Arbitral Tribunal Power to Disqualify Unethical Counsel

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Abstract: In specific matters of conflicts of interest ethical issues in connection with the parties’ legal representatives could occur in the course of arbitration proceedings. The purpose of this paper is to identify and investigate the current status of the arbitral tribunals and arbitral institutions power to sanction counsel’s misconduct in the event of conflicts of interest. Parties have a fundamental right to choose the counsel and in the same time the right to an independent and impartial tribunal, therefore the source of the arbitral tribunal power to disqualify a counsel is a hot topic. There are no express provisions granting arbitrators such power, only soft law instruments, but which have no binding effect as long as the parties do not agree on them. For these reasons, two renowned cases where international arbitral tribunals have dealt with the subject are examined. Different set of international and domestic rules have been applied by the arbitral tribunals and even if they held that arbitrators are empowered to sanction counsel’s misconduct, different outcomes on the issue have been retained: one tribunal found that the counsel is excluded from the proceedings, while the other deny this request and stated that such power would be exercised only rarely and in the most compelling situations. Therefore, developing “truly transnational” ethical rules and their implementation by the arbitral institutions might be a solution. Arbitral tribunals are establishing this issue on the basis of the undertaken and applied international soft law (professional guidelines) which gained credibility and popularity and also became accepted international standards in the arbitration field.

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JEL classification: F53, K19, K22, K29, K33, K41, K49

Introduction

International commercial arbitration is developing rapidly and becomes one of the fastest alternative to litigation means of dispute resolution concerning business world without replacing litigation and ensuring an especial administration of justice.

The ethical quality of the arbitration depends and it is determined by the ethical quality of its arbitrators and also by the major participants on the arbitral proceedings. This being said, besides the arbitrators called to ensure the due process, effectiveness, efficiency and
also to preserve and protect the arbitral process, the party representatives/ counsels are actors with significant role and functions to deter all the guerrilla tactics imported nowadays in arbitration from litigation [Rogers, 2014; Horvath & Wilske, 2013].

Within the historical context of the development of international relations, the last years witnessed a record evolution of the ethical issues in international arbitration. During the last 20 years a lot of international law codification was realized and it contributed to the growth of the regulatory effect of international arbitration in new fields of business, economic, social, cultural and even political. As a result of the development and challenges in business reality, the international arbitration needs to be prepared for the increase in disputes and high-profile disputes that implies a multitude of participants (arbitrators, arbitral institutions, parties, their legal and contractual representatives, counsels, experts, witnesses etc.) and the ethical issues that arose between them. A participant to the arbitration proceedings may be an arbitrator in one case and counsel, expert or witness in another. Alleged conflicts of interest can arise from some actors alternating between different functions. This situation may lead to the possibility of several conflicts of interest among these actors, when prospective appointments and necessary disclosure is concerned, considering that sometimes a counsel may become an arbitrator, an expert or an witness or vice-versa and all these qualities may interchange in the light of the ever-growing importance of arbitration as means of dispute resolution and its pool of participants to the arbitral proceedings.

This paper focus more on the issue of the ethical appointment of a counsel in arbitration proceedings after their commencement in a manner that may disrupt the balance of independence and impartiality of the constituted tribunal due to potential conflicts of interest with the new appointed counsel. And what can be done in such a case, who is called to take sanctions against the counsel, if the arbitrators have or not inherent powers to disqualify/ exclude the counsel in such cases.

1. On Arbitrators and Counsels Conflicts of Interest Codification

To achieve the goal in international arbitration of “providing a final binding resolution of the parties’ dispute” [Born, 2009] it is also vital to ensure and respect the ethics of all the participants in the arbitral proceedings. The successful and rapid practice of dispute settlement in various areas determined a major increase of the body of norms and soft law used. Simultaneously with international development some institutional changes also took place and the number of international organizations or institutions with competence in regulation of international arbitration expanded. The discussion on ethics it seems to have shifted more towards questions of counsel ethics while codes of conduct for arbitrators focus mostly on the questions of impartiality and independence. The arbitrators are compel to their most important obligations of independency, impartiality, neutrality and disclosure in international arbitration. There are some guidelines in this respect issued by international organization which intended to regulate the conflicts of interest issues that may occur mostly when making decisions about prospective appointments and disclosures.

The most prominent and influential professional code of conduct, the American Bar Association/American Arbitration Association’s Code of Ethics for Arbitrators in Commercial Disputes (AAA Code of Ethics), originally adopted in 1977 and revised in 2004, “recognizes the fundamental differences between arbitrators and judges”. The drafters of
the Code believe it is preferable that all arbitrators be neutral and comply with the same ethical standards (particularly in arbitrations with international aspects). The Code prescribes that all arbitrators should disclose “any known direct or indirect financial or personal interest in the outcome of the arbitration”, and “any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties.” The Code also prescribes in Canon II(B) that arbitrators have an ongoing duty to “make reasonable efforts to inform themselves of any interests or relationships” subject to disclosure [Brower, 2010].

Other such codifications are Arbitrators Ethics Guidelines provided by JAMS – The Resolution Experts (US), Guidelines of Good Practice and Code of Ethical Conduct of Arbitrators issued by The Chartered Institute of Arbitrators in London (CIArb), which provides also for the CIArb Practice Guideline: Interviewing Prospective Arbitrators. Nonetheless, the most renowned and used are the International Bar Association codifications, the IBA Guidelines on Conflicts of Interest in International Arbitration (adopted in 2004 and revised in 2014) and IBA Guidelines on Party Representation in International Arbitration (adopted in 2013).

Regarding the IBA Guidelines on Conflicts of Interest, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators and arbitral institutions and courts often consult the Guidelines in considering challenges to arbitrators. The goal of the IBA Guidelines on Conflicts of Interest stands to help parties, lawyers, arbitrators and arbitration institutions on such relevant issues as impartiality and independence and other ethical arbitration duties including disclosure, communication, diligence and confidentiality. The widespread acceptance of the IBA Guidelines has played a decisive role in bringing global arbitration into line [Fernández Rozas, 2010].

The IBA Guidelines on Party Representation focus on issues of counsel conduct and party representation in international arbitration that are subject to, or informed by, diverse and potentially conflicting rules and norms. They undertook to determine whether such differing norms and practices may undermine the fundamental fairness and integrity of international arbitral proceedings and whether international guidelines on party representation in international arbitration may assist parties, counsel and arbitrators (this is the declaration of the Guidelines themselves in the preamble).

These Guidelines are soft law instruments that provide directions for the regulation of arbitrators’ and counsel’s conduct, they are not legal norms and do not prevail over the applicable domestic legislations or over the parties’ chosen rules of arbitral proceedings. Only their acceptance by the parties to be referred to in the course of their proceedings ensures the application of these standards. Usually the tribunal itself is proposing such reference during the drafting of the main documents in arbitration, such as the Terms of Reference, Procedural Order no. 1 or others.

The IBA Guidelines of 2013 and 2014 are useful steps along the way to a rigorous ethics regime. But with the arbitral institution lies the task to lead the way, their true role being to fill the gaps and support the legitimacy of their arbitration systems. Thus the arbitral institutions are more appropriate to provide guidance and authority.

Even the arbitrators’ duty to disclose is subject to different standards, the general rule is that a prudent arbitrator when is in doubt should disclose that possible conflict, to avoid
any risk of penalty, such as removal or setting aside of the award. It has been noted that “non-disclosure plants the seed of nullity” [Hunter & Paulsson, 1985].

The notions of independence, impartiality and neutrality are vague and ambiguous enough, the domestic legislations approaches being different, especially the Europeans requirements being distinct from the US ones. In Europe the independence principle is broadly recognized, while American legislation (Federal Arbitration Act) states that an arbitral award may be annulled (set aside) only if evident and justified reasons of arbitrators’ corruption existed.

The Romanian Civil Procedure Code entered into force in 2013 ascertains in Article 562 the norms regarding the conflicts of interest, which are imported and inspired from the IBA Guidelines on Conflicts of Interest, in a succinct and concise manner, in order to cover as much as possible from the possible situations described in these Guidelines.

More recently, some arbitral institutions have taken up the challenge of creating codes of conduct for arbitrators acting under their auspices, most of them in Eastern Europe. Examples include the Court of Arbitration at the Polish Chamber of Commerce, the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia or the Latvian Chamber of Commerce and Industry. While some of these codes are no more than general, moral guidelines, others go further and regulate specific situations which typically arise during an arbitration. Sometimes, these rules of ethics are enforced. For example, under the rules of the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia, an arbitrator violating the code of ethics is explicitly considered to have failed to fulfil his or her duties. On the basis of this, the institution “may” terminate the arbitrator’s mandate either upon request of a party or, in exceptional circumstances, on its own accord. This regime makes the code of ethics more than just a guideline, creating a mechanism to control an arbitrator’s behaviour beyond just the adherence to fundamental principles. [Peters, 2010].


Regarding the counsel’s conduct in arbitration, IBA Guidelines on Party Representations are issued to assist parties, counsel, or arbitrators when issues on counsel conduct and party representation in international arbitration as party representatives arise. This conduct may be subject to diverse and hypothetically conflicting bodies of domestic rules.

In the preamble of these Guidelines is expressly stated that the potential for confusion may be aggravated when individual counsel working collectively, either within a firm or through a co-counsel relationship, are themselves admitted to practice in multiple jurisdictions that have conflicting rules and norms. The general idea promoted by these Guidelines is that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.

The Guidelines take into consideration several aspects related to the counsel’s conduct, including communications with arbitrators, submissions to the arbitral tribunal, information exchange and disclosure, witnesses and experts, remedies for misconduct. In Guidelines 4-6 the issue of party representative is treated related to clear identification of the party representatives as soon as possible and if any change occurs, then it should be
properly and promptly notified to the other party, the arbitral tribunal and also arbitral institutions (in case of institutional arbitration, which most of them are).

The hottest topic of possible exclusion of a counsel in case of a late appointment which could cause a conflict of interest and derailed the proceedings is tackled and it is stated:

“5. Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.

6. The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings.”

In such cases, if the arbitral tribunal finds it has the authority and the circumstances are justified and allow it, then the exclusion of that counsel could be considered under the IBA Guidelines on Conflicts of Interest, partially or totally. Of course, the parties should be invited to express their opinion about the existence of a conflict, the extent of the Tribunal’s authority to act in relation to such conflict, and the consequences of the measure that the Tribunal is contemplating [Comments of Guidelines 4-6].

In the end the Guidelines is offering a part which articulate potential remedies to address misconduct of party representatives. The measures that could be taken by the arbitral tribunal should be assess and balanced according to the particular situation analysed, without leaving aside the rights of the parties, relevant considerations of privilege and confidentiality, the good faith of the party representatives and the effects of the measure to be proportionate to the respective misconduct sanctioned. The proposed measures are: admonishing the party representative, drawing appropriate inferences in assessing the evidence relied upon or the legal arguments advanced by the party representative, considering the misconduct in apportioning the costs of the arbitration or any measure that might be considered as appropriate to preserve the integrity and fairness of the proceedings.

Significantly to be remarked is that the proposed sanctions in this final part of the Guidelines makes no specific and express reference to the exclusion of a new counsel having a conflict of interest with one of the arbitrators. This can lead to the conclusion that such a sanction is considered an extreme measure that arbitral tribunal is encouraged to consider only in exceptional cases. As the wording “or any other appropriate measure in order to preserve the fairness and integrity of the proceedings” leaves room for any other sanction, including the counsel disqualification/ exclusion, this means that arbitral tribunal can also adapt and adopt other appropriate measures to the specific circumstances they might came across in an arbitral process, not only a conflict.

3. Relevant Caseload on Disqualifying Counsel

The best practices that have been issued and discussed in consideration of the issue whether an arbitral tribunal has the competence to disqualify a counsel is not just so recent [Paulsson, 1992], as the problem is if the competence lies with the arbitral tribunal, the arbitral institution administering the case or the state courts. But it obtained recent sensitivity in light of two investment arbitration decisions with different results, Hrvatska [Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24 –
Tribunals’ Order concerning the participation of David Mildon QC in further stages of the proceedings, May 6, 2008] and Rompetrol [Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3 – Decision of the Tribunal on the participation of a counsel, January 14, 2010].

The power of the arbitral tribunal derives from the traditional authority of a court to judicially supervise the local legal profession, from the need to secure the proper administration of justice, to ensure the police of the proceedings, the discipline for misconduct, along with the need to protect the parties from malpractice attended with fraud and corruption [Rau, 2014].

The issue raised in these cases and subsequent ones related to counsel’s conduct and party representations matters are now addressed by the IBA Guidelines on Party Representation in International Arbitration adopted by the IBA Council on May 22, 2013, which were presented above.

3.1. Hrvatska Case

In Hrvatska case, the ICSID arbitral tribunal based on the concept of inherent powers rendered the decision that a party’s chosen counsel could not participate in arbitration proceedings. The circumstances of the case were related to disclosure obligations of relations between the counsel and arbitrator and the possible consequences of counsel’s emergence on the composition of the arbitral tribunal [Wilske, 2011].

The excluded counsel’s attendance in the case was disclosed only shortly before the merits of the final hearing. That counsel was a member of the same London Chambers at which the tribunal’s president was a “door tenant.” The opposing party, who was not familiar with the English legal system’s “split profession” of solicitors and barristers, objected that the participation created an “appearance of impropriety.”

Counsel for the claimant referred to ICSID Arbitration Rule 18(1) which obliges a party to notify the Secretary General of the identity of counsel; also Rule 19, which states that the "Tribunal shall make the order required for the conduct of the proceeding" and to Rule 39, which states that provisional measures could be made "for the preservation of (a party's) rights". Counsel for the respondent argued that it was not aware of any inherent jurisdiction or authority that would enable the tribunal to grant such relief [Olswang, 2009].

Strongly affected by the very late disclosure of the barrister’s role in the case, the Tribunal disqualified the barrister from the case although specified that there is no “hard and fast rule” preventing barristers from the same Chambers from acting as arbitrator and counsel in the same case [Bishop, 2010] (“the lack of clarity as to which ethical rules apply, the existence of conflicting rules and obligations, the non-transparency and the increased size of many proceedings, combined with greater public scrutiny, creates a certain instability in the system that could result in a future crisis of confidence”).

A peculiarity of this case was that the challenge was not to the president continuing on the tribunal; the parties were agreed that the president should not recuse himself. Instead the claimant sought an order that the respondents refrain from using the counsel in question.
3.2. Rompetrol Case

Here the arbitral tribunal noted that its reasoning is not to be considered as a recast of Hrvatska decision, but that “the Hrvatska decision might better be seen as an ad-hoc sanction for the failure to make proper disclosure in good time than as a holding of more general scope” [Whitsitt, 2010].

The fact of this case concerns a challenge to the lead counsel for Rompetrol which during the proceedings passed the legal conduct of the case from a particular partner in a law firm which retired from the business with another one which proved to be employed by a firm in which one of the arbitrators was a partner. The respondent challenged the propriety of the new appointed counsel and applied for an order requiring the claimant to remove the counsel from the case and to prohibit its further participation in the proceedings. It is noteworthy that respondent expressly pointed out that it is not looking for an arbitrator challenge.

Accordingly, the tribunal rejected the respondent’s request and posed a question mark on the lack of the relevant legal text to expressly provide for such inherent power and commented that “absent express provision, the only justification for the tribunal to award itself the power by extrapolation would be an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process.” It postulated that such power would be rarely and only in compelling circumstances employed.

The tribunal clearly wished to discourage challenges to legal representatives, noting that "to put the matter bluntly, there should be no room for any idea to gain ground that challenging counsel is a handy alternative to raising a challenge against the tribunal itself, with all the consequences that the latter implies".

The award represents a deliberate retreat from the decision in Hrvatska, in which a barrister was excluded from arbitration) and releases a contrary opinion, as a warning that parties should not pursue counsel challenge instead of arbitrator challenge as an alternative, considering that the circumstance of the case do not justify such a disqualification, as the evidence did not establish that there was a "real possibility" of bias and there was, therefore, no basis for the tribunal interfering in the claimant's choice of legal representation.

These cases involve ethical issues concerning the relationship between counsel and one of the arbitrators or cases when the same person fulfil the mission of arbitrator or counsel in different proceedings, but with similar legal matters at stake. Given the increased number of arbitrators and counsels in arbitration nowadays, these issues were about to happen anyway and it is important that certain measures to be taken in order to articulate and regulate such circumstances.

Conclusion

These motions for disqualification of unethical counsels appointed at a later stage in arbitral proceedings might be seen as the equivalent or surrogate of the challenge of the arbitrators themselves, but as a less burdensome alternative. The beaten track in cases when conflicts of interest occur between arbitrators and counsels, already standardized in IBA Guidelines on Conflicts of Interest, is to challenge the arbitrator, as the nomination of its own counsel is perceived as a party’s right which until now has not been infringed. The disqualification of counsel should rest on the same basis that would justify the
disqualification of an arbitrator, as raised the same doubts about the integrity of the decision-making process [Rau, 2014]. Consequently is not the counsel sanctioned, but the effect of his conduct on the legitimacy of the tribunal. And for efficiency purpose, when the matter intervened, it is advisable to be taken into account the cost/ benefit analysis given the stage of the proceedings and weighing which challenge will be less disruptive.

The basic source of the arbitral tribunal disqualifying counsel is to be found in the scope of the consent of the parties. This submission could be express or implicit, when parties voluntarily adopted the institutional rules. The parties entrusted the arbitral tribunal with a wide-ranging authority to determine how to proceed to settle the dispute. Nevertheless, the arbitral tribunal is compel to ensure the due process, an efficient conduct preserving the fundamental integrity, effectiveness and fairness of the arbitral proceedings, all of these under the parties’ legitimate expectations aligned to respectable standards in the field.

It is then the arbitral institutions’ mission to ensure sufficient codification addressing all potential issue related to ethics in international arbitration. Too much regulation is neither desirable nor advisable, but from practice and the fact that arbitration has become a big business (especially for the lawyers) lately emerged the necessity to increase the measure against the guerrilla tactics endangered the integrity and fairness of the arbitral proceedings and thus to ensure the public demands for transparency.

References


