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1. Introduction

The impartiality and independence of an arbitrator is a fundamental principle of international arbitration. This principle is compromised if an arbitrator has a conflict of interest with other participants of arbitration proceedings. One often occurring type of conflict of interest is that between an arbitrator and a counsel. Traditionally, such conflict was resolved via a challenge of an arbitrator. However, why should a party challenge an arbitrator, if it could challenge a counsel of the opposite party, thus solving the conflict of interest? Such a solution would avoid procedural delays and expenses related to them.

The problem with a disqualification of counsel is whether a tribunal has a necessary competence to order such disqualification. This question has been asked at least from the 1980’s by national courts and arbitral tribunals, but only recently it has come in the spotlight. In last few years two investment arbitration tribunals have made decisions about the disqualification of counsel. However, the issue remains hardly analyzed. Both authors and tribunals have never tried to give a comprehensive analysis of the issue, evaluating the arguments for and against such disqualification.

The purpose of this article is to give such analysis by evaluating the most probable arguments in relation to disqualification of counsel in commercial arbitration. The article discusses only the question of a conflict of interest between an arbitrator and a counsel, there could be other circumstances, when a party could try to challenge a counsel, e.g., if the latter has violated rules of professional ethics, the conclusions of this article cannot be applied to these cases.

The article has a following structure. Firstly, the author will review the rules of conflict of interest in commercial arbitration. Secondly, the author will summarize recent developments on disqualification of counsel in investment arbitration. Thirdly, the author will analyze arguments pro and contra the disqualification of counsel. Finally, the author will
discuss the circumstances under which the disqualification of counsel is permissible.

2. Conflict of interest in international arbitration – an overview

It is universally recognized that “the arbitrator must not be linked to either of the parties and must not have any interest in the outcome of the dispute.” The rules on conflict of interest are contained in national laws. Overall, most jurisdictions regulate the issue in similar manner.

Article 12(2) of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) provides that an arbitrator can be challenged "only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.” Under the Model Law the dismissal is first decided by the tribunal, but in case the decision is negative it can be reviewed by a court.

Section 8 of the Swedish arbitration law provides an identical procedure. Section 24.1 of the English Arbitration Act delegates the competence to decide the challenge directly to courts, with similar regime working in France. The rules are somewhat different in the US, since the Federal Arbitration Act contains no rules on the disqualification of an arbitrator. However, the US courts recognize that an arbitrator must be impartial and independent, even though a challenge against an arbitrator can be brought only during the recourse against an already made award. None of the acts mentioned above contain any rules concerning the challenge of counsel. From the developed jurisdictions, only the German Law on Civil Procedure, that, in principle, follows the Model Law, contains a mandatory rule that prohibits a tribunal from disqualifying counsel.

In international arbitration, national acts often play a secondary role to arbitration agreements, due to the principle of party autonomy that allows parties to modify default non-mandatory rules. The most recurrent form of such agreement is by a reference to institutional rules. The most popular sets of rules of institutional arbitrations permit the disqualification of an arbitrator provided that he/she is biased. The challenge to an arbitrator is usually heard by the institution itself. However, none of these rules speaks about the challenge to a counsel.

IBA Guidelines on Party Representation in International Arbitration make an exception to this silence in respect of counsel disqualification. Inspired by the recent developments in case-law (that will be discussed in the next section) Guideline 6 expressly allows the tribunal to disqualify the counsel in case of conflict of interest with an arbitrator. However, IBA Guidelines have contractual nature and cannot empower a tribunal to disqualify counsel, if the tribunal lacks such competence according to national arbitration law. Therefore, the question of tribunal’s competence to disqualify counsel remains within the ambit of arbitration law.

3. Recent cases of disqualification of counsel in investment arbitration

Whereas the question whether a tribunal can disqualify counsel has been posed from at least the 1980’s, it came into publicity only after two investment arbitration awards. In Hrvatska Elektroprivreda DD v The Republic of Slovenia (ICSID Case Nr. ARB/05/24) just before the commencement of the oral session, the respondent informed the tribunal that a new counsel would represent the respondent. As it turned out, this person and the president of the tribunal were members of the same barristers’ chamber. This fact alone was sufficient for the claimant to demand the tribunal to disqualify the counsel, since his presence would create a conflict of interest. The tribunal affirmed the challenge.

The tribunal found that the parties in an arbitral procedure “as a general rule […] may seek such representation as they see fit”. However, the tribunal considered that this principle is overridden by the principle of immutability of properly constituted tribunal. Thus, in cases where a party is adding a new counsel to its team during a late stage of the proceedings and the presence of the new counsel amounts to a conflict of interest, the tribunal is empowered to defend the principle of immutability by disqualifying the counsel.

In 2010 another investment arbitration case touched upon the challenge of counsel. In The Rompetrol Group NV v Romania (ICSID Case Nr. ARB/06/3), the claimant had added a new counsel after the commencement of the arbitral proceedings. It turned out that the newcomer has previously worked in the same law firm as the arbitrator appointed by the claimant. In this case the tribunal rejected a challenge to the counsel.

In Rompetrol, the tribunal analyzed the reasoning of the Hrvatska decision. The tribunal began its analysis by noting that it lacks any express authorization to decide about the disqualification of counsel. The tribunal did not consider this omission of authorization as a coincidence, since unlike arbitrators, the counsel are by their very nature biased. Under such circumstances the tribunal considered that such disqualification was permitted only under exceptional circumstances. However, further on, in a form of obiter dictum, the tribunal noted that even if it possessed the power to disqualify a counsel, the facts of the case were insufficient to justify such conduct. To prove this contention, the tribunal tried to distinguish its case from that of Hrvatska. For the Rompetrol tribunal, the Hrvatska decision was strongly limited to its own peculiar facts. Thus, the tribunal believed that the Hrvatska decision turned around the following facts: 1. the counsel played only a secondary role in his client’s representation team; and 2. the party making the challenge emphasized that the disqualification of the counsel “would eliminate the problem entirely”. Finally, the tribunal had no doubts that the Hrvatska decision would have been decided differently if the counsel had entered the proceeding in an earlier phase.

The tribunal in Rompetrol found that none of these circumstances were present. For this reason the tribunal decided that even provided it was empowered to disqualify the counsel, the rights were not to be used in the particular case.

4. Arguments for and against the disqualification of counsel
It follows from the previous sections that the disqualification of counsel has become an issue in investment arbitration. This naturally leads to a question: should this mechanism have its place in the commercial arbitration? In the following sections the author will analyze the possible arguments in favor and against the dismissal of counsel by tribunals. The author will discuss whether disqualification: A. violates public policy; B. infringes the right to choose counsel; C. is beyond the competence of the arbitral tribunals; D. is contrary to institutional scheme of arbitration procedure.

A. Disqualification of counsel – a violation of public policy

A development of the case-law in the US, seemingly, causes doubts whether arbitrators are allowed to disqualify counsel. In a number of decisions the US courts have decided that questions concerning professional ethics of attorneys are intertwined with the public interest. Based on that assumption, some of the US courts have concluded that a tribunal cannot decide on attorney ethics and, as a consequence, cannot decide on disqualification of attorneys.

On one hand this practice is understandable. Attorney ethics are among the founding values in a democratic society. If their violation remains unsanctioned that would undermine the trust in the institution of attorneys. In such case the member of society would be afraid to entrust their lives and property to attorneys. On contrary, if the rules of professional conduct were to be enforced too rigorously, the attorneys would lack necessary means to help their clients.

However, the author considers that the practice referred above does not preclude a tribunal in international arbitration from disqualifying a counsel. The US courts have evaluated the conduct of counsel in light of professional rules. In Bidermann Indus. Licensing, Inc. v. Aemar N.V., the court emphasized that "the regulation of attorneys, and determinations as to whether clients should be deprived of counsel of their choice as a result of professional responsibilities and ethical obligations, implicate fundamental public interest and policies which should be reserved for the courts and should not be subject to arbitration." In that case, the court made a decision based on the nature of the rules applied by the tribunal. However, in international arbitration the tribunal does not need to make a reference to the rules of professional conduct to disqualify a counsel. Instead, a tribunal could disqualify a counsel who is a cause of a conflict of interest, simply based on its interpretation of arbitration agreement. In doing so, the tribunal would exercise its "inherent jurisdiction to use powers necessary to ensure the fulfillment of the proper functioning of the tribunal."

Moreover, prohibition to arbitrators to disqualify counsel based on professional rules of conduct is also unjustified, at least for two reasons. Firstly, such prohibition creates an unjustified discrimination between counsel. In international arbitration parties may be represented by persons lacking registration at the bar. If tribunals are precluded from disqualifying attorneys, but not other counsel, it could create a situation when one party could require the disqualification of a counsel of its opponent, while the other would have been pressured to file a request in a court. Secondly, keeping responsibility for disqualification of counsel with arbitrators avoids parallel proceedings and as consequence provides a cheaper and a faster procedure.

The author considers that firstly, the US case-law does not
preclude a tribunal to disqualify a counsel, if the disqualification is not based on professional rules of ethics. However, even if these precedents apply to all cases of disqualification of a counsel, such practice is not justified on a policy level and should not be followed by other jurisdictions.

B. Disqualification as an infringement of the right to choose a counsel

The competence of a tribunal is regulated by the national acts and an arbitration agreement. The latter often makes reference to institutional rules. If the applicable law or the arbitration agreement prohibits a disqualification of counsel, then his/her removal will serve as ground for non-recognition of the award based on the Article V1 (d) of the New York Convention. Moreover, such award most likely will be annulled at the seat, since it would violate the applicable law. As it was mentioned before, at the moment such prohibition exists in Germany, and possibly in the US.

At the same time, almost every single national arbitration law and set of institutional rules includes rights of the parties to freely choose their counsel. It is only reasonable to invoke this principle as the pivotal argument against the rights of disqualification. This however, implies that the principle is absolute. Such mode of reasoning would mean that every other principle of arbitration law is subordinate to the principle of choice of counsel. This contention is baseless, if not absurd.

A right to choose a counsel "cannot be an unlimited one." Firstly, an abuse of these rights cannot be tolerated. As once stated by Prof. Lauterpacht: "[t]here is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused." A prevention of abuse is only logical, since "the right to counsel is not an end in itself but merely a means to the end of affording a party a proper opportunity to present its case." In this case "[t]he disqualification of counsel is [...] a remedy aimed at protecting 'the integrity of ongoing proceedings' [...] ."

Secondly, the rights to choose a counsel can come into conflict with rights to efficient arbitration proceeding. The authorities recognize that in such cases, the rights to choose counsel must also be limited. For example, McMullan considers that an arbitrator could exclude a counsel from the proceedings, if the latter "displays behaviour that is seriously disruptive of the proceedings [...]." Waincymer notes that "a party cannot choose counsel who will not be available for a number of years and then ask for an adjournment on the basis that it needs a full opportunity to present its case through the counsel of choice." These, seemingly self-evident, examples reflect a more general rule that efficiency, under certain circumstances, prevails over a right to choose a counsel.

In other words, a right to choose counsel has a well-defined purpose - to provide a party with an opportunity to present its case. These rights cannot be used abusively. Moreover, even when their use is non-abusive, their scope can be limited in order to effectuate efficient proceedings.

C. Disqualification of counsel - the source of competence

As has been established before, the rights to choose counsel do not prohibit a tribunal from disqualifying the latter. However, even if the national arbitration law does not prohibit disqualification of counsel the question remains what is the source of tribunal’s competence.

All the laws of developed jurisdictions and all the leading institutional rules include general provisions empowering arbitrators "to determine those aspects of procedure that the rules are silent on and where there is not an agreement between the parties." These open-ended rules could be a ground for disqualification of counsel. At the same time, Waincymer has deduced such competence from a principle of due process. For him, "fairness and due process obligations on a tribunal ought to be seen as both supporting the right to counsel and the right to protect the original independence and impartiality of the tribunal from a subsequent choice of counsel that would undermine it." In particular, reliance on the due process principle precludes parties from depriving a tribunal of its powers to disqualify counsel, since due process is a mandatory rule. The competency to disqualify a counsel could also be deduced from "implied consent based on good faith considerations." Finally, these powers could be based on the principle that precludes abusive use of procedural rights.

The author considers that is a futile exercise to try to crystalize a single principle or a rule that would justify the competence to disqualify a counsel. A good faith and efficient procedure is guaranteed by all the principles and rules mentioned above. All these principles and rules, including, the open-ended competency rules ought to be seen as a whole system, rather than a bundle of contradictory rules. Since the rights to disqualify a counsel are not provided explicitly, they are always implied, but their main source is the parties’ right to an efficient and good faith procedure, which itself is a part of a due process. It means that these rights have multiple sources, and a tribunal could rely on its open-ended authority interpreted in the light of the principle of due process, good faith and procedural efficiency to disqualify counsel.

A contrary exercise was performed by McMullan who has tried to justify the rights of arbitration tribunal to disqualify a counsel by a complicated legal construction. McMullan points out that Article 17 (2)(b) of the Model Law empowers arbitrators to make interim measures that order "a party to take an action that would prevent or restrain that party from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself." Even though the article in question formally applies only to parties and not to their counsel, McMullan envisages its possible application to the latter by means of analogy. This argument seems redundant. There is no need to based tribunal’s rights of disqualification on narrow legal provisions. Instead, disqualification rights are embedded in an arbitration agreement itself and are "aimed at protecting 'the integrity of ongoing proceedings' as between the parties.”

There is number of arguments against empowering a
tribunal to disqualify counsel. Firstly, it could be possible to rely on an argument from the contrary, to argue that the national laws and institutional rules that provide only a procedure for removal of arbitrators, implicitly exclude the rights to disqualify counsel. In other words, if legislators or parties were willing to allow arbitrators to decide on challenges of counsel, such rights would have been expressly provided.

However, these arguments can be refuted with ease. Firstly, as already mentioned tribunals have implied rights to assure an efficient and fair arbitral procedure. Secondly, both legislators and parties lack ability to perceive all the possible circumstances and it is for that reason they have empowered arbitral tribunal to decide on all the questions lacking express solution in law or agreement. In fact, a regulation through a general delegation of competence allows a tribunal to find a solution most appropriate in the light of the particular circumstances. Thirdly, the argument based on the contrary is double-sided. An example of a German legislator having explicitly deprived arbitrators of rights to disqualify counsel leaves nothing but to wonder, whether other legislators and arbitral institutions that have not acted similarly could be suspected in an implicit recognition of such rights.

Secondly, an ICC tribunal has proposed one more argument against the rights of arbitrators to disqualify counsel. In one case, an ICC tribunal treated an issue of counsel disqualification as a claim against a third party.11 The relevant arbitration agreement, naturally, did not include counsel among its parties, and this was a sufficient ground for the tribunal to find a lack of jurisdiction. The commentators have questioned the reasoning of the ICC tribunal. Firstly, the question of disqualification is not a separate claim against a third party; rather it is founded on parties’ rights to demand efficient arbitration proceedings.12 Secondly, it is reasonable to consider that from the moment a person agrees to participate in arbitration proceedings it consents to the power of arbitrators to control its behavior for the benefit of arbitration proceedings.13 Thus, a counsel submits itself to the jurisdiction of an arbitration tribunal. Due to these reasons, the position of the ICC tribunal fails to convince.

As, as shown above, there is no clear ground to eliminate the right to remove counsel. The general principles of international arbitration and open-ended provisions of competency should be interpreted in a manner that would allow such disqualification.

D. Disqualification of counsel – an institutional role

The majority of national laws provide that a challenge of an arbitrator is within a competence of national court of the seat. A similar mechanism is incorporated in the majority of institutional rules that provide the institutions with the competence to decide on the removal of arbitrators. The interest of institutions - keeping good reputation, motivates the latter to remove partial arbitrators. These mechanisms show that most legal systems “[wish] to take the view that a tribunal member cannot sit in judgment on the impropriety or otherwise of his or her own relationship”.

The disqualification of counsel, apparently, is in conflict with this institutional structure.20 If a tribunal has a right to disqualify a counsel, then indirectly the arbitrators become empowered to decide on their own conflict of interest. In addition, if such
practices would become a fully-fledged alternative to removal of arbitrators, it could endanger a uniform application of ethical rules within arbitral institutions, since tribunals could apply ethical rules differently than the secretariats of these institutions.

However, the author considers that such arguments are insufficient to prove that arbitrators lack rights to disqualify counsel. Firstly, national laws and institutional rules are prescribing only a mechanism to remove arbitrators. This mechanism is based on the principle that arbitrators should never take decisions about their own conflict of interest. It remains questionable, whether the mere recognition of such principle in relation to removal of arbitrators is sufficient, without express provisions, to preclude arbitrators to take decisions about disqualification of counsel. Secondly, even though avoidance of conflict of interest is crucial in arbitration, this has not prevented legislators from limiting parties’ rights to request removal of arbitrators. Thus, rights to have the most impartial arbitration can be limited in interest of efficiency. Similarly, there seems no reason why arbitrators could not be judging their own case, if that is overall benefiting the efficiency of the procedure. Moreover, if institutions or legislators really consider that disqualification of counsel will be diminishing the impartiality of arbitrators, they can always provide express prohibitions for arbitrators to remove counsel in the laws and institutional rules.

5. When counsel could be disqualified?

As was mentioned above, it is universally recognized that arbitrators have a wide competence to decide all procedural issues not decided by law or agreement even without express authorization. In particular, arbitrators have to ensure an effective arbitration procedure and prevent its abuse. It is rather simple to imagine a situation where an abuse of procedure requires the disqualification of counsel. If a party knowingly adds to its team a counsel having a conflict of interest with a member of a tribunal, the other party will have to challenge an arbitrator. Such challenge, if successful, could lead to a creation of a new tribunal or leave parties with a truncated one. In theory, a bad faith party could try its luck by adding new counsel repeatedly. Moreover, as shown in Hrvatska, the same problem can appear even if the changes in representation team are made in good faith. As was discussed in previous sections, under such circumstances there are no reasons to doubt that the disqualification of counsel can be justified.

At the same time, "in the normal case where the counsel is selected before the tribunal [a challenge] to the tribunal is clearly sufficient." An exception to this rule is those conflicts of interest that have appeared already during the proceedings. For example, a counsel of one of the parties, during the proceedings, joins a law firm where one of the arbitrators is working. In such case a challenge of the counsel is permissible.

However, outside these specific cases, the removal of counsel rarely will be an efficient tool. Such removal can prevent a counsel in question from participating in the oral proceedings and signing documents. However, no decision of tribunal can assure the person in question will not be “acting behind the scenes”. Waincymer considers that “the more the counsel operates behind the scenes, the less the tribunal is aware of this.” Thus, for Waincymer only open representation poses a risk of conflict of interest. The author thinks otherwise. The mere fact, that a tribunal has removed a counsel does not fully remove a risk of such conflict. While removal of arbitrator dissolves all the doubts of bias, since the very decision taker is disqualified, the removal of counsel creates uncertainty as to his/her role in the proceedings. If arbitrators themselves might continue to doubt over the role of the former counsel in the proceedings, then it is possible that they would still assume, even if unintentionally, that the counsel is working behind the scenes. This creates uncertainty as to whether the risk bias is removed.

If a party to the proceedings requests a disqualification of counsel, the tribunal has no inherent limitations to refuse considering such request. The tribunal must however, be cautious so that the request does not prejudice the other party’s right to choose a counsel. Therefore, the request must be well-founded and can be satisfied only in the light of exceptional facts of the case. In this respect, it is easy to agree with the Rompetrol tribunal that disqualification of counsel is not an alternative for removal of arbitrators, and it is of utmost importance that this form of removal itself is not used in an abusive manner.

6. Conclusions

The disqualification of counsel in case of conflict of interest is not based on the professional rules of ethics, but on the arbitration agreement itself. Therefore, disqualification of counsel has no prejudice on public policy related to application of these professional rules. Neither does the right to choose counsel prevents a tribunal to disqualify the latter, since this right gives way to considerations of good faith and procedural efficiency. Thus, the question of disqualification of counsel is within the competence of arbitral tribunal.

It is hard to deny that disqualification of counsel is a procedure somewhat difficult to reconcile with the institutional structure of arbitration procedure. The latter is based on the principle that arbitrators should not judge their own cases. However, such contradiction is not sufficient to deny tribunal rights of disqualification; rather a tribunal has to weigh all relevant circumstances to decide whether facts of the case justify the application of this exceptional remedy.

It is impossible to enumerate all the possible circumstances justifying the disqualification of a counsel. However, the author considers that the disqualification is justified, if the counsel has joined the proceedings for the purpose of creating artificial conflict of interest, or if the counsel in question has joined proceedings at the late stage. In any case, the tribunal must consider that disqualifying counsel is less efficient than disqualifying an arbitrator.

Aleksandrs Fillers

The practice of the US courts in this respect is not unanimous, some court have recognized that the rights to disqualify counsel remains with tribunals. A more detailed analysis of the US case-law see, Jacobus J.L., Rohner T. Conflicts of Interest Affecting Counsel In International Arbitrations, Mealey’s International Arbitration Report, August 2005, Vol. 20 (8).


Ibid


Ibid


Ibid


Hrvatska Elektroprivreda D.D v The Republic of Slovenia (ICSID Case No. ARB/03/24).


Ibid

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In principle, parties can explicitly agree to empower the tribunal to disqualify counsel, thus solving the problem of tribunal’s competence at the outset. Moreover, a parties’ agreement to apply IBA Guidelines will have the same effect, since Guideline 6 explicitly empowers the tribunal to disqualify counsel. However, if parties have not agreed to application of IBA Guidelines, the tribunal cannot apply Guideline 6, unless it is otherwise competent to disqualify counsel. See, IBA Guidelines, Guideline 1, Comments to Guidelines 1-3.


Brower C.N., Rompetrol, p. 6. See also, a partial award of 1997 in ICC case 8879, where the tribunal also considered that the disqualification of counsel is against the principle of his free choice. On contrary in a partial award of 2000 in ICC case 10776, the tribunal disqualified a counsel, seemingly, considering that such action is in accordance with the above mentioned principle. Quote from: Naon G. Choice-of-Law Problems in International Commercial Arbitration, Recueil des cours de l’Academie de droit international de La Haye, 2001, Vol. 289, p. 9, 158.

5. Waincymer, p. 110.


7. Waincymer, p. 110.


15. Cf., Ibid., p. 614. The reference to mandatory nature of the source of power to disqualify the counsel, made by Waincymer, is crucial. If this power is derived from a mandatory rule, then, presumably, such power cannot be abridged by a parties’ agreement. The author doubts whether parties can deprive a tribunal of its powers to disqualify counsel, if the conflict of interest has been created intentionally to delay the proceedings. In such cases, the parties would legitimize a bad faith conduct. However, in cases where a counsel has joined procedure at the late stage, without any intention of the party to delay and obstruct the proceedings, there seems no grounds to preclude an agreement that would deprive a tribunal from disqualifying counsel. Thus, the situation should not be viewed in black and white only.

16. Ibid., p. 616.

17. Ibid.


19. Ibid.

20. Ibid.


23. Ibid.


25. Ibid.

26. Thus, a party that has missed an opportunity to challenge an arbitrator during a specific time frame loses such rights. See, Born, p. 1539.

27. It is beyond doubt that a legislator can deprive a tribunal of its right to disqualify counsel. As already described before, the author thinks, that the case is more subtle if the agreement or institutional rules limit the rights of the tribunal to disqualify counsel.


29. See, Waincymer, p. 613.

30. Ibid., p. 611.


32. Waincymer, p. 612.

33. Ibid.

34. Rompetrol, p. 9.