President's Message

Counsel Ethics in International Arbitration – Could One Take Things a Step Further?

I do not like the term "hot topic".[1] However, the least one can say of the IBA Guidelines on Party Representation (the "IBA Guidelines") and of the newly adopted LCIA Arbitration Rules is that they have made the issue of party representations and counsel ethics a genuine "hot topic" in international arbitration. Witness the multiplication of conferences and papers dealing with the subject, and the public calls for self-regulation in our profession.

This President's Message does not aim to cover once more what has already been said. ASA's position on the IBA Guidelines is by now well-known and is posted on ASA's website.[2] ASA's position ends with a call for further reflection and exchanges of ideas. This is precisely what has been taking place over the past months, in particular within the ASA Executive Committee.

The purpose of this President's Message is to take the debate a step further by setting out some personal ideas of ASA's President. These ideas, or at least some of them, have encountered a favourable – sometimes even enthusiastic – response from several members of the ASA Executive Committee and various arbitration practitioners; they have also been met with scepticism, including within ASA. At the time these lines are being written (end-July 2014), the necessary debate has not yet taken place within ASA's Board, so that this message cannot be taken as reflecting any official ASA position.

Having taken all these precautions, let us turn to substance.

My thinking is driven by three fundamental concerns relating to the approach adopted in the IBA Guidelines, the LCIA's new Arbitration Rules and in the Annex to those rules:

– First, one of the main concerns about the IBA / LCIA approach is that it puts into the hands of arbitral tribunals the power to decide

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1 It tends to generate the type of expectation that no arbitration-related subject (or, for that matter, no legal subject) could possibly live up to. It is usually employed in flyers advertising conferences that have no substance. More often than not, "hot topics" are not "hot" because they are fresh out of the oven of arbitration practice or thinking, but because they are re-heated by the micro-wave of macro-marketing.

2 See http://www.arbitration-ch.org/pages/en/asa/news-&-projects/details/972.ethics-and-party-representation-asa-contributes-to-the-debate.html.

on matters relating purely to ethical (or unethical) conduct of counsel. ASA continues to believe strongly that this is wrong and undesirable, for the reasons set out in ASA's position paper. As for the approach consisting in conferring such powers on arbitration institutions, it is highly questionable in terms of legitimacy: neither the parties nor counsel have any say in the composition of the institutions' governing bodies or rules, and the decision by counsel to represent a party in institutional arbitration cannot – even by the longest stretch of the imagination – reasonably be deemed to equate to voluntary acceptance of the institution's rules and powers as regards professional ethics.

- Second, another significant concern (which affects mainly the IBA Guidelines) relates to the breadth of the standards, which ASA considers to be excessive. This second concern also relates to the fact that, to a certain extent, the IBA Guidelines appear to be regionally influenced.
- Third, initiatives by individual associations like the IBA or arbitration institutions like the LCIA generate a risk of fragmentation between different – and potentially contradictory – "rules" or "codes". This in turn would likely undermine the very legitimacy of the rules/codes that may be adopted, since offending counsel could point to differences to argue that there is no international consensus.

That said, the conclusion to be drawn from these three concerns is not that one should drop the subject or adopt a non-constructive naysayer stance (this is not, and never was, ASA's view). The right conclusion to draw is to seek ways of capitalising on the work done by the IBA, LCIA and others and to address these concerns. Taking them one by one:

- That the arbitral tribunal or the arbitration institution should not be the entity (or the only one) having jurisdiction to apply and enforce rules (and to impose sanctions) does not mean that one should not seek to identify what *would* be the appropriate decision-making body or bodies to do so.
- It would be extremely valuable to have a set of *truly core principles* – a kind of universally recognised "*international ordre public*" of counsel ethics, if only because this would enable parties or other participants in proceedings who are faced with offending lawyers to refer to a truly recognised text of narrow but clear principles instead of "generally accepted best practice" or the like.

– The risk of fragmentation between different – and potentially contradictory – "rules" or "codes" is not a reason to do nothing: on the contrary this very real risk means that there exists a need for a coordinated approach at a transnational level.

All of this leads to the following ideas, which can be viewed as an extension of the contributions already made by the IBA and the LCIA.

Creation of a truly transnational body to apply and enforce ethical principles

Major associations of arbitration professionals (one thinks of ICCA, ASA, IBA, CIArb, IPBA, etc.), in collaboration with major institutional arbitration bodies (for example LCIA, ICC, Swiss Chambers, AAA, SCC, SIAC, HKIAC, etc.) should work together to create a committee e.g. formed of appointees of each of the participating associations and arbitral institutions. This committee – not the arbitral tribunal or the arbitral institution – would have the main power to apply rules of professional ethics that it deems relevant and applicable.

In terms of sanctions, the subject is open. The committee could have the power to issue a warning, a formal reprimand, or, in serious cases, more severe penalties that would need to be defined. It would also be worthwhile to consider whether this committee would be empowered to recommend measures, leaving the arbitral tribunal or arbitral institution to decide whether to implement them. A combination of the above depending on the issue would also be worth exploring.

The decisions of the committee could be subject to appeal, either before another associations- or institutions-related appeals committee or by fast-track arbitration.

The committee would likely not have all-encompassing jurisdiction. For example, problems that arise when a party retains counsel only to create a conflict for an arbitrator are probably best dealt with by arbitral institutions within the framework of their own rules; the institutions should be empowered to issue decisions enabling arbitrators to exclude counsel without the arbitral tribunal making the primary ruling itself.[3] Part of the project would likely consist in identifying these issues and making recommendations to arbitral institutions. Also, it would be important to emphasise that in any event arbitral tribunals shall conserve the broad powers they already have to preserve the

[3] The acute conflict of interest between arbitrators and counsel in this context – who will continue to earn fees? – clearly militates for a solution in which it is not the arbitral tribunal or any of its members who decide whether to exclude counsel.

integrity of the process in other regards, for example in the face of obstreperous conduct at hearings, intemperate written submissions or delay tactics.

Creation of a set of "core principles" for counsel conduct

In parallel, the participating associations and arbitration institutions should work together to create an *international* and *joint* set of *truly core principles* that apply in all cases, irrespective of the legal or geographic background of counsel or parties.

To be clear: the idea is not to create yet another set of rules that would compete with, for example, the IBA Guidelines. The approach would be to collect what each participating association and institution considers to be part of "truly international public policy" for counsel ethics, and then to retain only those principles that are common to all. Such a set of core principles could probably fit into one or, at most, two pages and may well not be far from what is found in the Annex to the LCIA's new Arbitration Rules.

In addition to these core principles, the committee would remain free to apply other texts (for instance provisions of the IBA Guidelines) that it would find to be relevant and applicable in light of the circumstances of each case.

Relation with other bodies having jurisdiction to apply and enforce ethical rules

The above would not displace statutory or other rules that apply to counsel by virtue of their bar admission or affiliation to other professional associations. Violations of this type of rule would be governed by those rules and the jurisdiction of the bodies that apply those rules should remain untouched.

This is an ambitious project, outlined in full knowledge of the fact that in the past there have been similar initiatives by the Council of Bars and Law Societies of Europe ("CCBE") and by certain practitioners through the International Federation of Commercial Arbitration Institutions ("IFCAI"). These attempts failed for a variety of reasons (for that matter, ASA was critical of the CCBE initiative). Moreover, it may even well be that in a few years we will look back at the current debate on counsel ethics in international arbitration and conclude that it was merely just another "hot topic" of its time that was not worth the fuss. However, if the topic is indeed more than that, the moment is ripe for a debate that builds on the momentum

created by the IBA Guidelines and the new LCIA rules, and takes things even further. This is what this President's Message aims to do. It is submitted to the international arbitration community for scrutiny and, it is hoped, merciless yet constructive comment.

ELLIOTT GEISINGER

SAVE THE DATE

ASA Below 40 Conference
7 November 2014, Dolder, Zurich

ASA Arbitration Practice Seminar
16-18 January 2015, Badenweiler, Germany

ASA Annual Conference
The Arbitrators' Initiative: When, Why and How Should It Be Used?
6 February 2015, Geneva

For more information see www.arbitration-ch.org