

SANCTIONS AGAINST COUNSEL IN INTERNATIONAL ARBITRATION – POSSIBLE, DESIRABLE OR CONCEPTUAL CONFUSION?

*Stephan Wilske**

“離婁之明，公輸子之巧，不以規矩，不能成方圓”¹

* Partner, Gleiss Lutz, Stuttgart (Germany); FCIArb, admitted to the New York and German bar as well as to the U.S. Supreme Court, the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Appeals for the Second Circuit; Maîtrise en droit, Université d’Aix-Marseille III, France; LL.M. (The University of Chicago; Casper Platt Award); Dr. iur (Tübingen); Diploma in International Arbitration (Chartered Institute of Arbitrators); lecturer at the Universities of Heidelberg and Hannover; Visiting Professor at the National Taiwan University, College of Law (Spring 2010); Advisory Committee Member of the Swiss Arbitration Academy. Senior Committee Member of the Contemporary Asia Arbitration Journal; International Correspondent (Germany) of *Revista Română de Arbitraj* (Romanian Arbitration Review). He has been a member of the American Law Institute (ALI) since 2011. This paper was presented at the 2015 Taipei International Conference on Arbitration and Mediation (September 6 and 7, 2015), which was hosted by the Chinese Arbitration Association (hereinafter “CAA”) and the Asian Center for WTO & International Health Law and Policy, College of Law, National Taiwan University. Many thanks go to Sabrina Schäfer for fruitful discussions on concepts of contract law and her research work, Yufen Chang for her valuable input and sharing of wisdom, my colleague Todd J. Fox for a critical final review of the manuscript, as well as to Nicole Rohbeck and Angelika Maier for their invaluable assistance in patiently formatting the work of my various night shifts. For all errors and omissions the author assumes sole responsibility. The author can be reached at stephan.wilske@gleisslutz.com.

¹ The Sayings of Mencius, The Chapter on Li-lou. English translation by Yufen Chang: “Nothing can be accomplished without rules or standards (even if you are great masters).”

ABSTRACT

This paper deals with the perceived need for ethical standards as a consequence of the emergence of the guerrilla tactics phenomenon in international arbitration, and, as a counter-reaction hereto, the call for an increasing role of ethics in international arbitration. In particular, counsel is more and more becoming the focus of potential new ethical regulations or newly-discovered competences in the arbitration world, accompanied by sanctions in case of non-compliance. The consequence of counsel misconduct, namely sanctions against counsel, is the topic of this paper. The author will discuss the question of who may sanction misbehaving counsel: whether this task should be left to state authorities or bar associations, or whether it should fall into the competence of arbitration institutions, arbitral tribunals or new global arbitration entities dealing exclusively with ethics. The author concludes that a modern interpretation of the arbitral tribunal's implied competences to preserve the integrity of arbitral proceedings covers the power to sanction counsel. The author also concludes that counsel may not simply be regarded as a non-party to arbitration. The author also discusses how to sanction misbehaving counsel and discusses admonishment of counsel, exclusion of counsel and monetary sanctions against counsel. The author is of the opinion that the toolbox of an arbitral tribunal has more contents than expected. He is optimistic that future arbitration practice will shift towards combined efforts by arbitration institutions and arbitral tribunals to control and sanction misbehaving counsel to the extent that such conduct threatens the integrity of the arbitral proceedings.

KEYWORDS: *admonishment of counsel, blacklisting of counsel, consent, counsel conduct, ethical standards, exclusion of counsel, Global Arbitration Ethics Council, guerrilla tactics, IBA Guidelines on Party Representation in International Arbitration, LCIA Arbitration Rules, LCIA General Guidelines for the Parties' Legal Representatives, monetary sanctions, non-party, non-signatory, overregulation, regulation, regulatory overkill, sanctions.*