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Some Ethical Problems of Arbitration

I. On the professional background of arbitrators. Danger of attorney's juristocracy

In the second half of the 20th century, arbitrators in Hungary were lawyers of former foreign trade companies, former state judges, attorneys and university professors. Due to their former exceptional positions, lawyers of foreign trade companies had appropriate experience and expertise to handle matters of international trade. University professors also acting as arbitrators came from teachers of civil law, commercial law, private international law and civil procedure. Until 1994, some state judges were able to use their extensive professional experience in arbitration even while still pursuingtheir state court careers,but from 1995 on only after their retirement. On one hand, lawyers working in arbitration are essential for creating and maintaining the interest of potential clients in the institutional system of arbitration, and on the other hand, it may causeproblems in several ways. Therefore it is worth dealing with this topic separately in more detail.

The scientific and professional authority of university professors has been an important factor in maintaining the professional quality, power and authority and persuasive power of arbitration for a long time. However, more recently the legal and informal factors that determine the operational framework of arbitration no longer build on the authority of professors. At the same time, it is also true that due to the increase of the number of university professors working in Hungary and the perceived intergenerational stratification, professors of the faculty of law no longer have the authority they previously had, an authority that could be useful to ensure the quality of arbitration.[1] The fact – also played a role in this phenomenon – that the Hungarian Academy of Sciences has so far failed to enforce academic scientific quality and qualification values at the universities.

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1 See: KECSKÉS, LÁSZLÓ: *Választottbíráskodás – a 2020. február 11-én megtartott MTA rendes tagi székfoglaló előadás*. Európai Jog. 2020. évi 3. szám pp. 1–28. On the importance of the consistent, determined and considerable hardness of arbitral tribunals in proceedings, see PINSOLLE, PHILIPPE: *The Need for Strong Arbitral Tribunals*. In: International arbitration and the rule of law: Contribution and conformity ICCA International arbitration Congress Mauritius 8-11 May 2016. General Editor: Menaken, Andrea, Wolters Kluwer) pp. 623–962.

II. Equlibrium, antiequilibrium, caseload issues

Arbitration may be functional and effective under equilibrist economic and market conditions. In circumstances – in line with the interpretation of János Kornai – where the economic and sociological strength of entrepreneurs is at least similar in magnitude. In a distorted, antiequilibrium situation, the parties do not trust each other and do not trust in the correctness and fairness of the functioning of the conflict resolution system.[2]

In Hungary, permanent courts of arbitration have been established which reflect the former rigid sectoral system prevailing in the national economy that led to an antiequilibrium situation.

The problem of center and periphery arose in relation to the permanent court of arbitration and some of the parties. For a party positioned farther from the center, it was hard to believe that it could really trust the fact that there would be a fair judgement.For these reasons, these "sectoral" permanent courts of arbitration had serious caseload problems.

After the entry into force of the Act on Arbitration of 1994, the caseload of the permanent courts of arbitration were not significant with the exception of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry. Structural problems played a key role in this situation. While potential clients from a range of economic entities across different economic sectors could turn to the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, for other parties, the subjects of proceedings of the Hungarian permanent courts of arbitration were tied to an economic sector or the structure of a former economic sector.

The more recent permanent courts of arbitration which have been established since the mid-1990s were also usually based on an existing or former economic, sectoral, administrative-professional structure or traces of it. This is where their problems originate. In the case of professional, sectoral based courts of arbitration, one of the clients is necessarily closer to the center than the other. Permanent courts of arbitration have good perspectives and chances of operation if they are able to convince the potential clients farther from the center and their lawyers to trust in the system and that they will receive justice in a fair trial. The Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry had a great advantage over the other permanent courts of arbitration because it operated in a cross-sectoral way. Its potential clients came from a wide range, so the problem of proximity to the center did not occur in any material way.[3]

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[2] I understand and use the economic theory concepts of equilibrium and anti-equilibrium as described in Kornai János's book "Anti-equilibrium". See: KORNAI, JÁNOS: *Anti-equilibrium. A gazdasági rendszerek elméleteiről és a kutatás feladatairól*. Közgazdasági és Jogi Könyvkiadó. Budapest, 1971. pp. 1–437. Anti-equilibrium. On the theories of economic systems and research. Economic and Legal Publishing. Budapest, 1971. pp. 1–437. The concept of equilibrium and anti-equilibrium with respect to arbitration has already been introduced by an Austrian author, Ed Watzke. See: WATZKE, ED: *Aquilibristiscer Tanzzwischen Welten: auf dem Weg zu einer transgressiven Mediation*. Mönchengladbach, 1997. Aquilibristiscer Tanzzwischen Welten: auf dem Weg zu einer transgressiven Mediation. Mönchengladbach, 2000. KERTÉSZ, TIBOR: *Kötéltánc világok között: kultúraközi mediáció a facilitatívtól a narrative medközelítésig*. In: Közvetítés és vitarendezés a jogi és a vallási kultúrákban, (Szerkesztette: Bányai, Ferenc – Nagypál, Szabolcs) ELTE Eötvös Kiadó. Budapest, 2014. p. 34.

[3] KECSKÉS LÁSZLÓ: *A választottbíráskodás jogi szabályozása Magyarországon*. Jogi Tájékoztató Füzetek. Elhangzott szakmai előadásokról. Jogi Szekció. Budapest, 2012. pp. 173–174.

An important precondition for the successful operation of a court of arbitration is also to have a balanced equilibrium among the law firms choosing arbitration in the respective country and in the respective city. In time, it will deter the parties and their lawyers from arbitration if they find that some law firms are getting too close to directing, managing or administrating a court of arbitration.

Arbitration can function well if there is a balance or at least a relative balance among the large law firms in the respective city or country. If this balance is distorted or upset in favor of some law firms, arbitration – and thus the rule of law – could be jeopardized.

It jeopardizes the ethics of arbitration and may create chaotic interests that the "demarcation" line previously considered important between arbitrators and lawyers acting as legal representatives in arbitration has been abolished. The essence of this "demarcation" line was to exclude interoperability for lawyers as between the frequent unrestricted exchange of roles as arbitrators and as legal representatives.

By its unanimous resolution of the 6th of February 2019, the Presidium of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (which entered into force on the 1st March 2019) approved the deletion of Paragraph 4 of Article 6 of the Rules of Proceedings and the amendment of Paragraph 1 of Article 10 of the Rules of Proceedings.

Accordingly, the following mandatory rule of Paragraph 4 Article 6 of the Rules of Proceedings has been repealed: "Paragraph 4 of Article 6: [Representation […] Arbitrators included in the arbitrator recommendation list may not appear in arbitral proceedings before the Arbitration Court. A person acting as an arbitrator in an arbitral proceeding before the Arbitration Court may not appear in the arbitral proceedings before the Arbitration Court from the time of acceptance of that person's nomination or appointment until the termination of that person's mandate. [...]

With its resolution, the Presidium essentially dropped the reins betwixt the horses, apparently trusting in the increase in light caseload. In doing so, it has created a dangerous situation, especially in view of the evolution of public opinion with respect to the morally objectionable interactions between the roles of lawyers and judges irrespective of arbitration.

III. The establishment of the Hungarian Arbitration Association

Noticing the malfunctions of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry and arbitration in Hungary, based on the idea of Péter Nagy, a lawyer and arbitrator with great international experience, young Hungarian lawyers facing a promising career established an association in 2017, the "Association for the development of international trade relations and arbitration".[4] I am honoured to have been the founding President of this organization. Following the end of my term in 2019, this association, learning from the experience of the 2018 reorganization of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, very

[4] Articles of Association dated 30 October 2017. On 8 January 2018, the Metropolitan Court of Budapest ordered the registration of the association. 16. PK. 60731/2017/2 Registration number of the organization: 01-02-0016768.

wisely chose a young lawyer colleague as President who currently has no affiliation with any law firm. From 2019 on the association continues to operate under the name of the "Hungarian Arbitration Association".

IV. Corruption, guerrilla arbitration, "on elephants and pornography"[5]

In relation to arbitration, the concepts of corruption and guerrilla arbitration are often referred to as critical subjects. There is a thematic distinction between the categories mentioned, although there is undoubtedly an overlap between them. Corruption refers to events that justify criminal conviction. By contrast, guerrilla arbitration covers a wider range of matters.Inaddition to corruption in the field of criminal law, it also includes ethical abuses and breaches which may border corruption or even fall into the area of corruption. Cases of guerrilla arbitration are very broad.[6]

The difficult perceptions and observations of the problems of corruption and guerrilla arbitration are pointed out by William Park in his famous study, which was first published in 2001 and several more times thereafter. This study refers to elephants and pornography in the second part of its title. Günther Horváth has a similar impression, because in one of his studies he writes that "guerrilla tactics" in arbitration can only be approached in a cumbersome, devious way.[7] In the absence of enforceable ethical norms, it is difficult to separate creative litigation tactics from violations of legal rules of conduct. Guerrilla tactics do not always necessarily violate ethical or procedural rules, but almost always disturbingly interfere with arbitral proceedings.[8]

In the beginning, only a small group of legal professionals were involved in arbitration. At that time, ethical issues were rarely raised in relation to arbitration, because it was important for arbitrators to maintain their good reputation and their prestige. They required a high level of professionalism of each other. Later on, the number of arbitrators expanded and became very extensive. In addition, the extent of international arbitration has increased with globalization.[9]

The first famous case of the theoretical assessment of the occurrence of corruption in arbitration occurred when Gunnar Lagergen (1912–2008), a famous Swedish judge and arbitrator acting as a single judge, discussed a case in Paris (ICC Case No.1110)[10] [11].

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[5] Park, William uses this term in the title of one of his studies. See PARK, WILLIAM W. A*rbitration's Discontents: Of elephants and pornography*. Arbitrational International LCIA Volume 17, Issue 3. September 2001. pp. 263–274. Published 27 August 2014.

[6] See HORVATH, GÜNTHER J.: *Guerilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?* Austrian Yearbook on International Arbitration. 2011. (Klausegger, Klein-Kremslehner-Petsche-Pitkowitz-Power-Welser-Zeiler eds., 2011.) pp. 223–239.

[7] See HORVATH, GÜNTHER J.: *Stuble Ways of Addressing Guerilla Tactics*. Austrian Yearbook on International Arbitration, 2014. ManzscheVerlags- und Universitatsbuchhandlung Verlag C.H. Beck, München Stampfli Verlag. Bern, Wien, 2014. pp. 223–239.

[8] See HORVATH 2011, p. 297.

[9] See HORVATH, 2011, pp. 297–298.

[10] The highly respected Gunnar Karl Andreas Lagergen also discussed a large number of India-Pakistan, Egypt-Israel and Iran-US related cases. In 1943, he married Nina von Dardell, famous Swedish diplomat and half-

Lagergen declared in 1963 that he had no jurisdiction to arbitrate because of the obvious corrupt content of the contract on which the case was based.[12] Behind this position, it may have been his perception that arbitrators have an "ex officio" obligation to uncover corruption. Thereafter, for a few decades the relationship between corruption and arbitration was not particularly an issue. Von Wobeser mentions in his study published in 2016 that there has been an increasing number of arbitration judgments in which allegations of corruption are made.[13]

Suspicions of corruption also appear in international investment arbitration and international commercial arbitration. Corruption elements are most often raised in the examination of agency contracts and consulting (advisory) contracts in the practice of international commercial arbitration.[14] Among corruption offences, there are mainly signs of bribery and money laundering.[15]

In international investment protection cases, host states often invoke investor corruption to rid themselves of the jurisdiction of the court of arbitration concerned.[16] Investors, on the other hand, tend to claim that corruption has taken place on the side of the host state because they are trying to prove that the other side has acted in breach of contract.[17]

Guerrilla tactics also appear in multiple subject relationships during arbitration. Sometimes lawyers acting on opposite sides use these tools against each other, and often use such tools against the acting arbitration panel. Unfortunately, guerrilla arbitration tactics can occur even among members of arbitration panels.

An indicative list of guerrilla methods that appear as being tools of lawyers may include: making threats, intimidating witnesses; using information obtained by telephone taps, temporarily or permanently concealing new evidence from the other party, withholding evidence, the use of procedure-delaying tactics, applying political pressure and making unfounded objections to arbitrators. Guerrilla behaviour by lawyers against an arbitrator nominated by the other party appears to be strikingly common.[18]

Intentional delaying of a procedure is also a guerrilla phenomenon. This is particularly suspicious if it appears on the plaintiff's side. In arbitration proceedings between parties

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sister of Raul Wallenberg. In 1984, their daughter Nane born in 1944, became the second wife of Kofi Annan, Nobel Peace Prize winner in 2001 and UN Secretary General for two terms from 1996 to 2006.

[11] ICC Award No. 1110.

[12] VON WOBESER, CLAUS: *The Corruption Defence and Preserving the Rule of Law*. In: "Evolution and Arbitration: The Future of International Arbitration, 24th ICCA Congress 15-18 April 2018. Sydney, Australia, International Council for Commercial Arbitration, International Arbitration And The Rule of Law: Contribution and Conformity, General Editor: Andrea Menaker, Kluwer Law International B. V. The Netherlands. 2017. pp. 203–224., p. 204.

[13] See VON WOBESER 2017, p. 204.

[14] In a study published in 2016, Von Wobeser mentions that there has been an increasing number of arbitration awards in which allegations of corruption have been made. See VON WOBESER 2017, p. 211.

[15] In a study published in 2016, Von Wobeser mentions that there has been an increasing number of arbitration awards in which allegations of corruption have been made. See VON WOBESER 2017, pp. 209–210. BORBÁS, ESZTER (2018). Conference report. ("Fundamentals of arbitration and other alternative dispute resolution procedures") Manuscript. Pécs, 2018. pp. 1–12., with special regard to p. 3.

[16] VON WOBESER 2017, p. 206.

[17] VON WOBESER 2017, pp. 208–210.

[18] See: HORVATH 2011, pp. 297–313. HORVATH 2014, pp. 223–239. BORBÁS 2018, pp. 1–12.

with independent legal personality operating within the framework of larger organizations, there is a somewhat suspicious way that a respondent does not object to the assessment of the platinff'sclaim in order to meet certain external administrative, ministerial and governmental expectations. A much more serious circumstance is when cooperation between the parties is suspected of having a money laundering intent.

The following reprehensible conduct has appeared on the part of arbitrators: the resignation of the arbitrator in order to delay or frustrate the arbitration award, breach of the duty to disclose and leakage of communications to persons inside or outside the procedure. Delays and passivity of some arbitrators in the election of the Chairman of the panel in order to allow the Presidium or the President of the Permanent Arbitration Court to elect is another example of such conduct. Arbitrators have a duty to preserve the values of the rule of law in the course of their proceedings. On the other hand, arbitrators have a duty of trust and confidentiality towards the parties. Meeting these two criteria is sometimes not easy and can lead to complex problems in assessing the "reporting obligations" of arbitrators.[19]

Guerrilla arbitration as a technical term refers to the highly objectionable conduct of a lawyer or arbitrator which pushes the boundaries of unlawfulness or sometimes even crosses into it order to serve the interests of certain parties.

As the number of lawyers participating in arbitration increases, due to their different legal cultural backgrounds, different styles of activities havealsoincreased. The proceedings often involve lawyers and arbitrators from different states. This situation also raises practical issues that in the United States, for example, witnesses are allowed to be prepared by lawyers to testify. In England, on the other hand, such preparation is forbidden. A lawyer cannot make unsubstantiated allegations in the United States, England, and Germany, but, for example in Mexico and Saudi Arabia, a lawyer may do so.[20]

Arbitrators can act most effectively against arbitration guerrillas themselves. It is therefore important that tribunals consisting of practised and experienced arbitrators arbitrate.[21] Tribunals may also take action against guerrilla tactics with the assistance of the parties to the proceedings by drawing up a list of acceptable and unacceptable procedural conduct before proceeding with the substance of the case. In principle, it could also be an effective way in the long run for the tribunals to pass on the extra costs by issuing a so-called "costs award" to those who participate in guerilla tactics, or possibly to try to impose costs in a somewhat punitive way. However, a serious disadvantage of this method is that it may jeopardize the authority and reputation of the tribunal. It is therefore more appropriate if the tribunal preserves the values of the rule of law in the proceedings with its unquestionably outstanding professional and moral authority.[22]

Some continue to be optimistic for the application of international codes of ethics. Others, on the other hand, express doubts and point out in general terms that the spread of various "soft law" documents should already be limited in arbitration, as they increase the sense of uncertainty for enforcement bodies. Among the codes of ethics for arbitration, the

[19] See: VON WOBESER 2017, p. 24. HORVATH 2011, pp. 301–302.
[20] See: HORVATH 2011.
[21] See: HORVATH 2011, pp. 303–304.
[22] See: HORVATH 2011, pp. 297–313. HORVATH 2014, pp. 223–239.

"International Code of Ethics" by the International Bar Association (IBA) is of utmost importance.[23]

It is amusing if an author mentions gangsters and bandits without finding the common term of "guerrilla arbitration". That is how we write. (sic!)

At present, the ethical arbitration conflict and incident that has attracted the greatest attention and interest across Europe, with no corruption element at all, is the one that has erupted between Slovenia and Croatia in relation to the case concerning the Piran Bay. Judgment was made on the 29th of June 2017 by the Tribunal of the Permanent Court of Arbitration, chaired by Gillbert Guillaume, in proceedings under an arbitration agreement concluded between Slovenia and Croatia on the 4th of November 2009. By an unanimous decision, the five-member tribunal defined the disputed land-sea border and thus granted Slovenia an exit to international waters by designating a "Junction area". Slovenia gained possession of four fifths of the territory of the Piran Bay. The dispute between the two countries also temporarily hindered and delayed Croatia's accession to the European Union. In the summer of 2015, after the tapping of a telephone conversation between the Slovenian judge and a Slovenian official, the contents of the telephone conversation were widely published in the Serbian and Croatian press. This communication did not contain any elements of corruption, but the arbitrator nominated by Slovenia resigned and the arbitrator nominated by Croatia did so as well. According to Croatia, they could withdraw from the arbitration agreement as a result of the above events, but the five-member tribunal was of the opinion that Croatia was not only entitled but also obliged to conduct the proceedings. Slovenia has brought proceedings before the Court of Justice of the European Union concerning the recognition and enforcement of the arbitration award by Croatia. In his opinion of the 11th of December 2019, Advocate General Priit Pikamäe stated that this dispute fell outside the jurisdiction of the Court of Justice of the European Union.[24]

[23] HORVATH 2011, p. 299.
[24] See Opinion ECLI:EU:C:2019:1067.