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ArbWorld – Good Faith: The “LCIA Rules 2.0” Hidden Feature

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Being a fan of Mac as I have been for many years now, I have always enjoyed reading magazines related to those nifty computer products. Macworld is among the regular publications on my reading list. Two particular sections of it have always grabbed my attention. The first section is dedicated to “mac gems”, that is, those singular external applications to the operating system that perform specific tasks not available within that operating system. The other section is dedicated to the “hidden features” of MacOS, that is, those particular features and tools not immediately visible to the end-user but embedded in the operating system. Among other purposes, these “hidden features” allow every end-user to adapt the system to their needs, to better perform some tasks and even to solve issues that pop-up from time to time when using a computer.

On the other hand, as we all know, software programs are labelled according to their release version. That is the reason why Apple has just released a new version of its “OS” numbered MacOS X 10.10.

One may probably wonder what all this has to do with arbitration. As a matter of fact, there exists no such connection and these short introductory lines were evidently written for analogy purposes only.

Indeed, LCIA has recently approved a new set of arbitration rules. Most likely, someone else has already counted the versions and he/she is in a better position to number the current version. Although missing this important historical information, I would nevertheless be tempted to number the new set of rules as “LCIA Rules 2.0” by reference to the 1998 Rules available online at the LCIA website.

The most relevant features and tools of the “LCIA Rules 2.0” have already been thoroughly summarised, explained and commented on by others. The “source code” of the “LCIA Rules 2.0” has been opened to the arbitral community many times now. Accordingly, there is no need to further elaborate on these topics. However, one may add a word or two about a few “gems” and a “hidden feature”.

In fact, the most notorious “gem” is the “Annex” setting forth the “General Guidelines for the Parties’ Legal Representatives”. Indeed, this is a very up-to-date set of features available to arbitrations administered under the auspices of the LCIA, thus allowing the arbitral tribunal to sanction the conduct of the parties’ representatives.
Applying here the Macworld computer lexicon, I would say that the “Guidelines” and their sanctions are true “gems”. For one, the Guidelines were drafted as an “annex” and, secondly, to

some extent one could say that the LCIA guidelines are a purified summary of other guidelines already available in the world of arbitration. In this sense, the "Guidelines" are an external legal plug-in to the "operating system". At the same time, they are adapted to perform remarkable tasks within the set of rules of LCIA. Due to their outstanding character, these tools may well be seen as a precious cornerstone of the "LCIA Rules 2.0".

Hidden Feature of "LCIA 2.0" – The Good Faith

According to the computer lexicon that I am referring to, a hidden feature is a particular tool or option that is not publicised in the manuals, advertising materials and general comments. Although unnoticed, it is available to everyone who uses the "operating system" and its placed within its native "environment".

That is precisely the role to be played by "Good Faith" within the "LCIA Rules 2.0".

Indeed, the "LCIA Rules 2.0" incorporate two provisions setting forth the obligation to act in arbitration according to the principles of good faith. It having been newly incorporated within the Rules, its existence has been forgotten in most recent comments and communication materials. However, the role of good faith is of extreme importance. Further, the fact that it has been foreseen in these new rules is also of extraordinary relevance.

In fact, Art. 14.5 provides that

> '… at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.'

More impressively, Art. 32.1 provides that

> 'for all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith (…)'

This is not an unprecedented move within the world of arbitration: Art. 15 of the "Swiss Arbitration Rules", Art. 23 of the "CEPANI Rules" and Art. 26 of the rules of the "Corte de Arbitraje de la Cámara de Comercio de Madrid" (Art. 26), contemplate a provision setting forth a general principle of good faith in arbitration. Yet, in truth, regarding the rules of arbitral institutions, these are the only provisions I have been able to find from my research.

Nonetheless and as I have said, these LCIA provisions are of extreme importance.

It is true that a universal definition of good faith is yet to be found. One of course could resort to Cicero's thoughts: the words good faith 'express all the honest sentiments of a good conscience, without requiring a scrupulousness which would turn selflessness into sacrifice; the law banishes from contracts ruses and clever manoeuvres, dishonest dealings, fraudulent calculations, dissimulations and perfidious simulations, and malice, which under the guise of prudence and skill, takes advantage of credulity, simplicity and ignorance'.(Marcus Tullius Cicero, "De Officiis", 3,

17.) However, there is no express rule or written principle to invoke when presenting a definition of “good faith”.

At the same time, one may also have to be confronted with Blaise Pasqal’s paradox: ‘The truth on this side of the Pyrenees, error on the other.’

Notwithstanding this philosophical pothole and the hindrance appearing in the task of defining, good faith is undoubtedly the “salt” that tempers the interpretation and application of the law. Good faith and its corollaries are the legal means that, according to the flavoured Latin expression, allow us to apply the law “cum grano salis” (literally, “with a grain of salt”). Good faith carves the interpretation and application of the law in light of the particular circumstances of each case, by opening the door to a miscellany of values intrinsic to human nature when oriented towards the “good”. It may well be referred to as the key that “opens the contractual system to the ethics of what is just and equitable, the latter, according to CICERO’s dream, linking all men, citizens or pagans, in a universal society of boni viri, of good men”.(René-Marie Rampelberg, Repères romains pour le droit européen des contrats, L.G.D.J., Systèmes, Droit, 2005, p. 44.)

I have written elsewhere that the interpretation and application of “guidelines” carry in themselves the risk of being mathematical. The analogy with the computer binary world, filled with zeros and ones without any half unit (let alone with double and triple units) may be called upon. Yet, this vision will not be resumed here, namely in consideration of the good faith that is foreseen in the “LCIA Rules 2.0”. That is the reason why setting up general principles of good faith is so important in the context of the new rules. They will simply obliterate any risk of a binary application of rules, even though they may appear disguised as simple “guidelines”.

On the other hand, the use of good faith and its corollaries (namely, the principles of prohibition of abuse of rights, prohibition of “venire contra fact proprium” / “estoppel by representation” and the like) will allow well-known intricate issues to be resolved. That would be the case where a counsel would intervene in an on-going arbitration with the aim of raising reasonable doubts concerning the independence and impartiality of the arbitrator: the fundamental right to appoint a representative of the party would simply be barred on the basis of an abusive exercise of rights, which is a corollary of good faith.

Finally, the fact that the “LCIA Rules 2.0” now provide for the obligation to act in arbitration according to good faith, applicable to all participants in arbitration without exceptions, is of an extraordinary relevance in the light of the traditional reluctance of the common law culture to admit the importance of good faith in the application of the law.

One may recall Lord Bingham’s words in Interfoto Picture Library Ltd. v. Stiletto Visual Programmes, Ltd.:

> ‘English Law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness’ [such as the “estoppel” institute]. (1989 QB 433, 439, CA.)

One may also cite Lord Ackner in Walford v. Miles:

> 'the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. (…) A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.' (Walford v. Miles, [1992] 2 A.C. 128 (H.L.) 138 (U.K.). cited by Bernardo Cremades, in "Good Faith in International Arbitration", AM. U. INT'L L. REV., p. 774.)

Considering this tradition, these new provisions of the "LCIA Rules 2.0" are outstanding, to say the least.

Final remarks

The considerations above are consistent with a representation of good faith as an open or abstract clause that is filled in through a decision-making process. In this sense, good faith may be used in every circumstance and has the virtue of being used everywhere. Furthermore, the judge and arbitrator's own conceptions of law, their own legal traditions and their legal background will be called upon (and will be decisive as well) in determining the use of the fact specifics of each case to fulfill that normative provision.

However and for that reason, some have spoken about good faith being the 'terrorist of law, allowing for arbitrariness in judicial decision making.' (Fernando De Trazegnies Granda, Desacralizando la buena fe en el derecho [Desecrating the Good Faith in Law], in 2 TRATADO DE LA BUENA FE EN EL DERECHO 19, 43, 45 (Marcos M. Córdoba ed., 2004))

That is also the reason why good faith must be used, but without abuse. It is also the reason why a high degree of attentiveness is required when resorting to such legal institution.

We may well say that in the "ArbWorld" a hidden feature of the "LCIA Rules 2.0" is now targeted as a gem, to be used and nurtured as a gem should be, but never treated in a binary fashion.

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