under the heading „*No risk, no fun? A counsel's remarks on integrity*". That is a very catchy title, but I have to admit, it did not come from me, nor did the idea of speaking about integrity. In fact, when I was asked by the DIS if I could give a talk on the topic, I asked myself: why are they asking you? Given the subtext, do they believe you to be a little reckless in your strategies? Or do they think you are not reckless at all, which I guess is just a nice way of saying you are a bit boring?

As I pondered these thoughts, an even more important question arose: what is integrity, anyway? What do we mean when we speak of integrity? And what *is* integrity of counsel (because that is what I am going to talk about, not integrity of the arbitrator) in the context of international arbitration?

II. What is integrity of counsel?

Webster's dictionary defines integrity as (1.) "*the quality of being honest and fair*" and (2.) "*the state of being complete or whole*".[2] The first part of this definition obviously refers to a condition of mind, or a quality of behaviour. The second seems to be concerned with a physical or corporeal condition of inviolacy and intactness. Understood in that way, it seems evident that the first part, with its allusion to honesty and fairness, bears relevance to our topic or at least to our preconceived understanding of integrity in the present context. After all, we wish for arbitration to be an honest and fair process; these are the basic pillars of arbitration, and really of any adjudicative process.

On the other hand, the qualities of fairness and honesty are what we usually look for in the decision-makers, i. e. in the arbitrators but not necessarily in counsel. That is because counsel's first and foremost obligation, one would think, is not to be fair and honest. It is to serve and pursue the interests of his or her client. Moreover, it is the duty of counsel to act *exclusively* in these interests. This primary duty is dictated by the contract with the client, by ethical standards and professional rules of conduct, and last but not least by criminal law: in many jurisdictions, what we call "*Parteiverrat*" in Germany is a felony. So where the first prong of integrity, with its emphasis on fairness and honesty, aims at balancing and reconciling opposing positions, the job of counsel stands in direct contrast to this. My interest as counsel will not be, cannot be, must not be to reach a balancing of interests. My job is to see my client's interests through. That is not to say, of course, that under the right circumstances, advising my client to seek a compromise is not the best way to do just that.

Naturally, the analysis does not end there. It is undisputed that the duty to represent the client's interests is not without limitation. In addition, it is equally undisputed that many of these limitations aim at protecting the integrity of the process of dispute resolution. When I say integrity here, I am now of course referring to the second part of Webster's definition: to the state of being whole and complete, in other words, to the arbitral process remaining unviolated and intact. There is a plenitude of rules, regulations and guidelines that aim to protect that integrity: rules of ethics and conduct as imposed by bar associations the world over; the rules for European lawyers in cross-border-matters laid down in the CCBE Code of Conduct, the Council of Bars and Law Societies of Europe; the International Law Association's Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals of 2011; the IBA Guidelines on Party Representation in International Arbitration of 2013; or the General Guidelines for the Parties' Legal Representatives as annexed to the LCIA Rules of 2014.

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1) This paper is based on the author's speech at the DIS Autumn Conference 2016 in Berlin and adapted for publication.

2) Merriam-Webster Learner's Dictionary, see http://www.learnersdictionary.com/definition/integrity.

This second prong of integrity is also very much and directly in my interest as counsel – at least as long and to the extent that it serves my client's needs by restricting what the other side is allowed to do: as much as I wish to protect my client's position, and as much as I wish to be able to do that unhindered by concepts of fairness and balance, I also want the opposing party and their counsel to very much be constrained and bound by such principles. I want to have my cake and eat it: I want the strictest of standards imposed on them, and the least and most lenient of standards imposed on myself. And while that is probably no legitimate expectation, maybe this one is: I want to be held to the standards that apply to me, but none other; and I want opposing counsel to be held to at least the same standards, even if his or hers are more lenient than the set of standards that apply to me. I want, if anything, the famous "level playing field", but I want it my way.

III. How do we determine the level playing field?

So how then can we determine that kind of level playing field? Moreover, how can we ensure that no one runs off the field?

Many attempts have already been made at establishing a common ground. I just enumerated the most important regimes above. I believe, however, that the problem with many of these regimes is that they are simply too unspecific, or provide for little actual reference. If one looks, for example, at the LCIA Guidelines, one will see that they largely stipulate what should be uncontroversial anyway: "*a legal representative should not knowingly make any false statement*" (Paragraph 3); "*a legal representative should not knowingly procure or assist in the preparation of or rely upon any false evidence*" (Paragraph 4); "*a legal representative should not knowingly conceal, or assist in the concealment of, any Document*" (Paragraph 5). Other provisions remain vague, e.g., Paragraph 2, aimed at addressing guerrilla tactics: "*A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award.*"

Of course, when we read this language, we all can think of typical examples of what the drafters had in mind; and as we can see, they actually give one example, namely "*repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the Arbitral Tribunal known* [sic!] *to be unfounded*".

Still the difficulty lies in determining in each individual case whether an activity is intended to "*unfairly obstruct*" the arbitration. The question needs to be answered in each individual set of circumstances: is this obstructive behaviour – and an unfair one on top of that – or is it no more than the proper safeguarding of one's client's interests? That is where the guidelines fail to give guidance because they are not specific enough.

Similar criticism applies to the IBA Guidelines. To a large extent, they, too, proclaim what is self-evident. Yet more importantly, the IBA Guidelines not only declare what is improper in international arbitration; they also aim to disclose what is admissible. Now, they probably accurately reflect what is considered best practice. However, the problem is that only because the Guidelines allow for a certain activity does not mean that every counsel will be able to avail him or herself of the possibilities so recognised.

For example, Guideline 20: "*A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.*" This is good and fair, but it does not help counsel if they come from a jurisdiction where any contact with potential witnesses outside the formal proceedings is prohibited. The ethical rules of conduct under the bar that this lawyer is subject to will not change; and where the opposing side's counsel is not inhibited by similarly strict standards, he will certainly not subject himself voluntarily to the standards applying to his colleague. The playing field will not be levelled.

The drafters of the IBA Guidelines recognised this problem. The Comments on Guideline 20 have the following to say about it: "*If a Party Representative determines that he or she is subject to a higher standard than the standard prescribed in these Guidelines, he or she may address the situation with the other Party and/or the Arbitral Tribunal.*"

I would not go as far as saying that this is wishful thinking, but I do have my reservations whether this helps a less experienced counsel from a jurisdiction that does not see many international arbitrations. Would he or she really be aware of the different standards that exist internationally to know that he or she may have a problem and then be resolute enough to bring this to the tribunal's attention and insist that a solution be found which addresses his predicament?

IV. The level playing field cannot be found in pre-drafted rules, but must be determined for each arbitration anew

Obviously, it is simple to criticise. What is the proposition then? It is this: we should not seek guidance from pre-drafted guidelines offered to operate in every setting and in every circumstance. They will invariably be vague and unspecific – unless they address that which is beyond dispute – because they have to please everyone. As we all know: if you want to please everyone, you will please no one.

Allow me to offer two quotes here that seem right on point. The first is this: "*[T]he approach is to draft rules that seek to accommodate differences by abstraction. A sufficient level of abstraction must be reached in order for everybody to agree to it. The modus operandi is therefore to codify the minimum common ground, and if there is any doubt, the more bland the statement, the safer the proposition. It follows that the result of this process is generally a vague and obvious rule, which is of limited practical use.*"[3] The other is: "*The risk of rules that are general and vague seems somewhat inherent in any attempt to formulate universally acceptable principles for the conduct of the parties' legal representatives. A high level of abstraction is required in order to find consensus.*"[4] I agree with these quotes. As a result, I firmly believe that any effort to create a globally applic-

3) *Landau/Weeramantry*, A Pause for Thought in van den Berg (ed.), International Arbitration: The Coming of a New Age?, ICCA Congress Series Vol. 17.

4) *Scherer*, Conduct of Legal Representatives under the 2014 LCIA Arbitration Rules: How to Apply the New Provisions, Kluwer Arbitration Blog, 23.3.2015.

able and universally recognised code of conduct in international arbitration will suffer from these fallacies.

I therefore propose that we turn around and instead revive, and, with some adaptions, then apply a concept originally conceived by, as far as I can see, *Cyrus Benson* in a 2009 article in *Dispute Resolution International* – a time we did not yet have the LCIA or the IBA Guidelines.[5] In this article, *Benson* proposed the use of an "*ethical checklist that might be employed at the outset of a case to ensure that the parties, their counsel and the tribunal are on the same page insofar as ethical standards are concerned*". *Benson* went on to explain the methodology of such checklist to be "*to identify the areas where ethical standards among counsel may differ and offer parties suggested resolutions that may be adopted (or not) as the parties and the tribunal determine. Parties and their counsel would be encouraged to seek agreement in advance of the initial procedural hearing, with the tribunal then called upon to resolve any disagreements*". As regards the ultimate purpose of such checklist, he says that "*[t]he principal goal throughout would be to create an even playing field insofar as ethics is concerned*".

Benson then moves on to lay out a checklist. The checklist consists of a collection of ethical principles, sub-divided into 12 categories, which the parties are asked to cast their vote on as to whether the respective principle should be adopted in the arbitration. They are invited to do so by checking a "Yes" or a "No" box. Examples include this: "*Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. The lawyer must discharge with integrity all duties owed to clients, the tribunal, opposing parties and their counsel. ADOPT: Y □ N □*". Another example is: "*The lawyer shall not knowingly participate in the creation, preservation or use of fraudulent, false, altered or perjured testimony or evidence in any manner whatsoever. ADOPT: Y□ N□*".

I like two things about *Benson*'s proposal. The first is that it puts the issue on the table and urges the tribunal and counsel actively to address the "elephant in the room". The second is that his concept results in an ethical regime bespoke for the parties and their counsel. Rather than adopting rules that were meant to cover every case and are therefore inherently vague, abstract and unspecific, this concept of creating an ethical framework with counsel allows devising a setting which is unique and specific to the particular arbitration at hand. Much like careful consideration of what the parties need to resolve their dispute is better than handing out one's standard Procedural Order No. 1 template, the ethical checklist is in my view in fact superior to that of adopting a standard regime. Of course, to make full use of this advantage, the questions asked should probably be more specific than the examples quoted from *Benson*'s list and in fact, many of his suggestions are. In any event, more specific questions could look like this:

(i) Are you allowed/expected to communicate with witnesses and expert witnesses directly? What are the parameters under which you are allowed to communicate with them?

(ii) Are you allowed/expected to assist witnesses and expert witnesses in drafting witness statements and expert reports? What are the limitations?

(iii) Are you expected/required to discuss all relevant facts/review all relevant documents with your client, or may you rely on the facts and documents as presented to you by your client?

I mentioned above that I propose some amendments to *Benson*'s concept. The first is that I would recommend that in addition to suggesting ethical principles, the parties should be allowed to describe the specificities of their professional rules system. This should ensure that even those views are recognised which may seem obscure or at least come unexpected. The tribunal should also ask questions about how counsel have so far handled the dispute and the preparation for the arbitration – e.g. "*Have you been in contact with witnesses you intend to rely on?*" This way, not only the theory of the different restrictions, but also the differences of actual conduct can be taken into account.

V. The level playing field is not attained by levelling the differences, but by recognising them

The second, more important amendment, is that I do not agree that the tribunal should distil the answers given by the parties and then try and broker an agreement on an ethical framework binding on counsel. I also do not agree that the tribunal should hand down such framework by way of procedural order where the parties cannot reach an agreement. I do not think that this will work. The simple reason is that such framework, regardless of whether implemented by way of party agreement or by way of procedural order, cannot do away with the professional ethical rules that counsel is subject to. The rules do not change only because the parties or the tribunal wills it. Instead, rather than aiming at covering the arbitration with yet another layer of rules, the tribunal should simply take note of the standards as they apply to counsel, and then conduct the arbitration accordingly. For example, where one party is free to, and has, discussed matters openly with opposing witnesses while the other is not, this may be reflected in the level of substantiation or evidence required from the disadvantaged side. I guess the essence of this approach is this: the level playing field is not attained by making all rules level; the level playing field is attained by the tribunal recognising that they are not, and then acting on that. That is not to say that the tribunal should not establish some ground rules, e.g. explain that unilateral contact with an arbitrator is improper. However, I am saying that this should not be the only device.

Some respond to this: this approach will mean to treat parties without equality and will therefore violate one of the central principles of arbitration. I disagree. The principle of equal treatment forbids treating the parties differently and *thereby restricting* the fairness of the process.[6] What I am proposing is treating the parties differently *so as to guarantee* the fairness of the process. The proposal does not mean a violation of the equality of parties. It means to uphold it.

5) *Benson*, Can Professional Ethics Wait? The Need for Transparency in International Arbitration, Disp. Res. Int. 2009.

6) *Geimer* in Zöller, ZPO, 31. Aufl. 2016, § 1042, Rz. 2; *Schlosser* in Stein/Jonas, ZPO, 22. Aufl. 2013, § 1042 Rz. 7.

VI. How do we sanction transgressions?

I would now like to turn to the question of enforcing the ethical framework. What do we do when one side transgresses the limitations of the ethical framework? Who should monitor, who should sanction, and what should the sanctions be?

Acting as counsel, I care primarily about the integrity and fairness of the specific arbitration at hand and that my client's interests are treated with such integrity and fairness in these specific proceedings. This is a concern of due process, and the tribunal is the keeper of that grail. Much like I think it is the tribunal's job to compensate the imbalances by conducting the arbitration in a certain way, I think the tribunal should also compensate for any transgressions by the way it handles the proceedings: e. g. by extending timelines, by allowing for document inspections, by allocating costs in a specific manner, by drawing adverse inferences or by having the stamina to reject unwarranted and frivolous interlocutory applications. However, I am not after sanctions being imposed on my fellow colleagues by reprimanding them when they have transgressed, or reporting them to the relevant bar association and so forth – quite irrespective of the unresolved question of whether arbitrators are at all authorised to do any of that. In fact, I think if tribunals did that, it may only add to the ways employed to obstruct the proceedings. After all, it could open the floodgate to challenges of arbitrators.

For similar reasons, I do not think that arbitral institutions should engage in the practice of what has been called "policing" the arbitral process by issuing reprimands, reporting counsel to the bar or blacklist them when it comes to arbitrator appointments or nominations. This creates a whole lot of other problems, including – again – that of due process and the right to be heard in that context.

VII. Can we hold the parties responsible for the misconduct of counsel?

If, as I propose, the ethical balance should primarily be upheld by the arbitral tribunal taking procedural steps, one key problem remains: the steps which I have in mind – ordering document production, drawing adverse inferences, allocating costs and so forth – are primarily directed at the parties – not at counsel. Still it is the transgressions of counsel which these measures are meant to "punish". How then do we justify that the parties suffer for their counsel's improprieties? If you so will, this question is the "flipside equivalent" of the ongoing discussion how the arbitral tribunal can sanction counsel when counsel is not a party to the arbitration agreement?

The answer could be that there is a vicarious liability of the party for the conduct of its counsel, i. e. that counsel's conduct is somehow attributed to the party under a theory of contract. That contract would be the arbitration agreement, and the duty breached under it would be the duty to foster and support the arbitral process. Consequently, if the arbitration agreement is subject to say, German law, under which such duty is by and large recognised,[7] counsel would be the party's *Erfüllungsgehilfe*, and the party could be sanctioned by operation of Section 278 BGB.

However, there are two objections to this solution. First, this only works where counsel's violation of his or her bar rules really is tantamount to obstructing the arbitration. That may be so where counsel is employing guerrilla tactics. I do not think it can be said for every case of exceeding one's own bar rules. Second, the theory of contract described only works where the law governing the arbitration agreement provides such mechanism of attribution. Again, that may often be the case, but it may not be under every law that might conceivably apply.

To address this problem, I propose the following. The DIS is currently reviewing and most likely revising its present arbitration rules. I suggest that in the context of this revision, a rule be inserted which effectively says that the parties can be held accountable for the conduct of their counsel. As part of the arbitration rules, this would, by incorporation, become a binding term of the arbitration agreement. In fact that is the approach the LCIA used with its Section 18.5 of its Rules. So something like the following could be inserted as a new Paragraph 3 of the current Section 26, which deals with due process: "*The parties acknowledge that the arbitral tribunal may conduct the proceedings in a way so as to reflect and react to (1) an imbalance between the ethical rules and regulations applying to the respective counsel and (2) a violation of such rules and regulations by counsel.*" Further, while the DIS are at it, the DIS might also adopt the checklist concept: unlike the LCIA not as an annex to the Rules, but as a tool for arbitrators readily available on the website. That way, arbitrators would have something to start from when they ascertain the ethical framework of the arbitration.

VIII. Concluding Remarks

I would like to summarise the cornerstones of my thesis.

As counsel, I too am interested in fair proceedings, however, that does not mean that I would be, or could be, willing to accept having to live up to stricter standards than I am used to.

The famous level playing field cannot be attained by indiscriminately imposing the same rules on everyone. Rather than making it all the same, the differences should be identified and analysed. This can be done by an ethical checklist in which counsel attest to their ethical framework and conduct. The tribunal should then keep that in mind in order to guarantee for fair proceedings.

Nothing further should be required or expected from the arbitral tribunal or, for that matter, from the arbitral institution. There is no need for sanctioning counsel, no need for policing the arbitration.

To allow for a proper reaction by the arbitral tribunal, a rule should be inserted in the arbitration rules saying that the parties acknowledge the tribunal's powers to conduct the arbitration in a way reflective of the ethical framework applying to counsel, and any transgressions thereof by counsel.

7) BGH NJW 1971, 888 (890); *Geimer* in Zöller, ZPO, 31. Aufl. 2016, § 1029, Rz. 17.