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Exclusion of Legal Counsel in International Arbitrations Analysing the Scope of an Arbitrator's Powers

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ABSTRACT

The field of international arbitration has been the heart of new challenges and arguments in the recent times. It is crucial for the forerunners to keep amending the rules so as to maintain the adaptability of the process. An area to be pondered upon is the exclusion of counsel from the arbitral proceedings if they pose a threat to the credibility of the process. A conflict of interest is sparked by the addition of a counsel that jeopardizes the neutrality of an arbitrator.

Even though there are no explicit provisions that deal with the issue of counsel exclusion, the majority of arbitration rules and statues grant the arbitrators an unmistakable power to conduct the arbitral proceedings as they see fit and appropriate, thereby vesting wide discretionary powers in the hands of an arbitrator which should be exercised in order to preserve the efficacy of the proceedings by the exclusion of a counsel that causes a conflict of interest. On the contrary, it has also been argued that such an order violates a party's right to choose their own counsel as well as the right to present one's case.

This paper explores the role of an arbitrator in an international arbitration and analyses how an arbitrators' powers should be broad enough to influence the course of the arbitral proceedings, so as to give an impartial result to the parties' dispute.

I. INTRODUCTION

The field of international arbitration[3] has been the heart of new challenges and arguments in the recent times. Arbitration has turned into one of the most preferred mediums of alternate dispute resolution and it is crucial for the forerunners to keep amending the rules so as to maintain the adaptability of the process. There are several areas that still remain unexplored in the field of arbitration. For example, one such area is the exclusion of counsel from the arbitral proceedings if they pose a threat to the credibility of the process. It is true that a conflict of interest between an arbitrator and a party has been adequately resolved by arbitration rules and statutes. However, a conflict of interest is sparked by the addition of a legal counsel that

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jeopardizes the neutrality of an arbitrator.

Even though there are no particular rules that regulate a counsel's exclusion from an international arbitration, it must be quantified that several courts have approved the removal of a legal counsel from such proceedings so as to uphold the integrity of the arbitral process. It is true that when there is no agreement to a certain aspect of the procedure, the arbitrators have the discretion to determine the required procedure.[4] Arbitrators' discretion, similar to party autonomy, is one of the hallmarks of the international arbitral process[5] since the tribunal's procedural authority is an implicit part of the parties' agreement to arbitrate and is an indispensable precondition for an effective arbitral procedure. Wide discretionary power of arbitrators has been expressly documented by several arbitral institutions.

Realistically speaking, the purpose of an arbitral proceeding is to render an enforceable award in an efficient and expedient manner. Arbitrators have the right, the duty, and the capacity to make decisions so as to avoid an unwarranted postponement.[6] Time is imperative, not only in arbitration but also in litigation, since justice late is justice denied.[7] There are also instances where the right to counsel has been exploited as a deterrent in the arbitration proceedings. With a counsel of its own choosing, a party can create a conflict of interest quite easily. Even though the right to counsel is imperative, it is to be understood that this right is not indefinite and can be restricted under certain conditions.

The fact that efficiency of proceedings is important and can be weighed over one's right to counsel was held in the case of *Carey v. Rundle*.[8] It was observed that the right to a counsel may be limited when it is at odds with the principle of efficiency.[9] Efficiency is seen as a substantial factor, especially in alternative methods of dispute resolution. It is one of the main reasons why parties tend to prefer ADR over court proceedings. Thus, it is a mission for every arbitral tribunal to assure efficiency in arbitration and to conduct the proceedings in such manner so as to enable the deliverance of an award in an expeditious and effective manner.[10]

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[4] UNCITRAL Secretariat. Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006. (Jan. 15, 2018, 01:00 PM) http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

[5] Gary Born, International Commercial Arbitration, (2009).

[6] A. J. Van Den Berg, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, (1999).

[7] *Id.* at 2.

[8] Harry E. Carey v. A. T. Rundle, 409 F.2d 1210, 1214.

[9] Andrew Tweeddale & Karen Tweeddale, Arbitration of Commercial Disputes, (ed. 2005).

[10] United Nations Commission on International Trade Law Arbitration Rules, 2013 (hereinafter referred to as UNCITRAL Rules); Singapore International Arbitration Centre Rules, 2016 (hereinafter referred to as SIAC Rules); Hong Kong International Arbitration Centre Administered Arbitration Rules, 2013 (hereinafter referred to as HKIAC Rules); London Court of International Arbitration Rules, 2014 (hereinafter referred to as LCIA Rules).

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On the contrary, it has also been fairly reasoned that such an order to remove the legal counsel violates a party's right to choose their own counsel as well as the right to present one's case. The right to choose one's own counsel is a fundamental one and this right can be pronounced as one of the constituents of due process as such. This right is widely recognized both by international and by regional conventions on human rights. There is an obligation on the arbitrators to treat parties with equality and to give them a full opportunity to present their case.[11] The limitation of the authority of a tribunal to make procedural measures is an accepted fact – the authority is limited by the arbitration agreement and by arbitration rules. There are no arbitration rules that have the provisions with regards to the removal of counsel from an arbitral proceeding.[12] It has been argued that the exclusion does not fall within the ambit of the discretionary power of arbitrators simply because there is no express provision with respect to the same in the governing rules.

Taking note of all the pre-existing notions, this paper tries to explore the role of an arbitrator in international arbitrations and analyses how an arbitrators' powers should be broad enough to influence the course of the arbitral proceedings, so as to give an impartial result to the parties' dispute.

II. Implied And Inherent Discretionary Powers

A. Arbitrator's Discretionary Powers: An Overview

On the sphere of proper arbitral powers, there is always an area of sunshine and an area of shadow.[13] In the sunny areas are any powers well-defined in the arbitration agreement of the parties, in any rules of an arbitral institution adopted by the parties, and in any arbitration law at the seat of the arbitration. From these three sources, evident powers of the arbitrators can be clearly discerned. Nonetheless, there will always be some areas of shadow, because even the most comprehensive agreement, laws, or rules cannot cover every circumstance where an arbitrator may be required to act. For that reason, many laws and rules give wide discretion to the arbitrator with regards to various procedures that must be followed if the arbitration is to proceed to a final, enforceable award. Nonetheless, there will often be areas that cannot be directly placed within the discretionary powers provided and must come from some source other than the governing laws and rules.

In the past, the concept of party autonomy has been taken for granted based on the fact that

[11] Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration, (3rd ed. 1999).
[12] *Id.* at 8.
[13] Margaret L. Moses, *Inherent and Implied Powers of Arbitrators*, Defining Issues in International Arbitration.

only the parties have a say in how arbitral proceedings should be conducted. The arbitrators' powers are derived from the parties' will to arbitrate. In other words, where there is no arbitration agreement, no arbitration with arbitrators' decisions can take place. As a result, the relationship between parties and arbitrators was not seen as an issue of importance.[14] In contrast to this, only the relationship between the parties was viewed as a crucial one.[15] The arbitrator was viewed as a neutral spectator whose role was limited to watching a game played by the other subjects and then declaring the victory of one when the game was over. The current scenario recites an opposite tale where the arbitrator can enter the playing field in order to guarantee full respect for the rules of the game and to ensure that his verdict about the dispute is founded on factual and legal elements.[16] In other words, an arbitrators' powers should be broad enough to impact the course of the proceedings in such way that a fair and equitable result of the parties' dispute can be reached.

An arbitral tribunal's discretion may be defined as the inherent power to uphold the integrity of the proceedings and to carry them out in an expeditious and effective manner so as to end the dispute between the parties by delivering a valid award.[17] When parties agree upon arbitral rules, they grant arbitrators the discretion afforded under them.[18] The UNCITRAL Rules[19] set forth that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.[20] The UNCITRAL Model Law aims to ascertain a substantial framework for the course of arbitral proceedings because there is a great variety of necessities and circumstances that arise in international cases.[21] Framers of the Model Law sought to allow the arbitrators to mold the conduct of the proceedings with respect to the specific features of the case without being hindered by the conventional local law. In consequence, the discretion of arbitrators in the UNCITRAL Model Law has been construed very widely.

Several other arbitration rules provide similar provisions as far as the discretion of the arbitrators is concerned. The ICC Rules lay down that *"in order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of*

[14] Sir Michael J. Mustill & Stewart C. Boyd, The Law and Practice of Commercial Arbitration in England, (2nd ed. 1989).
[15] Mauro Rubino-Samartano, International Arbitration Law and Practice, (2nd ed. 2001).
[16] Piero Bernardini, The Role of the International Arbitrator, Arbitration International, (ed. 2004).
[17] Himpurna California Energy Ltd. v. Indonesia, Yearbook Commercial Arbitration 2000 - Volume XXV.
[18] Ripinsky, S., *Assessing Damages in Investment Disputes: Practice in Search of Perfec*t, 10:1 J. of World Inv. & Trade 5, (2009).
[19] UNCITRAL Rules, 2013.
[20] Art. 17(1) UNCITRAL Rules, 2013.
[21] UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, A/CN. 9/264.

the parties."[22] Moreover, the LCIA Rules set forth the extent of discretionary power when specifying that *"the Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable."*[23]

An identical view about the nature of the discretionary powers, as mentioned in the UNCITRAL Model Law, can be found in many other statutes, both in common law and civil law jurisdictions. With regards to civil law countries, the German Arbitration Law, which was derived from the UNCITRAL Model Law, uses exact wordings which state that the tribunal shall *'conduct the arbitration in such manner as it considers appropriate'*.[24] Similarly, the Japanese Arbitration Law as wells as the Austrian Code of Civil Procedure[25] stipulates similar provisions that bestow wide discretionary powers to the arbitrators in case of absence of an agreement between the parties.

Speaking of common law countries, a similar approach to discretionary powers of an arbitrator has been adopted. For example, the English Arbitration Act prescribes *'the tribunal shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense'.*[26] Further, the Australian Arbitration Act recommends that when there is an absence of an agreement between the parties, the tribunal may conduct the arbitration *'in such manner as it considers appropriate'.* As far as the Indian Arbitration Act[27] is concerned, Section 18 of the Act clearly affirms the need to conduct the arbitral proceedings so as to ensure the '*equal treatment of the parties'*.[28]

Thus, it is the duty of the Tribunal to conduct the process of arbitration in such manner which would enable fair and equal treatment of the parties concerned, upholding party autonomy. It is evident from the existing rules that the Tribunal must make use of its discretionary powers and conduct the arbitration process in a way which is appropriate and just. However, does that mean that the power to remove legal counsel is a part of this discretion?

B. The Discretion to Remove Legal Counsel

It can be perceived that the discretionary power of arbitrators can be, in the nonexistence of parties' agreement, very widely applied. The texts of all instruments (Arbitration Rules and

[22] Art. 22(2), International Chamber of Commerce Arbitration Rules, 2017 (hereinafter referred to as ICC Rules).
[23] Art. 14(5), London Court of International Arbitration Rules, 2014 (hereinafter referred to as LCIA).
[24] Sec. 1042, cl. 4, German Arbitration Law, 1998, Book Ten of the Code of Civil Procedure.
[25] Sec. 587, cl. 1, Austrian Code of Civil Procedure, 1983.
[26] Art. 33, cl. 1(b), UK Arbitration Act, 1996.
[27] Arbitration and Conciliation Act, 1996 (India).
[28] Sec. 18, Arbitration and Conciliation Act, 1996 (India).

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Arbitration Acts) allow the arbitrators an extensive amount of muscle as it is up to the arbitrators as to how they seek to resolve the procedural issue which threatens them. To substantiate the argument, there are three reasons that conclude that the power to remove legal counsel falls within the context of the discretionary powers:

Principle of Efficiency

The type of effectiveness that is applicable to international arbitration can be assessed in two ways – in terms of time, or in terms of money. As far as the practical implications are concerned, the purpose of an arbitral proceeding is to deliver an enforceable award in an efficient and expedient manner. The arbitrator's primary responsibility, within his general obligation to regulate the arbitral proceedings, is obviously to impose a resolution for procedural technicalities and put a stop to schemes that impertinently disrupt the arbitration procedure as set up and to do so firmly if needed.

It is a well-known fact that *"Arbitrators have the right, the duty, and the power to avoid unnecessary delays."*[29] Time is quite imperative, not just in the process of arbitration, but also in litigation since '*justice late is justice denied*'.[30] Efficacy is significant, particularly in alternative techniques of dispute resolution since it is an important reason why parties tend to choose it over court proceedings. Thus, it is a charge for each tribunal to observe efficiency in arbitration proceedings and to carry out the proceedings in such fashion so as to give an award in a swift and fair way.[31]

The meaning of efficiency may vary from case to case when it comes to resolving a conflict of interest between an arbitrator and a counsel. The addition of the counsel to the party's legal team, whether before or after the formation of the arbitral tribunal, is of utmost importance. If the legal counsel is already a part of the party's legal team when the arbitral tribunal is formed, the challenge of an arbitrator[32] is indeed a traditional, effective, and speedy method to resolve such conflict of interest. However, an unruly situation might occur if the counsel is added in the midst of the proceedings when the tribunal is fully familiarized with the case and the evidence has already been presented. In such cases, the removal of an arbitrator, instead of a counsel, would lead to severe delay and added costs for both parties since a new arbitrator would have to be appointed and all the evidence would have to be repeated. Counsel exclusion,

[29] A. J. Van Den Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, The Hague: Kluwer Law International, 1999.
[30] *Id.* at 8.
[31] See, Art. 17 cl. (1), CEAC Rules; Art. 22 cl. (1), ICC Rules; Art. 14.2, LCIA Rules; Art. 19 cl. (2), SCC Rules.
[32] See, procedures regarding the challenge of arbitrators: Art. 15, SCC Rules; Art. 14, ICC Rules; Art. 11, CEAC Rules; Art. 30, CIETAC Rules; Rule 9, ICSID Rules; Art. 10, LCIA Rules; Art. 11, UNCITRAL Rules.

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on the other hand, would be a quick solution. The aforementioned analysis was the core of the Hrvatska case[33], a landmark judgment in counsel exclusion. To sum up, the discretionary powers of the arbitrators must be put to use when efficiency of the arbitral proceedings is at stake. Such situation arises when a counsel is added in the middle of the proceedings and creates a situation of conflict of interest. To avoid additional costs and delay, the tribunal may be empowered, by the virtue of its discretionary power, to remove the counsel from the arbitral proceedings.

Preventing the Abuse of Right to Counsel

There is undeniably a general rule that parties may choose any person they deem fit as their legal representative in all types of litigation. Whether a legal counsel is retained or appointed, the party has a right to counsel without a conflict of interest.[34] If an actual conflict of interest is present, and that conflict has an adverse effect on the representation, the result is an automatic reversal. Even though the right to counsel is widely recognized, a party can easily create a conflict of interest situation by abusing this right. Hence, this right is not unlimited and can be constrained under certain circumstances.

Let's consider the following situation –

> *In the middle of an arbitration proceeding, Party A, noticing that the result of the arbitration might not be in its favor, wants the removal of an unfavorable arbitrator. However, it does not directly challenge the arbitrator but chooses to make a smarter move. Party A appoints a new counsel to its legal team, a counsel which has a close relationship with an arbitrator. Party B, while considering this conflict of interest situation, does not want to have a biased arbitrator and is thus compelled to pose a challenge.*

As one can clearly infer from the aforementioned scenario, the right to counsel could be abused as a tactical weapon in an arbitration proceeding. With a counsel of its own choosing, a party could create a situation of conflict of interest quite easily. Once again, in a situation like this, arbitrators should have the authority, within the scope of their discretionary power, to remove the counsel from the proceedings in order to prevent any irregularities in the arbitral process. It has been held by several courts[35] that when the right to counsel conflicts with an interest

[33] Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia, ICSID Case No. ARB/05/24, International Centre for Settlement of Investment Disputes, (May 6, 2008).
[34] See, Burger v. Kemp, 483 U.S. 776 (1987); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).
[35] See, Wheat v. the United States. 486 U.S. 153, 160.

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while conducting an efficient proceeding, a balance test should be adopted since not only the right to counsel but also an effective adversarial process should be given protection. In consequence, a court must balance competing interests and thus the right to choose a particular attorney cannot be seen as an absolute right, but rather as a qualified right[36], which may be limited when it comes to upholding the integrity of the arbitral process.

Upholding Party Autonomy

Party Autonomy is one of the hallmarks of the international arbitral process.[37] An arbitration is the result of the parties' will to arbitrate which makes party autonomy an implicit part of the parties' agreement and upholding it is an indispensable precondition for an effective arbitral process. When we speak of counsel exclusion, it may seem that party autonomy would be dishonored in case a counsel is excluded since the party could not fulfil its wish to choose its own representative.

However, one has to take a closer look. On one hand we have a counsel hired by a single party, and on the other hand, we have an arbitrator – a person which has been agreed upon not by one party, but by both parties together. The nomination of an arbitrator is a result of the parties' agreement. Addition of a legal counsel, on the other hand, is merely a one-sided procedure. Therefore, party autonomy, a value greatly respected within the area of international arbitration,[38] can be better preserved if a counsel is excluded in order to keep the appointed arbitrator in the proceedings.

III. LIMITATION TO DISCRETIONARY POWERS

Even though wide discretionary powers of the arbitrators is recognized both by arbitration acts and arbitration rules, there are, of course, limits to their employment.[39] The arbitration rules indicated by the parties and mandatory provisions of arbitration acts set the limits for the discretionary competence of an arbitrator.[40] Generally, these restrictions would refer to the duty of an arbitrator to treat parties with impartiality and to give them a full opportunity to present their case.[41] The tricky part, when it comes to the exclusion of counsel, is the fact that one's

[36] Michael Lubowitz, *The Right to Counsel of Choice after Wheat v. United States: Whose Choice is it?*, The American University Law Review (Vol. 39, 1990).
[37] Gary Born, International Commercial Arbitration, (Vol. II, Austin: Wolters Kluwer, 2009).
[38] Julian Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration*, (The Hague: Kluwer Law International, 2003).
[39] *Id.* at 36.
[40] Jeff Waincymer, *Reconciling Conflicting Rights in International Arbitration: The Right to Choice of Counsel and the Right to an Independent and Impartial Tribunal*, Arbitration International (Vol. 26, 2010).
[41] Howard Holtzmann & Josephf Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration – Legislative History and Commentary*, (The Hague: T.M.C. Asser Instituut, 1989).

right to present its case might be infringed. It is true that everyone can choose their legal counsel and hire someone who suits them the most and is, for instance, an expert in the field and an esteemed attorney. A party may object that it can fully present its case only with a particular counsel who is specialized in the field and that if the tribunal excludes the counsel, the party can no longer present its case in a way it wishes to.

Right to counsel has been acknowledged far and wide

The right to a counsel of one's own choice can be described as one of the factors that constitute due process as such. In the modern world, this right has been widely recognized both by international and regional conventions on human rights. The International Covenant on Civil and Political Rights[42] specifies that *"everyone shall be entitled (...) to defend himself through legal assistance of his own choosing."*[43] Relatedly, the African Charter on Human and People's Rights states that everyone may *"be defended by counsel of his choice."*[44] Looking at the European context, the European Convention on Human Rights stipulates that an individual may *"defend himself in person or through legal assistance of his own choosing."*[45]

Subsequently, we need to take a closer look at arbitration rules and arbitration statutes to analyze the true existence of this right. It is true to say that arbitration rules also recognize the right to counsel. While the UNCITRAL Rules[46] have implemented the provision that *"each party may be represented or assisted by persons chosen by it"*[47], there are arbitral bodies such as the LCIA[48] which classify that a party may choose both legal experts as well as other representatives to appear for them during an arbitration. The IBA General Principles for the Legal Profession provides that *"A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional rules or by law, a lawyer shall be free to take on or reject a case."*[49] Even though a majority of domestic arbitration statutes contain no express guidelines regarding the freedom of the parties to select their representatives in international arbitration[50], we can still find particular provisions in some well-known arbitration statutes such as the English Arbitration Act[51] and the Australian International

[42] International Covenant on Civil and Political Rights, 1966.
[43] Art. 14, International Covenant on Civil and Political Rights, 1966.
[44] Art. 7, African Charter on Human and People's Rights, 1981.
[45] Art. 6, European Convention on Human Rights, 1950.
[46] *Id.* at 8.
[47] Art. 5, UNCITRAL Rules, 2013.
[48] Art. 18, LCIA Rules, 2014.
[49] Art. 7, International Bar Association (IBA) General Principles for the Legal Profession, 2006.
[50] *Id.* at 36.
[51] Sec. 36, Arbitration Act, 1996 (United Kingdom).

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Arbitration Act. [52] Further, since most of the domestic arbitration acts[53] are based on the framework provided by the UNCITRAL model law, it is innocuous to assume that the right to counsel has been absorbed by all these domestic statutes.

The significance of the right to counsel was established in the partial award given in ICC case No. 8879[54] wherein the tribunal had examined whether it had the power to exclude a counsel on the basis of a conflict of interest. The tribunal concluded that the exclusion would dispossess the respondents of their right to freely choose their counsel and damage the interests of such counsel. The tribunal also held that the question of counsel conduct should be the subject of 'domestic proceedings', reasoning that domestic courts are better equipped to address objections regarding counsel conduct than international arbitral bodies.[55]

One can clearly discern that the right to counsel is imperative, as stated by arbitration rules, arbitration statutes, and precedents set by case laws. Nevertheless, in practice, the right to select one's own representative is not at all absolute since everyone can not have the best attorney available. In conclusion, since there are restraints characteristic to the right to counsel for various practical reasons stated above, how far can we go in limiting this right? Can it be limited for the sake of efficiency of the arbitral process and to ensure impartiality and independence of an arbitrator? We shall look to answer the questions by examining two landmark cases in the field of counsel exclusion in international arbitration.

IV. Analysis Of The Hrvatska And Rompetrol Case

When dealing with the issue of excluding a legal counsel from an international arbitration, we must consider whether an arbitrator's duty to preserve the integrity of the proceedings may predominate the parties' right to choose their counsel, thus conferring the arbitrator the power to exclude counsel from the proceedings in situations where the latter's presence jeopardizes the credibility of those proceedings.[56] There are two ICSID[57] decisions that deal with this particular problem *in extenso*.

[52] Sec. 29, International Arbitration Act, 1974 (Australia).
[53] Arbitration and Conciliation Act, 1996 (India).
[54] Partial award in ICC Case 8879 of 1997, Quoted from: Choice-of-Law Problems in International Commercial Arbitration, Recueil des cours de l'Acadmie de droit international de La Haye, (Vol. 289, 2001).
[55] Charles 'Chip' B. Rosenberg, M. Imad Khan, *'Who Should Regulate Counsel Conduct in International Arbitration?'*, Kluwer Arbitration Blog, April 18 2016, (Feb 18, 2018, 01:30 PM) http://arbitrationblog.kluwerarbitration.com/2016/04/18/who-should-regulate-counsel-conduct-in-international-arbitration/
[56] Antonias Dimolitsa, *'Chapter 5: The Arbitrator and the Litigants (Some Exceptional Clashes)'*, in Yves Derains and Laurent Lévy (eds), Is Arbitration Only as Good as the Arbitrator? Status, Power, and Role of the Arbitrator, Dossiers of the ICC Institute of World Business Law, (Vol. 8, Kluwer Law International; International Chamber of Commerce (ICC) 2011).
[57] International Centre for Settlement of Investment Disputes, Washington, D.C., USA.

A. Hrvatska Elektroprivreda, D.D. (HEP) *v.* The Republic of Slovenia

The decision of the ICSID tribunal in the Hrvatska case[58] led to the rise of heated discussions among legal intellectuals and practitioners since in this particular case, the tribunal found its inherent power to exclude the legal counsel when a conflict of interest situation arose in the middle of the proceedings.[59] The brief facts that led to the decision were:

> *Even though the arbitral tribunal had been constituted two years prior to the hearing, Mr. David Mildon QC of the Essex Court Chambers in London, was added to the respondent's legal team ten days before the hearing which was to take place on May, 5 2008. The addition of the new counsel caused distress for the claimant since the President of the tribunal, David Williams QC, was a door tenant at the same Chambers as Mr. Mildon. The claimant responded instantly, seeking full disclosure of several facts and intentions of the respondent and, most importantly, disclosure as to when Mr. Mildon was appointed and what role he was likely to play at the hearing. The President of the tribunal submitted that he had never had any personal connection with Mr. Mildon. Similarly, the respondent declared that Mr. Mildon had no professional or personal relationship with Mr. Williams, but refused to disclose when Mr. Mildon had been appointed and what role he was expected to play in the arbitral process. The claimant reasoned that such an addition gives rise to a conflict of interest between the arbitrator and the counsel and sought an order from the tribunal that the respondents abstain from using the services of Mr. Mildon.*

The tribunal ruled that Mr. David Mildon QC shall refrain from participating as counsel in this case, after having particularly considered the following points: (i) The fact that although it common practice that members of the same chambers acting as counsel appear before other fellow members acting as arbitrators, this practice is not universally understood and agreed upon. It was logical that the claimant, to which the London Chambers system was completely foreign, would consider that Mr. Mildon's participation in the proceedings would create *"apprehensions of the appearance of impropriety"* in the case. (ii) The fact that the respondent had made three errors - first, its mindful decision not to inform the claimant or the tribunal regarding Mr Mildon's participation in the case; second, the tardiness of the respondent's revelation of Mr Mildon's participation; and, third, its ensuing refusal to divulge the extent of

[58] Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, 2008.
[59] David Branson, *'An ICSID Tribunal Applies Supranational Legal Norms to Banish Counsel from the Proceedings'*, 25(4) Arbitration International (2009).

Mr Mildon's involvement.[60] The tribunal excluded the legal counsel from the proceedings. In its reasoning, the tribunal emphasized that:

> *"although the respondent, in this case, was free to select its legal team as it saw fit prior to the constitution of the Tribunal, it was not entitled to subsequently amend the composition of its legal team in such fashion as to imperil the Tribunal's status or legitimacy."*[61]

Drawing conclusions from the *Hrvatska* decision, the time of the appointment of the legal counsel is utmost importance. It is important to quote the tribunal's concluding statement that:

> *"[The Tribunal] considers that, as a judicial formation governed by public international law, the Tribunal has an inherent power to take measures to preserve the integrity of its proceedings…independently of any statutory reference."*[62]

Unarguably, if a counsel is present from the time of commencement, a challenge towards an arbitrator at the start of the proceedings is a much more practical and effective solution. However, a different situation arises if the tribunal has already been constituted and a counsel giving rise to a conflict of interest is added subsequently. Both parties in the case maintained that they did not wish the President of the tribunal to resign. The repercussions with regards to the cost and delay in the process were apparent to all.[63] From this, it is clear that efficiency was something that the arbitrators bore in mind. In order to conduct the proceedings with an unprejudiced and fair tribunal, and to avoid costs and delay, the arbitral tribunal decided to go with the most effective solution – to remove the counsel from the proceedings.

B. The Rompetrol Group N.V. *v.* Romania.

The second landmark case vis-à-vis the problem of counsel exclusion was also decided by the ICSID in the case of *The Rompetrol Group N.V. v. Romania*.[64] However, the tribunal, in this case, was much more reluctant to recognize the presence of an inherent power that would allow them to remove the counsel from the proceedings. The brief facts of the case were:

> *Mr. Barton Legum, the claimant's representative, appeared in the proceedings of the case in July 2009. He replaced the first counsel for the claimant who had participated in the proceedings since its initiation in February 2007. The respondent was apprehensive about the fact that Mr. Legum had been a member of the same law firm*

[60] *Id.* at 58.
[61] Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia (Para. 26), ICSID Case No. ARB/05/24, 2008.
[62] Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia (Para. 33), ICSID Case No. ARB/05/24, 2008.
[63] Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia (Para. 16), ICSID Case No. ARB/05/24, 2008.
[64] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, 2010.

> *as the arbitrator appointed by the claimant. Even though Mr. Legum had worked for the firm for four years and had left before he started to represent the claimant. The respondent requested the tribunal for the removal of Mr. Legum from the proceedings.*

With regards to the inherent powers of arbitrators, the tribunal noted that there were no explicit provisions that dealt with the power to exclude a legal counsel. The ICSID Convention and Arbitration Rules[65] that governed the arbitration contained no provisions allowing a challenge to the appointment of a counsel by a party.[66] The tribunal, considering the decision in the *Hrvatska* case, dealt with the matter in three stages. Firstly, the tribunal ascertained that if an inherent power to exclude the counsel existed, it could be employed only in extraordinary situations, those being the situations which would touch on the integrity of the arbitral process. The sole reason for the tribunal to utilise such power would be in the situation of an *"overriding and undeniable need to protect the fundamental integrity of the entire process."*[67] In other words, the Tribunal recognized that the power existed and can be used. But, such a scenario can happen only in rare and extraordinary circumstances.

Secondly, the tribunal explicitly declared that it was unwilling to encourage any practice over and above the accepted rules of professional conduct and ethics that might end up casting a stain over the party's freedom to find the most appropriate person to represent it in promoting its claims.[68] Thirdly, the tribunal could not find anything with regards to the connection between counsel and the arbitrator that might, on the *Porter v. Magill*[69] standard of the UK House of Lords, raise *'a real possibility that the tribunal was biased'*, or that might provide sensible grounds, as per Article 14[70] of the ICSID Convention and Article 6 of the Rules[71], for questioning the ability of the Tribunal or any of its Members to judge fairly or exercise independent judgment.[72]

The tribunal deliberated that in the particular case, there is a conflict between two basic principles – the principle of impartiality of the tribunal and the right to choose one o own counsel. It is to be understood that there is a duty on the arbitrators to find a way to bring these two conflicting principles into balance and not to assign priority to one over the other. In conclusion, In the end, the tribunal in the *Rompetrol* case did not see the situation at hand as

[65] ICSID Convention, Regulations, and Rules, 2003.
[66] The Rompetrol Group N.V. v. Romania (Para. 14), ICSID Case No. ARB/06/3, 2010.
[67] The Rompetrol Group N.V. v. Romania (Para. 16), ICSID Case No. ARB/06/3, 2010.
[68] The Rompetrol Group N.V. v. Romania (Para. 22), ICSID Case No. ARB/06/3, 2010.
[69] (2001) UKHL 67.
[70] Art. 14, ICSID Convention, 2003.
[71] Art. 6, ICSID Arbitration Rules, 2003.
[72] The Rompetrol Group N.V. v. Romania (Para. 26), ICSID Case No. ARB/06/3, 2010.

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raising any concerns as to the conflict of interest. Thus, the counsel was not excluded from the proceedings.

C. Comparisons

Trying to compare these two ICSID judgments, we can observe several similarities and dissimilarities that may help us advance our reflection. The likeness of the facts that led to these decisions bear noting. In the *Hrvatska* case, the arbitrator and counsel were members of the same chambers; in the *Rompetrol* case, they were members of the same law firm until recently. Both the tribunals established that in case of a conflict of interest, an arbitral body does possess inherent powers to safeguard the proceedings. The implicated arbitrator in the *Hrvatska* case was the President of the tribunal, whereas in the *Rompetrol* case, he was the arbitrator appointed by the claimant (which, almost certainly, made a difference in the eyes of the tribunal in the *Rompetrol* case while analysing the *possible apprehension of potential bias*).

The most significant disparity between the decisions given by the two tribunals is that the particular tribunal in the *Hrvatska* case was worried by the presence of bias within the tribunal as seen by the claimant. On the other hand, the tribunal in the *Rompetrol* case was only concerned regarding a real possibility that would lead to a biased tribunal, without any reference to the presence of bias as such. In conclusion, we can perceive that both the tribunals acknowledged (albeit at different degrees of conviction and courage) the existence of an arbitrator's power to exclude counsel in lieu of upholding the integrity of the arbitral proceedings.[73]

V. Practical Implications On Enforceability Of Award

Enforceability of an award rendered by the arbitral tribunal is an issue that every arbitrator bears in mind while drafting an award. Even though it is not clear whether there is a compulsion to render a valid and enforceable award[74], or it is a basic obligation of an arbitrator to render a final and binding resolution to a dispute[75], the least we can assume is that it is a matter of reputation to every arbitrator. While there are several legal texts that deal with the issue of recognition and enforcement of arbitral awards[76], the New York Convention[77] is the most

[73] *Id.* at 58.
[74] Martin Platte, *'An Arbitrator's Duty to Render Enforceable Awards'*, Journal of International Arbitration – Issue 3, 2003.
[75] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration*, Alphen aan den Rijn: Kluwer Law International, 2012.
[76] See, European Convention on International Arbitration, Geneva, 1961; Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation, Moscow, 1972; Inter-American Convention on International Commercial Arbitration, Panama, 1975, etc.
[77] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereinafter referred to as

important international document (with nearly 156 state parties) and is undoubted to be *'one of the main reasons for the success of international arbitration'*[78] as such. Article V[79] of the Convention lays down seven grounds under which the recognition and enforcement of an award might be denied by the domestic courts. In case of an exclusion of a counsel, two grounds for refusal might come into play. Firstly, an award allowing the exclusion of the counsel might be conflicting with the public policy of a state where recognition and enforcement are sought. Secondly, even if the award does not conflict with the public policy, it still might violate the laws of natural justice and become unenforceable.

Non-enforcement Due to Conflict with Public Policy

Public policy embraces the most fundamental notions of morality and justice, such as the fundamental rights or the principles of civil law, within a state.[80] As per Article V(2) of the New York Convention:

> *"the recognition and enforcement of an award may be refused if the competent authority in the state where the recognition and enforcement is sought finds that: (a) The subject matter of the difference is not qualified for settlement by arbitration under the law of that state (i.e. the matter of arbitrability); or (b) The recognition or enforcement of the award would be contrary to the public policy of that state."*[81]

The New York Supreme Court in the case of *Bidermann v. Avmar*[82] held that matters of counsel exclusion are beyond the scope of an arbitrators' powers since these issues are a part of the public policy of the state. The court reasoned that:

> *"the regulation of attorneys, and determination as to whether clients should be deprived of counsel of their choice as a result of professional responsibilities and ethical obligations, implicate fundamental public interests and policies which should be reserved for the courts and should not be subject to arbitration."*[83]

The approach adopted by the court in the *Bidermann* case was implemented in several other cases such as *Merrill Lynch v. Clifford Benjamin*[84] and *R3 Aerospace Inc v. Marshall of*

the New York Convention).

[78] Jacob Grierson & Annet van Hooft, *Arbitrating under the 2012 ICC Rules*, Alphen aan den Rijn: Kluwer Law International, 2012.

[79] Art. 5, New York Convention, 1958.

[80] Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Alphen aan den Rijn, Kluwer Law International, 2010.

[81] Art. 5, cl. 2, New York Convention, 1958.

[82] 173 A.D. 2d 401, New York Supreme Court (US).

[83] Bidermann v. Avmar N.V., 173 A.D. 2d 401, New York Supreme Court (US), 1991.

[84] 1 A.D.3d 39; 766 N.Y.S.2d 1, New York Supreme Court (US), 2003.

Cambridge Aerospace Limited[85] wherein it was held that attorney disqualification was not a dispute capable of settlement by arbitration. Nevertheless, not all judgments given by the U.S. Courts took this view. In the case of *Cook Chocolate Company v. Salomon Inc et. al.*, the Court agreed to the reasoning that *"judicial intervention into arbitration proceedings would frustrate the purpose of arbitration to resolve disputes quickly and economically."* [86] Only arbitrators should be empowered to take measures to disqualify a counsel in order to protect the integrity of the proceedings.[87]

Clearly, one can observe that there are varying opinions regarding the violation of public policy according to the New York Convention. It is safe to assume that the public policy of a state won't be compromised as the New York Convention seldom goes against the enforcement and the public policy exception is construed very narrowly. Furthermore, with the advancement of arbitration as an effective method of dispute resolution, if the matter of counsel exclusion was to be reserved only for domestic courts, it would create an obstruction in the course of arbitration as a whole.

Non-enforcement Due to Conflict with Principles of Natural Justice

The challenge to an arbitral award based upon the breach of principles of natural justice is a developing trend in the field of international arbitration. However, the success rates for such challenges are notoriously low. In cases where a foreign arbitral award conflicts with the principles of natural justice, a party may request to set aside the award in the domestic court of a state where enforcement is anticipated. Natural justice is an administrative law concept that encapsulates two well-known maxims. The principles might as well be called the *grundnorm*[88] for any legal system based on rule of law. These are:

- No one shall be a judge in his own cause (*nemo iudex in causa sua*)
- Each party is to be given the opportunity to be heard (*audi alteram partem*

A problem occurs instantly when, not just the unbiased arbitrators, but also the *'afflicted'* arbitrator (the one that has the conflict of interest with the counsel) decides upon the challenge to remove a counsel. This breaks the basic principle that *'nobody can be a judge in their own*

[85] 927 F. Supp. 121, 123.
[86] 748 F. Supp. 122, 130 (D.N.Y. 1990).
[87] Antonias Dimolitsa, *The Arbitrator and the Litigants (Some Exceptional Clashes)*, Dossier of the ICC Institute of World Business Law: Is Arbitration Only as Good as the Arbitrator? Status, Powers and Role of the Arbitrator, 2011.
[88] Hans Kelsen, *Pure Theory of Law*, (Clark, N.J.: Lawbook Exchange, 2009).

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matter'[89] since in reality, the arbitrator would have to analyse whether he personally has a conflict of interest with the particular counsel. Further, Article V(1)(b)[90] of the New York Convention states that recognition and enforcement of an award might be refused in a domestic court if the party against whom the award is invoked was otherwise *'unable to present its case'*.[91] Even though this exception proves to be one of the most popular claims to avoid enforcement, such claims are rarely successful. The major reason for this is the promotion of effective recognition and enforcement of foreign arbitral awards in agreement with the spirit of the New York Convention. Hence, the term *'to present one's case'* is interpreted very narrowly[92] which can be seen in the case of *Consorcio Rive v. Briggs of Cancun* where the US Court of Appeals held that:

> *"Strong federal policy in support of encouraging arbitration and enforcing arbitration awards dictates that we narrowly construe the defense that a party was unable to present its case."*[93]

Such an approach could also be referred to as pragmatic and sound since the party has numerous ways to present its case, and not just with the assistance of a specific legal counsel. As lawyers are in fact expendable, the violation of rights with regards to due process should hardly ever arise in case a counsel is excluded.

VI. CONCLUSION

After a thorough analysis of the various aspects related to the exclusion of counsel from an arbitral proceeding, it can be ascertained that a counsel can indeed be removed by an arbitral tribunal by virtue of their inherent and discretionary powers so as to preserve the sanctity and independence of the arbitration process. Practically speaking, each party to an arbitration agreement chose to settle any disputes by arbitration (instead of litigation) due to the efficiency of the proceedings. If arbitrators are robbed of the power to decide on matters of counsel exclusion, the courts would have to step in and resolve the disputes. This would not only limit the procedural powers of an arbitrator, but also create additional costs and delay.

Even though there are no explicit provisions that deal with the issue of counsel exclusion, the majority of arbitration rules and statues grant the arbitrators an unmistakeable power to conduct

[89] Thomas Bonham v. College of Physicians, 8 Co. Rep. 107 (1610).
[90] Art. 5, cl. 1(b), New York Convention, 1958.
[91] Parsons & Whittemore Overseas Co v. Societe Generale de L"Industrie du Papier (RAKTA), 508 F.2d 969, 973 (1974).
[92] Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2010.
[93] 82 Fed. Appx. 359 (2003).

the arbitral proceedings as they see fit and appropriate, thereby vesting wide discretionary powers in the hands of an arbitrator which should be exercised in order to preserve the efficacy of the proceedings by the exclusion of a counsel that causes a conflict of interest.

It is true that times are moving quickly and the practices that were once considered unobjectionable are, in many cases, thought to be questionable today. A successful arbitration institution would be one which not only looks to improve upon the basics of limiting costs, increasing efficiency, and confirming transparency, but also to confront new problems that are arising in the field of international arbitration and recognise that the system demands more than just *cosmetic changes* when it comes to conflicts of interest.

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