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Sous la direction de

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CONFÉRENCES / CONFERENCE REPORTS

17th Annual IBA International Arbitration Day, "Advocates' Duties in International Arbitration: Has the time come for a set of norms?", Paris, February 13-14, 2014

The International Bar Association (IBA) hosted the 17th Annual IBA International Arbitration Day in Paris on February 13-14, 2014. Leading arbitrators and practitioners presented their insights on the subject "Advocates' Duties in International Arbitration: Has the time come for a set of norms?" in four working sessions.

The conference began with opening remarks from Carole Champalaune, Director of Civil Affairs at the French Ministry of Justice, on the New French Arbitration Law and the importance of Paris as a place of arbitration. These remarks were followed by an introduction from Eduardo Zuleta, Co-Chair of the IBA Arbitration Committee.

The first panel discussed **the existence of a duty of honesty**. Cristian Conejero and Vera van Houtte moderated and posed the question of whether counsel owe a duty of honesty in relation to their submissions, and (if so) when and to whom. The panel was composed of Pierre Mayer, Cecil Abraham, David W. Rivkin, and John Beechey. Mr. Mayer began by observing that most professional bodies have adopted rules on the duty of honesty. Whether these rules apply to international arbitration is yet another matter. Indeed, Mr. Mayer observed that most rules say either nothing on the subject or broadly refer to tribunals, thereby arguably encompassing arbitral tribunals.

Cecil Abraham, who offered an Asia-Pacific perspective, expected that, despite the absence of mandatory rules, counsel practicing international arbitration would normally be familiar with international arbitration norms and therefore treat arbitral tribunals with the same degree of honesty and candor that they owe to their national courts. He observed that the same is not true, however, in jurisdictions

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such as Thailand, Vietnam and Cambodia, where there is a lack of familiarity with international arbitration and its norms.

David W. Rivkin focused on what international norms can realistically require or authorize counsel to do when faced with false or misleading submissions. In his view, common law jurisdictions contain specific rules making the duty of honesty applicable to arbitral tribunals whereas civil codes do not contain similar provisions. In any event, Mr. Rivkin opined that counsel practicing in international arbitration have the duty not to mislead arbitral tribunals by, for instance, refraining from calling dishonest witnesses or persuading their client not to introduce false evidence.

Last, John Beechey addressed the tension between counsel's ethical duties and the confidentiality of counsel-client communications. In his view, "counsel have no business with the justice or injustice of the case," which is to be decided by the judge or the arbitrator. However, counsel still have a duty not to use false or misleading evidence. Mr. Beechey observed that states within the Council of Bars and Law Societies of Europe have developed specific provisions to protect the confidentiality of counsel-client communications. Inevitably, strict observance of these rules has an impact on counsel accountability.

In the next session, David Arias and Luca Radicati di Brozolo introduced panel participants Klaus Reichert, Louis Degos, Doug Jones, and Constantine Partasides to address **the gathering and taking of evidence**. Klaus Reichert observed that the role of arbitral tribunals is to ensure that all parties play by the same rules with respect to the gathering and production of evidence or testimony. Mr. Reichert noted the important role the IBA plays in this regard. He identified several instances where arbitral tribunals can help level the playing field. For instance, tribunals can engage in their own inquiries with regard to evidence (*see* Section 1782 of the U.S. Federal Rules of Civil Procedure on discovery in aid of foreign proceedings).

Louis Degos discussed the circumstances in which it would be improper or unethical to contact, prepare and coach witnesses. He explained that witness preparation is generally limited. In the United States, counsel may do whatever is feasible to prepare witnesses, whereas in the United Kingdom, witness preparation is more limited and witness coaching is prohibited. In his view, the difficulty resides in the definition of improper witness preparation. In the absence of clear rules in this regard, Mr. Degos suggested that leveling the playing field should be part of the role of the tribunal.

Doug Jones then discussed the role of counsel in the preparation of written witness testimony. Mr. Jones explained that written testimony has become an integral component in the arbitration process. The issue, however, is that written witness testimony, as compared to oral evidence, provides a far greater opportunity for counsel to influence the content of the witness' evidence and therefore requires closer scrutiny by the international arbitration community. The IBA Rules on the Taking of Evidence and the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration of the Chartered Institute of Arbitrators have addressed some of these concerns. However, because these guidelines are non-binding, there is still a risk that counsel in international arbitration are not acting in good faith in the preparation of witness evidence.

Last, Constantine Partasides discussed counsel duties in ensuring that their client complies with the production of documents in a fair and honest manner.

Mr. Partasides observed that, while common law jurisdictions have adopted specific rules on discovery (see U.S. Federal Rule of Procedure 26(G)(l)), civil law jurisdictions contain only broad principles on discovery (see Article 10 of the French Civil Code). Thus, the document production process depends on confidence that opposing counsel will implement and police the process with equal rigor. Mr. Partasides noted that the IBA Guidelines on Party Representation in International Arbitration provide a useful tool to level the playing field but questioned whether the sanctions for misconduct go far enough.

The next panel addressed **the powers of the arbitrators with regard to counsel misconduct**. Robin Oldenstam and Claus von Wobeser moderated the discussion by Karl-Heinz Böckstiegel, Christine Guerrier, Gabrielle Kaufmann-Kohler, and Alan Rau. Ms. Guerrier began by discussing whether arbitral tribunals have the inherent power to address counsel misconduct. She observed that the role of the arbitral tribunals is to ensure transparency, efficiency and fairness in the dispute resolution process. As such, arbitrators have the authority to address abuses and disruption of the arbitration process by counsel. Institutional arbitrations may also help promote ethical conduct and help develop specific sanctions in the event of counsel misconduct. In any event, it is also the duty of the parties to ensure that counsel act in an ethical manner and in their best interest.

Karl-Heinz Böckstiegel and Gabrielle Kaufmann-Kohler discussed the remedies that may be available to arbitrators when faced with counsel misconduct. Mr. Böckstiegel began by taking the example of forged documents. He explained that, in such a case, a tribunal should not only refrain from taking into account the said document, but should also sanction the party for misconduct. Another example concerns counsel's role in settlement discussions as more than half of the arbitrations are settled amicably before the issuance of the award. Mr. Böckstiegel noted that there are instances where counsel tend to resist the idea of settling the case in the hopes of continuing charging their client. In such a case, one possible solution is for the tribunal to request to speak with the parties in the absence of counsel.

In the view of Ms. Kaufmann-Kohler, the remedies applicable in the event of counsel misconduct depend on the function of the arbitral tribunal. Ms. Kaufmann-Kohler drew a distinction between the private function and the public function of arbitrators, insisting that arbitrators only have the power to impose sanctions when exercising a public function. She cited the example of a tribunal ordering a party who had breached confidentiality to assume all the costs resulting from the breach and making the sanction public. In this case, no order was given against counsel because the tribunal had no jurisdiction over counsel. At the same time, the party did not suffer from the measure because it was expected that counsel would pay the fine. In short, arbitral tribunals have the inherent power to deal with counsel misconduct but that depends on the function exercised by that tribunal.

Lastly, Alan Rau discussed whether arbitrators have the power to disqualify counsel for misconduct. Mr. Rau explained that counsel disqualification is rooted in the practice of American litigation. This is so because the traditional authority of a state's judiciary to supervise the local legal profession is routinely asserted as part of the judiciary's "inherent powers". However, the general view is that it is beyond the power of the arbitrators to disqualify counsel because such power is

an exercise of discipline, a view Mr. Rau did not share. He posited that attempts to disqualify counsel due to a conflict of interest with a member of the tribunal or a former client should rest on the same basis as challenging a member of the tribunal. The real question is whether the potential conflict of interest has tainted the underlying proceeding, not whether arbitrators have the power to disqualify counsel.

The last panel discussed **the adequacy of the IBA Guidelines on Party Representation in International Arbitration** (the "Guidelines"). Wendy Miles moderated the discussion by Eric Schwartz, Toby Landau, Emmanuel Gaillard and Michael Schneider. Eric Schwartz began by posing the question whether there is already too much soft law. The purpose of non-binding guidelines by a body, such as the IBA, is to develop consensus among the community. In this sense, these guidelines are a "sanitary development". Because nearly all rules have been adopted with references to local processes, it is not desirable that they be taken out of the context in which they were enacted. In Mr. Schwartz's view, the drafters of these Guidelines did not mean that they be set in stone. Instead, the Guidelines are merely "a first step" that will be "subject to continuing debate and experience".

Next, Toby Landau discussed whether the Guidelines contributed to the development of more ethical practices. His answer was that they "did not". Mr. Landau explained that ethics is an area of public policy and local rules and must therefore be considered with "extreme care". It is no doubt difficult to impose one single uniform rule when views diverge so drastically on the subject. For self-evident rules, such as "you must not make any statement of fact", the difficulty may not be so great. However, any attempt to impose uniform rules for more complex situations is much like "moving into a minefield". There are not only difficulties in the application of the Guidelines, but there is also the risk that they may be incomplete. In his view, the real risk resides in seeking to find a "single process". Instead, a distinction must be drawn "between a leveled playing field and a single playing field".

Emmanuel Gaillard ironically described the Guidelines as an "impressive piece of drafting", referring to the provision that "an expert report means a written statement by an expert". There are, however, several provisions of the Guidelines that may be useful, including those referring to conflicts of interest, witness preparation and document production. Also "marginally useful," according to Mr. Gaillard, are the provisions relating to communications with arbitrators. Mr. Gaillard cautioned the audience not to forget that these are only Guidelines and should be viewed as such. While it is true that the Guidelines are vague, "someone else, such as a legislator, might have done something worse".

Finally, Michael Schneider criticized the Guidelines for imposing a burden on the arbitral tribunal separate from the adjudication of the dispute. Mr Schneider explained that he was "concerned as a practitioner about the Guidelines". In particular, certain subjects are not addressed in the IBA Guidelines. Mr Schneider cited the recent case from the English High Court in which White & Case was disqualified from acting on one of its flagship cases due to a conflict of interest (see *Georgian American Alloys, Inc & Or v White & Case LLP & Anor* [2014] EWHC 94). In that case, the issue of the professional duties of White & Case was dealt with by a court in a separate proceeding in which White & Case was named as a

party without reference to the Guidelines. Mr. Schneider concluded that his main concerns were directed at Guidelines 12 (Need to Preserve Evidence), 20 (Witness Preparation) and 26 (Remedies for Misconduct).

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The Allocation of Costs in International Arbitration ICC Conference, Paris, 13 February 2014

À la veille du 17e IBA Arbitration Day, la Cour International d'Arbitrage de l'ICC a organisé une conférence sur la question si importante de la répartition des frais dans l'arbitrage international.

Andrea Carlevaris et **Edouardo Zuleta Jaramillo** ont ouvert la conférence en soulignant l'importance de cette question qui se pose dans toutes les affaires. La solution adoptée par le tribunal peut être influencée par les cultures juridiques des différents intervenants mais également par d'autres critères, permettant, notamment, d'influencer le comportement des parties. Le principe généralement admis par les arbitres en matière de répartition des frais est celui de la liberté des parties de choisir les règles qu'elles entendent voir appliquer. Il existe une croyance commune selon laquelle les règles fixées par le *Lex arbitri* seraient obligatoires. Cette croyance est bien évidemment à proscrire. Cependant, il peut être difficile de définir avec précision le contenu de ces règles et les utilisateurs veulent que la répartition des frais soit réglée de manière prévisible. C'est pourquoi la Commission ADR et Arbitrage d'ICC a mis en place un groupe de travail chargé d'étudier les mécanismes utilisés par les arbitres pour répartir les frais. Ce groupe de travail est présidé par Messieurs Bernard Hanotiau et Julian Lew et devrait rendre son rapport au début du mois de mai.

Les premiers résultats de ce groupe ont été présentés par **Hélène van Lith**. Près de 400 décisions ont été étudiées dont 200 traitaient uniquement de la question de la répartition des frais. Le groupe a voulu déterminer les critères appliqués par les arbitres plutôt que d'établir des statistiques. De manière peu surprenante, cette étude montre que les solutions adoptées en application du règlement ICC 2012 ne diffèrent pas des solutions adoptées en application des règlements antérieurs.

Dans le cadre de cette étude, il est apparu un autre élément commun à toutes les sentences : les arbitres ont considéré avoir un pouvoir discrétionnaire quant au choix de la règle applicable à la répartition des frais. Au titre de ce choix, la règle la plus souvent visée par les arbitres dans les sentences étudiées est celle suivant laquelle les frais suivent le sort du principal (« *the costs follow the event* »). Par ailleurs, les arbitres prennent souvent en compte le comportement des parties pendant la procédure et le caractère raisonnable ou non des frais lorsqu'ils doivent statuer sur la répartition des frais. Le groupe a pu relever qu'il y a parfois des déséquilibres significatifs entre les frais supportés par les parties. Ainsi, les frais du demandeur sont souvent beaucoup plus élevés que ceux du défendeur. Les membres du groupe de travail ont également relevé que les frais internes n'étaient pas toujours traités de la même manière par les arbitres.

La première table ronde de la conférence, modérée par **Andrea Carlevaris**, a discuté des **règles supplétives en matière de répartition des frais**. **Julian D. M. Lew**