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Responsibility for Ethical Misconduct and Deployment of Guerrilla Tactics in International Arbitration?

Stephan Wilske (Gleiss Lutz) · Thursday, January 9th, 2014

and Dr. Günther J. Horvath, Partner, Freshfields Bruckhaus Deringer

Should we blame the new entrants (or the old dogs) or are we experiencing a general lowering of ethical standards?

The Chief Justice of Singapore, Sundaresh Menon, already has a reputation for addressing sensitive issues of international arbitration and fueling debate. At the Chartered Institute of Arbitrators' International Arbitration Conference held in August 2013 in Penang (Malaysia) (reprinted in Arbitration Vol. 79 (November 2013), 393-406) he identified three areas of international arbitration, which, in his opinion require attention: (1) the dramatic growth in the number of new entrants to a growing arbitration scene, many of whom may not identify with the ethical standards that traditional practitioners may take for granted; (2) the increasing use of third-party funding; and (3) the rising costs of international arbitration (which seems in the meantime to be a standard concern in international arbitration).

The first area addressed by the Chief Justice seems to be the most challenging, where he argues (ibid, p. 394) that *"[t]he new entrants bring with them their own conceptions of what constitutes ethically acceptable conduct, much of which is shaped by the broad range of legal, cultural and social backgrounds from which they come"*. He further argues that *"[i]mplied understandings or shared values no longer provide any meaningful means of shaping or influencing conduct in this context"* and seems to conclude that as a consequence, *"[a]rbitrators can no longer consider themselves bound by peer standards, because there are no peers in the true sense, amidst all this diversity"* and *"[t]he absence of common or defined ethical standards to guide such a great diversity of practitioners obviously poses serious difficulties and has the potential to create an uneven battleground that can ultimately affect fairness and integrity in international arbitrations"*.

The phenomenon of increasing ethical misconduct and even the deployment of guerrilla tactics in international arbitration – also referred to by Chief Justice Menon – is meanwhile recognized by the international arbitration community and has been dealt with extensively, most recently in Günther J. Horvath & Stephan Wilske (eds.), *Guerrilla Tactics in International Arbitration*, Wolters Kluwer 2013.

However, the question remains whether responsibility for ethical misconduct and deployment of guerrilla tactics in international arbitration rests solely with the new entrants. Is it not true that

increasing competition, increasingly high stakes at issue and – as a more coincidental consequence of the increasing number of entrants – the fact that the chance of meeting the same arbitral tribunal and the same opposing counsel in another case are rather limited may lead to an increasing temptation even for well-established arbitration practitioners and reputable law firms to investigate a murky area?

Quite a number of incidents of this kind, where the temptation has been too strong, are meanwhile of public record and have been described in legal writing (see Horvath & Wilske). It is quite often "the regulars" that consciously choose to "play tennis without the net" (to borrow an expression from Laurence Shore) which may lead to frustration among other arbitration practitioners (in particular the "new kids on the block") and give off the wrong impression that the only accepted and universally followed rule of international arbitration is: "There is no rule in international arbitration". However, by no means should new entrants to international arbitration gain the impression that it makes no sense either for their own practice or for their clients' interests to be the "last good guy".

Different jurisdictions do provide ethical rules, which may be mandatory or of a guiding character, in order to regulate lawyers' conduct. Moreover, despite all the criticism of overregulation of international arbitration, the international arbitration community should also give the new *IBA Guidelines on Party Representation in International Arbitration* (adopted 25 May 2013) a fair chance not only as a way of informing new entrants about the rules of the game, but also of reminding the "old bulls" that the end does not justify all the means and that ethical rules are not only an issue for international arbitration conferences, but a mandatory part of international arbitration practice. Otherwise we could be facing a serious threat to the "golden age of arbitration", which was the topic of the key address by Sundaresh Menon – then Singapore's Attorney-General at the 2012 ICCA Congress in Singapore.

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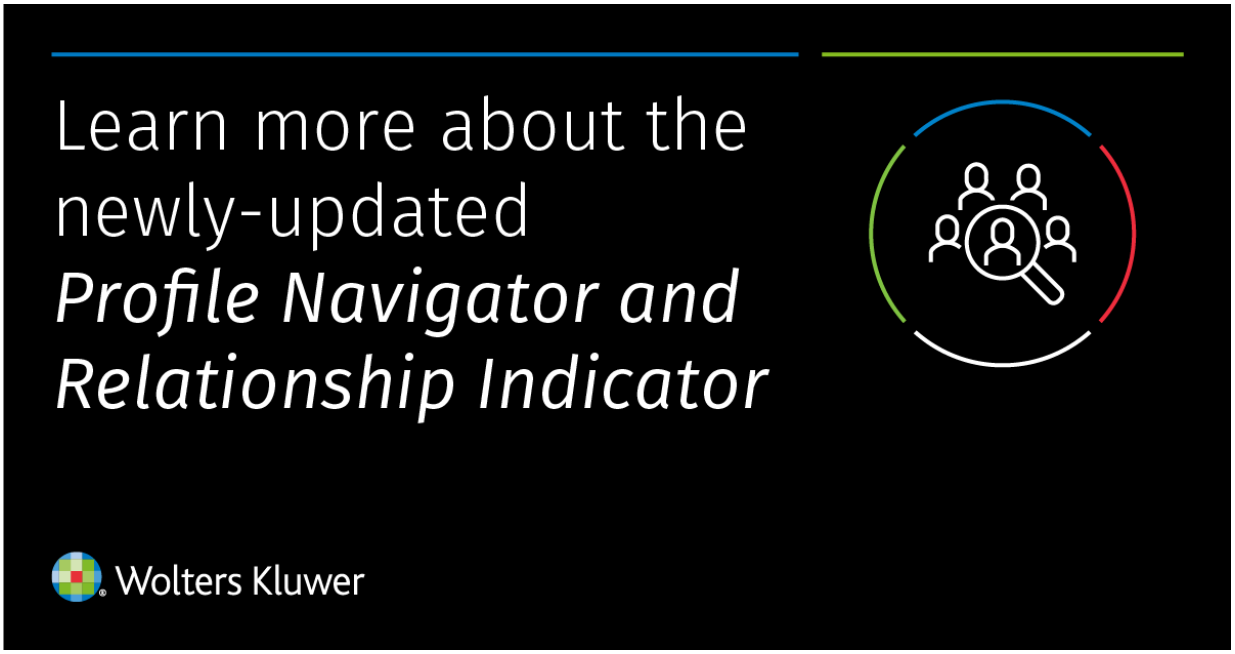

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