Milan: how to arbitrate Obama-style

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The latest Milan Chamber of Arbitration annual conference considered the problem of unethical conduct and guerilla tactics in international arbitration, with one speaker advising oppressed parties to follow the advice of former US first lady Michelle Obama, “When they go low, we go high”.

Michelle Obama

The programme moderated by the institution’s secretary general **Stefano Azzali** offered three sessions: on the duty to arbitrate in good faith; guerrilla tactics; and whether there is a need for regulation on counsel ethics.

A keynote speech by the president of the ICC International Court of Arbitration **Alexis Mourre** highlighted the role flexible and transnational soft law instruments, such as the 2013 IBA Guidelines on Party Representation in International Arbitration, can play in emerging countries, where a lack of rules creates uncertainty about the proper conduct of arbitration.

Such soft law can be applied to jurisdictions with deep cultural differences, he said.

At the same time, he said there is a need for more education of parties and counsel about aspects of their conduct, for example their duties when it comes to document production.

Mourre also highlighted the importance of arbitral institutions in providing incentives to counsel to conduct themselves properly to improve the overall efficiency of the proceedings.

Avoiding zealous advocacy

In the first session, **Lawrence Shore** of Herbert Smith Freehills in New York underlined the importance of counsel having a good faith approach to advocacy and tribunals being able to recognise whether conduct is in good faith or not.

He said counsel should eschew "zealous advocacy" in favour of "empathetic detachment" towards clients, raising the recent sexual harassment lawsuit brought in the US by Fox News host Gretchen Carlson against the channel's chairman and CEO Roger Ailes as an example. In this case, the defendant's counsel's initial, public condemnation of the claimant's "baseless allegations" were soon quieted when a tape recording emerged apparently supporting them.

Referring to a lecture by **VV Veeder QC**, Shore said good faith is a general contractual obligation in many jurisdictions, which of course applies to arbitration agreements and to the participants in arbitrations. Articles II and III of the New York Convention support the principle and it has been been crystallised in many national laws including the 1996 UK Arbitration Act.

Moreover, Shore argued that the New York Rules of Professional Conduct give useful guidance on what constitutes good faith in advocacy. This guidance is transnational, not parochial, he argued – thus the rules' recent addition of a reference to "zealous advocacy" is transferable to international arbitral proceedings.

Acting in good faith also means counsel must cooperate with the arbitrators they appear before, since often excessive document production frustrates the efficiency of the tribunal and its capacity to deliver the award in a timely fashion, Shore said. Abuse of document production can also have negative consequences for the parties themselves.

Shore went on to mention the beneficial role that arbitral institutions, arbitrators, and LLM programmes can play in reinforcing the importance of good faith advocacy.

Cecilia Carrara of Legance in Milan considered the different perceptions of what constitutes ethical conduct among lawyers in common law and civil law jurisdictions, for example with regard to the duty to tell the truth through discovery. Sometimes poor counsel behaviour is not the result of bad ethics, but of different conceptions of how deontological rules apply in a transnational context, she said.

Carrara underlined the potential conflict between practitioners' interest in satisfying clients – the goal to which they all aspire – and in playing fair. Examples she gave of bad ethical behaviour included specious arbitrators' challenges and breaches of confidentiality in relation to correspondence between counsel.

There are national and regional codes of ethics which are in many ways adequate within their contexts, she said. In Italy there is a "codice deontologico degli avvocati", and there is also a European Code of Conduct.

In a more global context, she argued there might be the need for more harmonisation, but without imposing one legal tradition on others.

Guerrilla warfare

There are a growing number of stories about guerilla tactics in international arbitration worldwide, both aimed at the tribunal and the opponent, said Lalive partner **Michael Schneider** in the second session – recommending that delegates read a 2013 book on the subject by **Gunther Horvarth** and **Stephan Wilske**.

Anecdotes also show the real risk in investment arbitration of governments pressurising arbitrators or failing to pay the costs of cases relating to the actions of their predecessors, resulting in the early dismissal of the case and potential difficulties for the arbitrators and institutions in recovering fees, he said.

Schneider highlighted how counsel may taking advantage of the economic power of the party they represent by bringing multiple challenges against arbitrators or using other means to make proceedings more expensive. This can paralyse the proceeding owing to the other side's inability to pay costs advances.

Happily, even courts without great experience of arbitration are becoming more aware of such tactics and taking measures to restrict them, Schneider said, noting a recent Egyptian court decision that rejected a challenge to an arbitrator.

Guerilla tactics also happen within tribunals. Schneider highlighted how party-appointed arbitrators can be even more obstructive than counsel – deliberately missing hearings to delay proceedings or even resigning to create a truncated panel.

Administered proceedings might be preferable to ad hoc proceedings because the rules of the arbitral institution often provide remedies to prevent serious consequences if this happens, he said.

But Schneider emphasised that such tactics are infrequent and can often be effectively dealt with by the tribunal.

In an intervention, Clifford Chance's co-head of international arbitration **Audley Sheppard QC** considered guerilla tactics from the perspective of a London-based practitioner. He noted that section 40 of UK's 1996 Arbitration Act 1996 imposes a duty on parties to do all things necessary for the proper and expeditious conduct of the proceedings, while article 32.2 of the LCIA rules require each of the parties to act at all times in good faith. The UK Solicitors' Code of Conduct also requires integrity in dealings with other lawyers.

All these notwithstanding, Sheppard said it is in the nature of adversarial proceedings that advocates are robust and gladiatorial. Once negotiations have failed and arbitration has started, a client will often expect its advocate to play hardball to encourage a favorable settlement offer from other side, even if this is unappealing to the tribunal.

When does the zealous advocate go too far and become a zealot, he wanted to know? Examples he gave of questionable tactics against opposing counsel included misrepresenting what they have said; showing a lack of civility or cooperation; or speculatively seeking to have them removed from the case because of an alleged conflict or the alleged receipt of privileged information (as in the ICSID case of Fraport v Philippines).

Other tactics he said are used by parties include not paying their share of costs; deliberately delaying proceedings; producing last-minute evidential surprises; flooding the tribunal with applications and correspondence; seeking disproportionate production of documents; declaring themselves unavailable for hearings; and making multiple changes of counsel.

Sheppard suggested that tribunals at the beginning of the arbitration should remind the parties of what is expected and include an obligation of good faith in any terms of reference or initial procedural order. They should also note the power to sanction bad conduct with adverse costs awards.

During the arbitration, the tribunal should not be hesitant to express its disapproval. And the oppressed party should follow Michelle Obama's advice in a speech during the US election campaign: "when they go low, we go high!"

Sheppard also mentioned the tribunal's power to exclude counsel. Section 36 of the UK's 1996 Act provides that, "unless otherwise agreed," a party may be represented by a lawyer or other person chosen by him, he noted. However, article 18.6 of the LCIA rules most likely allows a tribunal to exclude counsel for violating the general guidelines for parties' legal representatives annexed to the rules and tribunals are increasingly including in their terms of appointment the power to exclude new counsel if they threaten the integrity of the proceedings, especially if it creates a conflict.

Despite this, Sheppard was generally in favour of parties having a choice as to who they instruct as counsel. Jurisdictions that make it difficult to use international counsel in arbitration include the US state of California, which requires cumbersome registration, and Nigeria, which restricts parties to using Nigerian lawyers, he said.

The one sanction lawyers care about

Paolo Marzolini of Patocchi & Marzolini in Geneva spoke about counsel's overarching duties, which include duties of fairness and loyalty to their clients and to the arbitrators. These duties may sometimes conflict with one another, he acknowledged.

He argued that where counsel behave badly, the other side should seek monetary remedies, taking advantage of arbitrators' discretion to rule on lawyers' fees or freely allocate the costs of the proceedings regardless of the decision on the merits. The sanctions of national bar associations may sometimes prove to be ineffective, he said – and they may have a potential conflict of interest.

The LCIA rules and IBA Guidelines have nobly sought to address the problem through regulation, Marzolini said.

But **Eduardo Silva Romero**, the Paris-based co-head of international arbitration at Dechert, questioned whether there is a real need for such regulation. We are talking about exceptional cases and most counsel conduct themselves properly, he stressed.

He also noted cultural and sociological differences which mean the same behaviour is perceived differently in different countries – making regulation problematic.

Though the IBA and LCIA guidelines are well written, they are scarcely applied, he argued. By far the most important sanction for counsel is the sanction of their own client.

Luigi Fumagalli, president of the Milan Chamber's arbitral council delivered closing remarks, highlighting the importance of parties and arbitrators in regulating proceedings. They have a great power and discretion, which if used wisely and in conjunction with soft law can ensure ethical and efficient proceedings, he said.

The conference took place in late November, soon after the US election. Speaking afterwards, Azzali reflected on how the problem of maintaining ethical standards in arbitration has arisen as a result of this form of dispute settlement “spreading its wings worldwide” and becoming a field of opportunity for lawyers from many different backgrounds, which in itself is a good thing.

“In the past, the small community has been capable of self-regulating, but now the situation has radically changed and there was a common feeling at the conference that rules or guidance are needed,” he says.

“With the increase in the number of arbitrations worldwide, one hears more examples of deplorable conduct but it remains relatively rare. One bad story gets repeated more than 100 good stories. What is clear is that arbitration practitioners still want to operate in a community of ‘gentlemen’ and have respect and esteem for professional colleagues. Their regard for what their peers think helps ensure ethical and professional behaviour.”

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