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Conduct of Legal Representatives under the 2014 LCIA Arbitration Rules: How to Apply the New Provisions

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Issues relating to the conduct of legal representatives in international arbitration have attracted significant attention in recent years.[1)] There is a lively debate as to whether and how counsel conduct can or should be regulated. On the one hand, one might argue that regulation is necessary to level the playing field in an area where legal cultures differ greatly.[2)] Lawyers from jurisdictions with strict ethical standards might feel a competitive disadvantage compared to colleagues from jurisdictions where no such detailed or stringent standards exist. On the other hand, there are more and more voices in the arbitration community warning about risks of overregulation.[3)]

The new LCIA Arbitration Rules, which entered into force on 1 October 2014 (hereafter the '2014 LCIA Rules' or 'Rules') are at the core of this debate since they are the first institutional rules that have included provisions regulating the legal representatives' conduct. Article 18 of the Rules deals with the parties' fundamental right to choose legal representatives,[4)]as well as with the consequences of any change or addition to the parties' legal representation after the formation of the arbitral tribunal.[5)] In their Annex, the Rules contain 'General Guidelines for the Parties' Legal Representatives' (hereafter the 'Guidelines').

It is not the purpose of this post to discuss whether the LCIA's decision to include these provisions in the 2014 LCIA Rules was an opportune one. Rather, this post will focus on how these provisions will apply in practice. In particular, this post will briefly analyze a number of selected issues concerning (i) the Guidelines' scope, (ii) their content, and (iii) the tribunal's powers in the case of a violation thereof. A comprehensive and detailed discussion of Article 18 of the Rules and the Guidelines can be found in the forthcoming book: Scherer/Richman/Gerbay, *Arbitrating under the 2014 LCIA R*ules – A *User's Guide* (Kluwer Law International 2015).

1) Scope of the Guidelines: To whom do they apply?

The Guidelines apply to any 'legal representative appearing by name' before the arbitral tribunal. [6] A legal representative includes any third person (lawyer or non-lawyer) chosen by a party to represent it in the arbitration. [7] An in-house lawyer is likely not considered as a 'legal representative' of the company in which he or she works, but rather as a part or extension of the legal entity that is the company.[8] Accordingly, the Guidelines do not apply to in-house lawyers. However, since they are part of the parties' legal entities, they are bound by the parties' obligations in the arbitration, including, for instance, the duty under Article 14.5 to 'do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration'.[9]

One could query whether the wording 'appearing by name' before the arbitral tribunal could be interpreted as limiting the scope of the Guidelines to those expressly named as the parties' representatives. For instance, the parties are sometimes represented by large law firms which staff numerous lawyers on the case, all of whom will not necessarily be expressly named on the file as legal representatives. However, it would undermine the entire purpose of the Guidelines if one could circumvent their application by simply not naming someone on the record as a legal representative. Rather, it is submitted that any person involved in the case under the supervision of the legal representatives appearing by name should be considered a sub-agent and be required to abide by the Guidelines. Therefore, the consequences of any violation, including any possible sanctions, should be borne by the party representatives appearing by name, in accordance with the principle that the agent is liable for the acts of his or her sub-agent.

2) Content of the Guidelines: What do they cover?

The aim of the Guidelines is to 'promote the good and equal conduct of the parties' legal representatives'.[10] In order to achieve this goal, the Guidelines contain five relatively short paragraphs about what legal representatives should (or rather should not) do in international arbitration proceedings under the LCIA Rules, including not to (i) unfairly obstruct the arbitration or jeopardize the award (paragraph 2); (ii) knowingly make any false statements (paragraph 3); (iii) procure or assist in the preparation of, or reply upon, any false evidence (paragraph 4); (iv) conceal or assist in the concealment of any document (paragraph 5); or (v) enter into ex parte communications with the tribunal or members of the LCIA Court involved in making any decision regarding the arbitration (paragraph 6).

As a preliminary remark, one cannot but notice that these obligations are fairly general and high-level. The 2013 IBA Guidelines on Party Representation in International Arbitration contain similarly bland propositions that have been criticized as being 'uncertain'.[11] 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.[12] Given the broad character of the LCIA Guidelines, it will not be straightforward for parties and tribunals to apply them.

For instance, paragraph 2 of the Guidelines stipulates that legal representatives 'should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award'. Such activities, which are sometimes called 'guerrilla tactics', aim at exploiting various procedural possibilities in order to delay or even derail the arbitration.[13] Paragraph 2 provides as an example the 'repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the

Arbitral Tribunal known to be unfounded by that legal representative'. However, this example is by no means exhaustive and one can think of other, similar activities which could fall under paragraph 2, including:

– requesting multiple unjustified extensions of deadlines;
– seeking disclosure of documents that are known not to exist or not to be relevant; and
– initiating unjustified parallel actions in national courts, possibly combined with the use of anti-arbitration injunctions.

While such procedural actions (e.g., requesting extensions of deadlines, seeking production of documents, challenging arbitrators, etc.) may individually and generally be permissible, the repeated and knowingly unfounded nature of them destroy their status as a legitimate exercise of procedural rights and could be considered by a tribunal as attempted sabotage of the arbitral proceedings.

Arbitral tribunals should, however, be careful in applying paragraph 2 of the Guidelines. While activities that aim at obstructing the arbitration or jeopardizing the finality of the award should be sanctioned, the tribunal also needs to keep in mind that sometimes repeated procedural steps (e.g., arbitrator challenges or requests for extensions) might be necessary to represent effectively a party in the arbitration. Importantly, the Guidelines also protect 'any legal representative's […] obligation to present that party's case effectively to the Arbitral Tribunal'. [14)] Accordingly, paragraph 2 of the Guidelines must be interpreted in light of this obligation and therefore only clear cases of obstructive activities should be considered to trigger sanctions under the Guidelines.

3) Consequences of a Violation of the Guidelines: What Are the Tribunal's Powers?

One of the most controversial and significant developments in the 2014 LCIA Rules is that they expressly establish the tribunal's power to determine violations of the Guidelines and to order sanctions against the legal representative(s) in the case of a violation.[15)] Article 18.6 lists possible sanctions a tribunal may order if it finds that a legal representative has violated the Guidelines. Pursuant to Article 18.6(i) and (ii), the tribunal may issue a 'written reprimand' or 'written caution as to future conduct in the arbitration'.[16)] declares the lawyer's conduct to be improper but does not limit his or her right to practice law'. See Black's Law Dictionary 1494 (10th ed., 2014). Both reprimands and sanctions aim at putting legal representatives on notice that the tribunal is mindful of the compliance with the Guidelines. They might also be a first step while the tribunal considers whether further and stronger sanctions are necessary.] Article 18.6(iii) further provides that the tribunal can take 'any other measure necessary to fulfil within the arbitration the general duties' of the tribunal under Article 14.4.

While some argue that the arbitrators' power to sanction is necessary to preserve the integrity of the arbitral proceedings before them,[17)]others are of the opinion that such 'policing' powers should not lie with the arbitral tribunal, but be reserved for domestic, or possibly transnational, professional regulatory bodies.[18)]

In order to address the latter concern, the drafters of the LCIA Rules were careful to leave the tribunal with important leeway in using their powers under the Guidelines. According to Article 18.6, the tribunal 'may' decide whether the legal representative has violated the Guidelines, and 'may' order sanctions. The tribunal's discretion is broad and applies not only to the decision

whether or not to order sanctions (and which ones), but also to the question of whether or not the tribunal wishes to assess the legal representatives' conduct in the first place. In other words, there is no obligation on the tribunal to 'police' the legal representatives' conduct under the Guidelines. However, if the tribunal is aware of any violation of the Guidelines, the tribunal should, at a minimum, consider whether or not a sanction is necessary.

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Due to space constraints, this post has only dealt with a selected number of issues relating to the new provisions on conduct of legal representatives found in the 2014 LCIA Rules. There are many others, and it will be interesting to see how these provisions will be applied in practice by counsel and arbitral tribunals. Regrettably, however, most decisions will remain confidential and it will therefore be difficult to assess and develop "best-practices" in this context.

References

?1 See generally on the issue, *C. Rogers, Ethics in International Arbitration* (Oxford University Press 2014).

?2 See, e.g., W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 Arb. Intl 409 (2014).

?3 See, e.g., T. Landau & J. Weeramantry, *A Pause for Thought, in International Arbitration: The Coming of a New Age?* 496, 498 (A. van den Berg ed., Kluwer Law International 2013).

?4 LCIA Rules (2014), Article 18.1 ('Any party may be represented in the arbitration by one or more authorised legal representatives appearing by name before the Arbitral Tribunal.'). See also LCIA Rules (1998), Article 18.1. Compare UNCITRAL Rules (2010), Article 5; ICDR Rules (2014), Article 12; Swiss Rules (2012), Article 15.6; WIPO Rules (2014), Article 13(a); ICC Rules (2012), Article 26.4; HKIAC Rules (2013), Article 13.6.

?5 LCIA Rules (2014), Articles 18.3, 18.4. As shown in the well-known *Hrvatska* case, the change or addition of new legal representatives after the formation of the tribunal, may affect the tribunal's impartiality and independence. See *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision of 6 May 2008, at §§33-34. See also *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision of 14 January 2010, at §§26-27.

?6 LCIA Rules (2014), Article 18.5, Guidelines, para. 1.

?7 In the 1998 version of the LCIA Arbitration Rules, Article 18.1 allowed parties to be represented either by 'legal practitioners or any other representatives', which clearly indicates that the parties' representatives need not to be legally trained or qualified. In the 2014 revision process, the wording 'legal practitioners or any other representatives' was replaced by 'legal representatives'. This change does not mean, however, that the 2014 Rules require the parties' representatives to be lawyers. Indeed, the term 'legal' does not refer to the representatives' legal training, but to the fact that these persons legally represent the party in the arbitration.

?8 On the one hand, the formulation of Article 18.1 seems wide enough to include any person appearing by name in the arbitration on behalf of the party, even a party's in-house counsel. On the other hand, it has been argued forcefully, and rather convincingly, that in-house lawyers do not represent 'their' company but are rather a part or extension thereof. See J.-C. Najar, *A Pro Domo Pleading: Of In-House Counsel, and Their Necessary Participation in International Commercial Arbitration*, 25 J. Intl Arb. 623-630 (2008). See also W. Park, *Two Faces of Progress: Fairness and Flexibility in Arbitration Procedure*, 23 Arb. Intl 499 (2007).

?9 LCIA Rules (2014), Article 14.4 ('Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include: (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.')

?10, ?14 LCIA Rules (2014), Annex, para. 1.

?11 . Waincymer, *Regulatory Developments in the Control of Counsel in International Arbitration – The IBA Guidelines on Party Representation in International Arbitration and the New LCIA Rules and Annex*, 30 Arb. Intl 513, 527-528 (2014) ('uncertain norms'); U. Draetta, *Counsel as Client's First Enemy in Arbitration?* 116 (Juris 2014).

?12 Landau & Weeramantry, *A Pause for Thought, in International Arbitration: The Coming of a New Age?* 503.

?13 Cf. G. Horvath, *Guerrilla Tactics in Arbitration, an Ethical Battle Field: Is There Need for a Universal Code of Ethics?*, 2011 Austrian Y.B. Intl Arb. 297 (C. Klausegger et al. eds, Manz'sche Verlags- und Universitätsbuchhandlung 2011); W. Rowley, *Guerrilla Tactics and Developing Issues, in Guerrilla Tactics in International Arbitration* §1.04 (G. Horvath & S. Wilske eds, Kluwer Law International 2013).

LCIA Rules (2014), Article 18.6, Guidelines, para. 7. In other contexts, some arbitral tribunal have found that they possess inherent power to take measures against the parties' representatives if such measures are necessary to preserve the integrity of the arbitration. See *Unpublished Decision of ICSID Annulment Committee* (2008), in R. Bishop & M. Stevens, *Advocacy and*

?15 *Ethics in International Arbitration: The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, in *Arbitration Advocacy in Changing Times* (ICCA Congress Series Vol. 15) 391 (A. van den Berg ed., Kluwer Law International 2010). See also A. Rau, *Arbitrators without Powers? Disqualifying Counsel in Arbitral Proceedings* 457, 502.

?16 A 'reprimand' may be defined as 'a form of disciplinary action that […

?17 Landau & Weeramantry, *A Pause for Thought* 517-527.

See, e.g., E. Geisinger, *President's Message: Counsel Ethics in International Arbitration – Could One Take Things a Step Further?* (September 2014), available at

?18 www.arbitration-ch.org/pages/en/asa/news-&-projects/presidents-message/index.html (the president of ASA, the Swiss Arbitration Association, criticized the approach in the 2014 LCIA Rules and proposed that the issue would be better suited for a transnational body with the jurisdiction to decide over the implementation of international rules of conduct for counsel).

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