DEFINING THE CONTOURS OF A COMMERCIAL ARBITRAL TRIBUNAL: CAN ICSID DECISIONS CONFER AN INHERENT POWER ON THE TRIBUNAL TO REGULATE APPOINTMENT OF COUNSELS?

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Abstract

International arbitration dwells in an ethical no-man's land. There exists no supra-national norm of sufficient clarity that allows arbitrators to regulate the behaviour of a counsel whose participation is detrimental to the fair adjudication of the dispute. In such circumstances, if a party appoints a counsel much after the tribunal has been formed, such that the independence and impartiality of the tribunal is put to test, important questions about the scope of inherent powers of the tribunal are raised. Two ICSID decisions have sought to address this problem, by advocating the existence of an inherent power, exercisable under certain circumstances to terminate the appointment of such a counsel. This paper attempts to expand the use of such a power in the field of international commercial arbitration, in the absence of any codification of law on the issue. The fundamental assumption of this paper is that this power is to be exercised only in situations where the tribunal has been formed and a party has exercised mala fides in appointing a counsel post such formation. It proposes the adoption of a middle path between the two ICSID decisions in order to ensure legitimacy of the arbitral process.

III. Introduction

Consider a situation where two parties agree to settle their disputes by resorting to arbitration, and mutually appoint an arbitrator to preside over the tribunal. However, one party notifies the other of the appointment of a counsel, who has the potential of raising justifiable doubts as to the impartiality and independence of the presiding arbitrator, on the day of the formation of the tribunal, much after such mutual consent to the arbitrator's appointment has been given. Also, consider that the arbitrator is a renowned expert in the field of commercial arbitration and international trade law. In order to make this situation a little more complex, assume that the applicable rules of law do not regulate such an appointment by the party; instead, they confer on the party a

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fundamental right to choose its representation and at the same time, have detailed procedural rules to challenge the appointment and continuation of an arbitrator. Given these circumstances, can a tribunal constituted as a result of the agreement between the parties adjudicate on the cancellation of the counsel's appointment?

Ethical obligations of a counsel in international arbitration have always opened a Pandora's Box. This is primarily because international arbitration offers legal advisers the opportunity to practice law outside of their jurisdiction, its regulations, *et al.*[1]However, this gives rise to conflict situations which cannot be addressed because of the lack of supranational norms to govern them. Moreover, recourse to national courts remains unavailable, given the minimal hold courts have over international commercial arbitration.[2] Thus, there exists an evident void in international arbitration when it comes to regulation of such behaviour. This glaring void in the international regime becomes problematic in situations where the tribunal has been constituted and sufficient time and money has been spent in its formation.

This paper seeks to resolve the aforementioned situation by relying on the *inherent power doctrine*to remove the counsel, as laid down in two recent ICSID decisions. Relying on these decisions, the paper first addresses the paucity in the current codified regime. It then discusses the two starkly different approaches that ICSID tribunals have adopted in the backdrop of the apparent conflict between one's right to representation and the maintenance of the integrity of the tribunal. Part IV of the paper examines the feasibility of adopting ICSID's approach in international commercial arbitration, putting forth arguments in its favour. The conclusion then discusses the need for a codified regime, given the proposed applicability of these decisions in the field of commercial arbitration.

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[1] Sam McMullan, *Holding Counsel to Account in International Arbitration,* 24(2) L.J.I.L. 491 (2011).

[2]CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION119 (Franco Ferrari and Stefan Kroll, eds., 2011) [Hereinafter "Ferrari and Kroll"]; Ashraf El Motei, *Local Court Intervention in International Arbitration*, http://motei.com/news-insights-pdf/local-court-involvement-in-international-arbitration.pdf (last visited March 2013) .

Insufficiency of the present laws regulating lawyer's ethics in international arbitration

A common attribute of numerous legal professions, at least in their initial years, is the absence of formal rules to regulate the behaviour of counsels, and this trend has been witnessed with the international legal profession as well.[3] Interestingly, while rules have been formalized to govern the behaviour of counsels under international arbitration, their glaring insufficiency has resulted in a plethora of jurisdictional issues for the arbitrators;[4] including conflicts raised by a counsel with the arbitrator as a result of his/her appointment. The International Bar Association Principles on Conduct for the Legal Profession is the primary document that assists arbitrators in regulating counsel behaviour.[5]However, even after numerous revisions, its latest edition in 2011 still lacks the basic regulation explicitly requiring counsels to uphold the integrity of the arbitral process by rejecting cases that raise issues of impartiality of the arbitrator.

While one may argue that it is implied in the obligation on the counsel to maintain *"the highest standards of honesty, integrity and fairness towards the…court"*, [6]the same is qualified by its recognition of the applicability of differing standards by the counsel towards his/her client and the concerned court.[7]This difference in the expectation of integrity towards the counsel and the court is based on the logic that the counsel has a duty to present the party's case with the degree of dependence and partiality that his/her role necessitates, which means that the integrity of the proceedings can still be ensured so long as the dependence does not violate the applicable rules governing ethics and professional

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[3]Detlev F. Vagts, *The International Legal Profession: A Need for More Governance*, 90(2) AM. J. INT'L L. 250 (1996).

[4]Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration* http://www.ssrn.com/abstract= 1559012(last visited March 2012).

[5] IBA International Principles on Conduct for the Legal Profession (May 28, 2011), https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&sqi=2&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D1730FC33-6D70-4469-9B9D-8A12C319468C&ei=t0NDUtfpGtDQrAff6oAo&usg=AFQjCNEP6k5NFU2QmzK_40q-dzTxXrnkeQ&sig2=OJeL6FE_yBT-yI7qQw2AUw&bvm=bv.53217764,d.bmk [Hereinafter "IBA Guidelines on Counsel's Ethics"].

[6]*Id.*principle 2.

[7] *Id.* principle 2.

conduct.[8]This essentially creates a situation where national rules are inapplicable by virtue of international arbitration being designed in a manner that the counsels are generally not licensed in the seat of the arbitration, making the applicability of the concerned counsel's national codes and the code of the seat murky.[9] Therefore, reliance has to be placed on supra-national guidelines such as the IBA Guidelines on Counsel's Ethics, which provides a scope to establish that a counsel's actions are within the parameters specified in the IBA Guidelines and are therefore conducted with *honesty, integrity and fairness towards the Court.*

Moreover, reliance on domestic codes of ethics of the seat of arbitration and the counsel's national codes may not be the best solution to the problem. As Jan Paulsson, in his article describes it, there might arise a situation where the domestic code of the counsel's State may conflict with the code of the seat;[10] in such situations, reconciling the two may not be within the jurisdiction of the arbitral tribunal, since interpretation of codes implicates issues of public policy. In addition, institutional rules and arbitration statutes of most nations cannot be alluded to, since none of these regimes confer an explicit power on the tribunal to regulate attorney appointments.

Therefore, it becomes evident that the tribunal cannot rely on any explicit power, either in the designated arbitration rules and the law of the *situs* or international principles mandating ethical behaviour by counsels. In such a case, the tribunal has no option but to confer upon itself extraordinary powers, as was adopted in two recent ICSID decisions, in order to uphold the legitimacy of the proceedings before it. The ICSID decisions are discussed in Segment IV.

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[8]Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, ¶19, (Jan. 14, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1370_En&caseId=C72 [Hereinafter Rompetrol v. Romania]

[9]Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration,* 23 Mich. J. Int'l. L. 341, 356 (2002). [Hereinafter "Rogers"].

[10]Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration,* 3 Am. Rev. Int'l Arb. 214 (1992).

The Conflict- party's right to legal representation vis-à-vis the right to be heard by an independent and impartial tribunal

Before we indulge in a discussion on the ICSID Cases, it is important to keep in mind the conflict between a party's right to representation and the right to be heard by an independent tribunal, which is the *only* argument against the acceptance of an inherent power.

The right to legal representation finds explicit acknowledgment in the arbitration rules of most institutions[11] and has also been recognized by judicial decisions[12].Even though some jurisdictions do place a limitation on this right in the form of a bar on the unauthorized practice of law,[13] the peculiar nature of international arbitration, as discussed above, prevents the exercise of these rules in regulating counsel behaviour. Therefore, it presents a major roadblock in conferring any power to the tribunal to regulate this right.

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[11]LCIAArbitration Rules, Rule 18.1, http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx; UNCITRAL Arbitration Rules, Art. 5, http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf; CIETAC Rules, Article 20, http://cn.cietac.org/rules/rules.pdf [hereinafter "CIETAC"]; Swiss Rules of Arbitration, Art. 3, https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf; ICC Rules, Art. 21(4), https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf.

[12]Partial Award in ICC Case8879 (unpublished)*;* Anne Pasque v. Gerald Council, 186 N.J. 127 (2006) (USA); Whaling and Seals Claims against Russia, on account of arrest and seizure of four American vessels Cape Horn Pigeon', 'James Hamilton Lewis', 'C. H. White' and 'Kate and Anna', IX 1960 RIAA 51-78.

[13]Mich. Comp. Laws §600.916 (1961), http://www.legislature.mi.gov/(S(5aldyj45yor3bq554wuynh45))/mileg.aspx?page=GetObject&objectname=mcl600-916; Singapore Legal Professions Act, Section 29 and 30, http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A%225dd4c39e-610a-475e-ba7b-260ace00872a%22%20Status%3Apublished%20Depth%3A0;rec=0; Williamson v. John D. Quinn Construction Co., 537 F.Supp. 613 (S.D.N.Y 1982) (USA); Lawler, Matusky & Skeller v. Attorney General of Barbados, Civ. Case No. 320 0f 1981 (Barbados).

On the other hand, parties enjoy the right to be judged by an independent and impartial tribunal, a principle that has been given universal recognition by all arbitral institutions.[14] Arbitral impartiality and independence has been opined to constitute the moral or ethical aspect of arbitral fairness and a party is generally not permitted to contract out of this fundamental principle.[15] Therefore, a threat to this right, raised by the exercise of the right of representation, raises uncomfortable questions of reconciliation.

Over and above these rights, parties have a fundamental right of due process and fair hearing which involves the reasonable opportunity to present one's case.[16] This makes the issue more complex since both the continuance and restriction of a counsel on a party's legal team may adversely affect the exercise of this right. On the one hand, if a party is not permitted to continue with a counsel, it can argue that its right to be heard completely has been restricted; and on the other, the continuance of a counsel which jeopardizes the impartiality of the tribunal, may also be argued to be a violation of this right.

These principles together constitute the *'Magna Carta'* of international commercial arbitration making the resolution of a conflict between them immensely controversial.[17]

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[14]Jeff Waincymer, *Reconciling Conflicting Rights in International Arbitration: The Right to Choice of Counsel and the Right to an Independent and Impartial Tribunal*, 26 (4) Arb. Int'l 597 (2010) [Hereinafter "*Waincymer*"].

[15] Horacio Grigera Naón, *Factors to Consider in Choosing an Efficient Arbitrator*, 9 ICCA Congress Series 289 (1999); SAM LUTTRELL, BIAS IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST 10 (2009).

[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(b), June 10, 1958, 21 U.S.T. 2517; J.D.M. LEW, L.A. MISTELIS & S.M. KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 95 (2003) [Hereinafter "Lew/Mistelis/Kroll"].

[17] *Id.,* at 95.

Addressing The Conflict: Birth of the *inherent power*

Two recent decisions of the ICSID have provided an interesting solution to fill the lacuna that currently exists in international arbitration, keeping in mind the conflict discussed above, by proposing the existence of an inherent power in the tribunal to regulate such appointments. The holdings in these two cases are discussed in the following paragraphs.

The first case to come up before an ICSID tribunal is *Hrvatska Elektroprivreda d.d. v. The Republic of Slovenia.*[18] The dispute in this case revolved around the appointment of Mr. David Mildon on the Respondent's legal team. This appointment raised doubts over the independence and impartiality of the president of the Tribunal, Mr Williams, since he was a door tenant as Essex Court Chambers, of which the Respondent's counsel was also a member. Claimant alleged *mala fides* also on the grounds that the disclosure of this appointment was made at the eleventh hour based on the IBA Guidelines on Conflict of Interest, the provisions of which require prompt disclosure[19]. Given these circumstances, Claimant sought to challenge David Mildon's appointment.

In deciding the matter, reliance was placed on numerous provisions of the ICSID Convention. While the tribunal accepted that the freedom of representation was a cardinal rule and the Convention contained no explicit provision to place fetters on this rule, it stated that such fundamental principles must give way to *"overriding exceptions"* such as that of the *immutability of properly constituted tribunals*, which was enshrined in Article 56(1) of ICSID Convention.[20] Based on this exception, the Tribunal concluded that the freedom of representation remained absolute only if the legal team was amended prior to a tribunal's constitution; however, any subsequent amendment jeopardizing its legitimacy was subject to scrutiny by a tribunal. It is this need to preserve the integrity of the proceedings that drove the Tribunal to declare that it had the *inherent power* to take

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[18] ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (May 06, 2008), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69. [Hereinafter "Hrvatska v. Slovenia"].

[19] IBA Guidelines on Conflict of Interest of Arbitrators, (May 22, 2004) General Standards 3 and 7.[hereinafter "IBA on Conflict of Interest"] .

[20] Hrvatska v. Slovenia, *supra* note 18, ¶¶24, 25.

measures such as removal of a party's counsel.[21]It also stated that international courts and tribunals in general had broad *"inherent powers to deal with issues necessary for the conduct of matters falling within its jurisdiction"*. Relying on these considerations, the Tribunal declared that David Mildon's participation was improper; however it was quick to maintain that there is *"no hard and fast rule preventing barristers from the same Chambers from acting as arbitrators and counsel in the same case"*. It is evident then that the decision of the Tribunal was heavily influenced by Respondent's late disclosure of the participation of David Mildon on its legal team.

This case was followed by the decision in *Rompetrol Group N.V. v. Romania*[22]which undertook a more nuanced understanding of the issue and sought to curb the scope of the decision in *Hrvatska v. Slovenia*. This case dealt with the appointment of Mr Barton Legum and his colleagues on claimant's legal team, a fact that raised doubts over the impartiality and independence of a member of the Tribunal, since both the arbitrator and the counsel were members of the same law firm. On a challenge to Mr. Barton's appointment, the Tribunal concluded that if an inherent power be attributed to the Tribunal, it would only be exercisable "*in extraordinary circumstances, these being circumstances which genuinely touch on the integrity of the arbitral process as assessed by the Tribunal itself*".[23] In doing so, it sought to distinguish its decision in *Hrvatska*by granting a party's right to legal representation a fundamental status, as a result of which only an *overriding and undeniable need* to protect the integrity of the arbitral process could justify the invocation of such a power.[24]

The Tribunal also granted recognition to the fact that international arbitration is a closed, tight-knit community, where encounters with acquaintances are not a rarity.[25]Therefore, it buttressed its argument on the extraordinary nature of the inherent power by holding

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[21] *Id.* ¶33.
[22] Rompetrol v. Romania, *supra* note 8.
[23] Rompetrol v. Romania, *supra* note 8, ¶15.
[24] Rompetrol v. Romania, *supra* note 8*,* ¶16.
[25] Catherine A. Rogers, *The Vocation of an International Arbitrator,* 20 AM. U. INT'L L. REV. 957, 977 (2005); KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 95 (2003).

that a mere subjective claim of an association between a counsel and an arbitrator is not sufficient unless it could be based on an objective and dispassionate assessment of the relevant circumstances by a fair-minded and informed observer.

Moreover, it placed emphasis on the absence of a specific provision regulating such appointments, in coming to its conclusion. A fundamental distinction was drawn between the nature of a counsel's appointment and the appointment of an arbitrator- while the arbitrator is required to exercise complete impartiality, a counsel is allowed to partial to his client, to the extent that it does not violate the applicable ethical codes.

Finally, it sought to reconcile the apparent contradiction between a party's right to fair trial by ensuring the independence and impartiality of the tribunal, and its right to appoint a representative of its choice, by holding that neither takes precedence over the other and it's a matter to be decided based on the circumstances of each case. It added as a caution, though, that the removal of a counsel must not be sought as a *handy alternative* to a challenge against the tribunal itself.[26]

A third ICSID proceeding dealt with the issue of conflict of interest, though the facts were different. The proceeding involved a challenge to the Claimant's counsel on the ground that he had represented the Respondent in a related matter five years ago. The Committee adjudicating on the issue recognized that it had the duty to treat parties fairly and equally and to ensure that a counsel upholds the general principles on conflict of interests.[27] However, the applicability of this decision to decide on the strength of the *Hrvatska* and the *Rompetrol* decisions seems suspect since the facts are clearly distinguishable. Moreover, *Rompetrol* clearly relied on the fact of existence of an alternative remedy to challenge the appointment of the arbitrator itself, in reaching its conclusion. The fact, that this decision did not involve such a conflict between the arbitrator and the counsel could also take away from the materiality of this decision in concluding the debate.

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[26] Rompetrol v. Romania, *supra* note 8, ¶21.

[27] Doak Bishop. *Ethics in International Arbitration*, http:// www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynotespeech.pdf (last visited March 2012). [Hereinafter "Bishop"]

The Solution - Justifications to apply the ICSID decisions in international commercial arbitration

This section justifies the applicability of these decisions to regulate counsel behaviour in international commercial arbitration. It begins with a discussion on the best way forward given the vast difference in the line of reasoning in the ICSID Cases. It then argues for expanding the scope of these decisions to make them applicable to commercial disputes. This section concludes with a discussion on the viability of conferring such a power on the tribunal.

D. The better approach - Hrvatska or Rompetrol?

The Tribunal in *Hrvatska* conferred upon itself a blanket inherent power to regulate a counsel's appointment. In arriving at such a wide power, it was driven by considerations of late disclosure by the party.[28] Over and above this, overarching considerations of costs and delay in continuing the proceedings had a huge bearing on the outcome in that case, since the party in question altered its legal team after the tribunal had been formed.[29]

In stark contrast to this approach, the Tribunal in *Rompetrol* was hesitant to confer such a power upon itself unless the existence of compelling circumstances could be established. In very explicit terms, it rejected the binding value of the decision in *Hrvatska*, to hold that there did not exist an inherent conflict between the right to legal representation and the impartiality of the tribunal. Moreover, it placed immense faith on the qualifications an arbitrator possesses, by holding that it is not wise to question the qualification of an arbitrator one has himself selected on the mere suspicion that the person presenting those arguments is likely to create a bias in his mind. Thus, in its attempt to neutralize the impact of the decision in *Hrvatska* and to prevent parties from misusing this inherent power, the Tribunal restricted the exercise of inherent powers to extraordinary circumstances.

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[28] *Id.*

[29] Hrvatska v. Slovenia, *supra* note 18, ¶16.

On a first reading, the *Rompetrol* decision seems the better road ahead. However, we must keep in mind that our hypothetical counsel has been appointed after the formation of the tribunal; moreover, the presiding arbitrator objectively has immense standing in the field of international arbitration and has been appointed by mutual approval. Therefore, keeping in mind this factual background, the tribunal in *Hrvatska* took into account an important consideration, which cannot be discounted in choosing the scope of this power.

First, the Tribunal was affected by the late disclosure of the counsel's appointment. This obligation to disclose potentially conflicting relations is one that is cast upon the arbitrators under the widely accepted International Bar Association Guidelines on Conflict of Interest.[30]Violation of this duty has been considered a disqualifying factor in itself.[31] However, this does not mean that all cases of non-disclosure should be considered a relevant circumstance.[32] But, a fact such as the one presented here, where the arbitrator was made aware of the appointment by the opposing party and still refused to submit a new declaration disclosing his potential interest, could be a compounding factor in favour of conferring such a power. In addition, even parties have been placed with an obligation to inform the arbitrator and the opposing party of relations that may

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[30] IBA Guidelines on Conflict of Interest of Arbitrators, *supra* note 19, General Standard 3; Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968).

[31] Olsonv. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995).

[32]Tidewater, Inc. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator (Dec. 23, 2010). https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2031_En&caseId=C96; GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 343 (3rd ed. 2010) [Hereinafter "Born"]; ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 560 (4th ed. 2005) [Hereinafter "Redfern &' Hunter"] .

create justifiable doubts.[33] This obligation involves an exercise of due diligence since the party is required to perform a reasonable search of publicly available information.[34] Therefore, the potential defence that knowledge of the relation was not available to the party stands defeated by virtue of this obligation.

Second, the Tribunal placed fetters on the party's right to representation since such right was exercised after the formation of the tribunal. While the concerns raised in *Rompetrol* hold great relevance, one cannot overlook the fact that once the Tribunal has been constituted, replacement of a mutually appointed arbitrator would lead to inefficient outcomes in terms of delay and additional expenses.[35] In such cases, recourse to lengthy proceedings involving challenges to the impartiality and independence of the tribunal may not be the most practicable solution for business houses looking to resolve their dispute quickly and efficiently. Therefore, while *Rompetrol's* hesitance in giving the inherent power absolute legitimacy might be completely justified when such appointment is made prior to the constitution of the tribunal; the same cannot be applied to a situation where such a step has been undertaken by a party after the formation of the tribunal.

Therefore, if we take into consideration the concerns raised by the Tribunal in *Hrvatska*, it is proposed that a middle path be taken. While a general inherent power in all situations may not be advisable, if there exists a situation where a delayed disclosure is made by the parties and the arbitrator himself has chosen not to amend his disclosure, the tribunal should refrain from indulging into an assessment of the propinquity of the relationship between the counsel and the arbitrator, to decide whether it has jurisdiction. Instead, the fact of delayed disclosure, formation of the tribunal and the administrative hurdles involved in removing the arbitrator, must in itself create a *prima facie* situation extraordinary to invoke this power.

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[33]IBA Guidelines on Conflict of Interest of Arbitrators, supra note 19, General Standard 7.
[34]IBA Guidelines on Conflict of Interest of Arbitrators, *supra* note 19, General Standard 7(b).
[35]Waincymer, *supra* note 14, at 611.

The first challenge that the applicability of these decisions faces is the absence of certain provisions in institutional rules of all bodies except the ICSID. One of the primary reasons why *Hrvatska* decided in favour of such an inherent power was the existence of the principle of immutability of properly constituted tribunals in the ICSID Convention.[36]Moreover, the Convention allows tribunals to decide *"any question of procedure"*.[37] Therefore, these provisions allowed the Tribunal to rule in favour of such a power. Over and above this, the ICSID is a public international body implicating issues of public interest, a fact that was acknowledged in the decision itself.[38] A combined effect of the two may create a *prima facie* case for rejecting the principle of these decisions to resolution of commercial disputes, since the basis of such resolution is party autonomy[39] and none of the arbitration rules grant such wide powers to a tribunal.

While one cannot deny that the ICSID Convention confers certain special powers on a tribunal which are absent in commercial arbitration rules, one can also not deny that the decision in *Rompetrol* was given without relying on these provisions. The tribunal, in that case, was clear about the existence of such a power if exceptional circumstances could be established. However, one can still contest that this does not pose a valid counter to the issue of the tribunal being governed by considerations of public international law.

Therefore, one may rely on Article 19 of the UNCITRAL Model Law on International Commercial Arbitration. The Article grants broad discretionary powers to a tribunal to decide on procedural issues, if the parties do not reach an agreement and therefore can be assumed to be similar to Article 44 of the ICSID Convention.[40] However, in his

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[36] Convention on the Settlement of Investment Disputes between States and Nationals of other States art. 56(1) March 18, 1965, 17 U.S.T. 1270. [Hereinafter "ICSID Convention"]

[37]*Id.,* Article 44.

[38]Hrvatska v. Slovenia, *supra* note 18, ¶33.

[39] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 19(1); Redfern & Hunter, *supra* note 32, at 315; Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure,* http://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf,. (last visited March 2013).

[40]*Waincymer*, s*upra* note 14, at 613.

article on the issue, Professor Jeff Waincymer poses some interesting problems in tracing the source of the power from this provision. He argues that *first;* parties may contract out of this provision, thereby making it impossible to use the provision to source the power. *Secondly*, he opines that Article 18, which grants the party the right to present its case, is a fundamental principle that would gain priority over Article 19, which merely grants discretion to a tribunal to decide on procedural issues.[41] However, one must remember that Article 19 of the Model Law is also a fundamental principle forming part of the same *"Magna Carta"* that was referred to in previous sections.[42] Moreover, provisions recognizing another fundamental right, i.e., the impartiality of the tribunal enjoy the same status as that of Article 18.[43] Therefore, both concerns raised by Professor Waincymer do not hold ground and it is submitted that priority would be accorded to one right over the other based on the circumstances of the case, as was proposed in the *Rompetrol* decision.

Even assuming that one cannot rely on Article 19 of the UNCITRAL Model Law to source such an inherent power, commercial arbitration tribunals have held that such a power falls squarely within the scope of an arbitration agreement between parties, since it involves a procedural issue directly affecting the integrity of the proceedings. In ICC Case 10776, the tribunal was of the opinion that that an arbitral tribunal has the duty to address such matters which directly affect the proper conduct of the arbitral proceedings and are therefore inherent in nature.[44]This position has also been accepted by Courts in national jurisdictions. *Caanan Partners* is one such example. The Connecticut Supreme

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[41]*Id.*.

[42]Born, *supra* note 32, at 1278; Thomas R. Klotzel, *The Right to be Heard and the Right to Hear: Cultural Dimensions of International Commerial Arbitration*, 72 Arbitration 27 (2006).

[43]HOWARD M. HOLTZMANN AND JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 390 (1989).

[44]ICC Court of Arbitration Case 10776 of 2000 (unpublished); Horacio Grigera Naón, *Choice of Law Problems in International Commercial Arbitration*, 289 Recueil Des Cours 9 (2001)

Court, in that dispute, laid down the *positive assurance test*, to hold that unless there is positive assurance that the arbitration clause cannot be interpreted to cover the dispute in question, the jurisdiction of the tribunal to adjudicate on the issue cannot be denied.[45]

Moreover, inherent powers have been invoked frequently and across multiple issues by international tribunals. The doctrine has been applied to grant interim relief when the applicable arbitration rules do not confer any such explicit power;[46] such a power has allowed tribunals to reopen cases outside the procedural issues, in cases of fraud,[47] to suspend proceedings and to deny hearing to vexatious claims[48]. Additionally, Courts have been unequivocal in declaring that the recognition of an inherent power is not dependant on references in procedural rules.[49]Therefore, the extension of such a power to authorize the termination of an attorney's appointment does not seem a remedy, not within the bounds of the arbitral tribunals.

Is the Tribunal the best authority to settle the dispute

Historically, it has been argued that arbitrability of such a dispute does not fall within the jurisdiction of a tribunal, since it implicates issues of transnational public policy.[50] Transnational public policy involves those violations which are contrary to the fundamental moral or legal principles recognized in all civilized countries.[51] The regulation of a counsel's appointment requires application of substantive laws regulating legal profession and implicates fundamental interests and public policy, matters which

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[45]*Canaan Venture Partners, L.P. v. Salzman*, 1996 WL 69314 (4th Cir. 1992).

[46]Ferrariand Kroll, *supra* note 2, at 412.
[47]LOUKAS A. MISTELIS, CONCISE INTERNATIONALARBITRATION 223 (2009).
[48]Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76(1) B.Y.I.L. 195 (2005).
[49]Prosecutor v. Beqa Bajaj, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations, May 27, 2005 (ICTY).
[50]Bidermann Industries Licensing, Inc. v. Avmar N.V., N.Y.L.J., October 26, 1990 (N.Y. Supreme Court) [hereinafter "Bidermann];Munich Reinsurance America, Inc. v. ACE Property & Casualty Insurance Co., 2007 WL 1056707 (S.D.N.Y. April 10, 2007); Born, *supra* note 32 at 1278.
[51]PIETER SANDERS, COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (1987).

are within the judicial powers of the Courts and not an arbitral tribunal.[52] Moreover, it involves a departure from the fundamental right of legal representation conferred on parties.[53]

However, as has been argued above, this historical position has undergone a sea change, and it is now an accepted position that such a dispute falls within the scope of the arbitration agreement and unless there is a positive restriction on the exercise of this power, arbitrability of the dispute cannot be disputed. In fact, courts in USA which historically maintained that the regulation of counsels is the sole prerogative of the Courts,[54] have itself retracted from that position and have now accepted that this subject is capable of arbitration.[55]

This, however, is not the only concern that needs to be addressed before we declare that this is the best solution available. Due process requires that a person should not be allowed to be a judge in his own cause.[56] However, Courts in various jurisdictions permit a challenge to the judge's impartiality to be made before the judge itself, in order to avoid expenses and unnecessary delays.[57] Institutional rules such as the CIETAC Rules also allow for delegation of powers to the tribunal, to decide on all procedural issues.[58] In fact, if the tribunal consists of three members and the bias affects only one of the three arbitrators, there exists no threat of the decision being violative of due process and procedural fairness. However, even if such concerns are considered valid, it is always

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[52]Born, *supra* note 50, at 518; STEVEN C. BENNET, ARBITRATION ESSENTIALS 177 (2002).

[53]ICC Court of Arbitration Case No. 8879 of 1997 (unpublished); UNCITRAL Model Law on International Commercial Arbitration, 1985 art. 18. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

[54]Bidermann, *supra* note 50; Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Benjamin, 1.A.D.3d 39, 44, 766 N.Y.S.2d 1 (N.Y. App. Div. 2003).

[55]Hibbard Brown & Co. v. ABC Family Trust, 959 F.2d 231, 1992 WL 69314 (4th Cir. 1992).

[56] The principle of *nemo debet esse judex in propria causa* is a fundamental principle in adjudicatory process. B.A. Wortley, *Some Principles Common to Public and Private International Law* 85 Recueil Des Cours316 (1954); Judgment of January 31, 1907, DFT 33 I 143 (Swiss. Federal Tribunal).

[57]*Waincymer*, *supra* note 14, at 620.

[58]CIETAC, *supra* note 11, Arts. 6.2, 6.3.

possible to restrict the adjudication of the issue by arbitrators whose relations have not been brought into question.

Conclusion

International arbitration dwells in an ethical no-man's land.[59]Since international arbitration involves a complex interplay of laws, it becomes obvious that unambiguous rules defining the contours of the powers a tribunal enjoys would make for an efficient and convenient adjudicatory process. However, law-making in international law is slow and often not the best recourse available.[60] In such a situation, viable alternatives need to be found, till an effective *lex scripta* is made available.[61] It has been the attempt of this paper to establish that international commercial tribunals enjoy the competence and more importantly, have an obligation to ensure fairness and efficiency in adjudication. While it is not one's case to expand the powers such to make counsel termination a handy alternative to challenges to arbitrators, circumstances which mandate the exercise of such a power, must not be restricted in future by a tribunal, by rejecting the ICSID precedents. If that is done, the day is not far away, where parties will deploy the appointment of counsels with conflicting associations, solely to delay the arbitral process, since the only recourse available would be a lengthy challenge to the appointment of the arbitrator!

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[59]Rogers, s*upra* note 9.

[60]Charles G. Fenwick, *Codification of International Law*, 12(2) AMERICAN POLITICAL SCIENCE REVIEW 301 (1918).

[61]Charles N. Brower and Stefan W. Schill, *Regulating Counsel Conduct before International Arbitral Tribunals* in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 510 (Pieter Bekker, Rudolf Dolzer and Michael Waibel, eds., 2010).