

THOUGHTS ABOUT ETHICS INSPIRED BY A VIAC CASE

European ADR: Ethics, Empathy and Exasperation

Challenging Ethics in Europe

Susanne Heger



Who sets the standards of Ethics in Arbitration in Austria?

A recent and prominent Case:

- Administered by VIAC (Vienna International Arbitral Centre)
 - Amount in dispute € 10 million
 - **Claimant:** a BVI company claiming fees for services in relation to the sale of a company (also “the Consultant”)
 - **Respondent:** an Austrian GmbH refusing payment of part of the fees (also “the Seller”)
 - **Notary/Escrow Agent:** not party to the arbitration, but party to an escrow agreement with Claimant and Respondent
 - **Arbitrators:** two Austrian lawyers and an Austrian university professor
 - **Party Representatives:** Austrian lawyers
 - **Dispute / Key question:** whether Claimant was entitled to claim the full amount of fees or whether the Seller of the company, the later Respondent, was entitled to refuse payment of part of the fees
 - **Award:** Respondent was ordered to deposit the remainder of the fees into the notary’s escrow account and to consent to the amendment to the escrow agreement as agreed between the Claimant and the notary
- No decision on the key question!**



Who sets the standards of Ethics in Arbitration in Austria?

“If people turn to arbitration, they don’t deserve any better.”

So who sets the ethical standards in Austria?

It is the arbitration community that sets the standards.

Taking a broader view on Ethics in Arbitration



Core Elements of Ethics: Impartiality and independence of arbitrators and fair proceedings

Fundamental principles of ethics in arbitration

- impartiality and independence of arbitrators
- fair proceedings (equal treatment of parties and a fair opportunity to present the case)

(For example: Articles 12/18 UNCITRAL Model Law, 11/17 UNCITRAL Arbitration Rules, 7/16 ICDR International Arbitration Rules, 11,14/22 ICC Rules of Arbitration, 5/14 LCIA Arbitration Rules, 16/28 VIAC Rules of Arbitration)



Core Elements of Ethics: Impartiality and independence of arbitrators and fair proceedings

Independence as key element of Ethics

Independence of court judges developed to protect the judge against the state

Judges

- are irremovable and cannot be transferred to another position.
- are not liable to the parties.
- are subject to control.

What would be the equivalent for arbitrators, in which way can their independence be underpinned?

Arbitrators

- derive their powers from the parties.
- are liable to the parties.
- have an economic interest in being appointed and reappointed.
- are mostly part of a system of mutual appointment obligations between lawyers.

Control mechanisms are weak or not existing at all.



Core Elements of Ethics: Impartiality and independence of arbitrators and fair proceedings

Ethics as a mechanism to underpin the independence of arbitrators

Numerous attempts to regulate ethics by way of guidelines and rules, mainly addressing arbitrators.

Examples:

- The CIArb Code of Professional and Ethical conduct for Members (October 2009)
- AAA/ABA Code of Ethics for Arbitration in Commercial Disputes (1 March 2004)
- IBA Rules of Ethics for International Arbitrators (1987)
- IBA Guidelines on Conflicts of Interest in International Arbitration (2004)

New guidelines addressing party representatives

- IBA Guidelines on Party Representation in International Arbitration (adopted in 2013)

Problem with these guidelines and rules:

- apply only if agreed between the parties (or the arbitrators)
- hardly any sanctions to be feared.



**Is Ethics as a means of ensuring fair proceedings and correct awards a myth?
Does arbitration need control?**