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ADDRESSING COUNSEL-ARBITRATOR CONFLICTS OF INTEREST IN ICSID ARBITRATION

by Juan Felipe Patiño

I. INTRODUCTION

The evolution of democratic societies settled a number of principles to ensure peace among human communities and between communities by themselves. One of the most prominent principles is the separation of public powers, according to which no authority may accumulate the powers vested to the states by the people: the power to say the law, the power to execute the law, and the power to judge under the law. In that sense, *western institutional theorists have concerned themselves with the problem of ensuring that the exercise of governmental power, which is essential to the realization of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote.*[1]

Arising from that cornerstone, several principles apply to each branch of public power, principles that guarantee balance and stability for prosperous societies. Among those principles, fairness and impartiality of the judiciary stands out, initially applied to domestic but later transferred to international dispute resolution mechanisms.

However, the practice of dispute resolution across history has shed light on a number of conflicts of interest that arise from its participating actors (disputing parties, adjudicators, and counsel). Conflicts of interest are not creatures with "an only parent"; one cannot have a conflict of interest with himself. To exist, conflicts of interest require a relationship between two individuals. In that sense, conflicts of interest are relative.

The evolution of domestic procedural systems has set a number of solutions to deal with those conflicts of interests, which have been (fortunately or unfortunately) transplanted to international disputes resolution mechanisms, like international arbitration. Some of these remedies comprise excluding a conflicting adjudicator,

[1] M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS, 2 (1998).

excluding a conflicting party counsel, disregarding the arguments of a party-appointed expert witness, and so on.

This article will address how ICSID arbitration currently deals with a specific conflict of interest: counsel-arbitrator conflict of interest. However, neither the applicable standards to disqualify party counsel or arbitrators, nor other conflicts of interest scenarios (party-arbitrator; party-counsel) will be discussed here. Instead, the objective is to analyze the procedural mechanisms and the existing remedies to address conflict of interest between party counsel and arbitrators. In that sense, Part I will address the origin of an alternative remedy to deal with counsel-arbitrator conflict of interest. Part II will set the current status of remedies for such conflicts of interest under several arbitration rules. Part III will argue why the alternative remedy created by case law is beneficial for the ICSID dispute resolution mechanism. Part IV will discuss some issues that arise from the current remedy structure. Finally, Part V will propose some conclusions on this topic and solutions that may benefit the management of counsel-arbitrator conflict of interest in ICSID arbitration as well as arbitration under other institutional rules.

II. THE ORIGINS OF AN ALTERNATIVE REMEDY

Conflict of interest is a common concern in adjudicative dispute resolution mechanisms, whether litigation or arbitration. In that sense, "*a conflict of interest can be defined as a situation where a person entrusted with the function of determining the outcome of a case has a personal interest in that outcome. Conflicts of interest of international arbitrators typically are identified by a lack of independence or a lack of impartiality.*"[2]

The essential interest that disputes be decided by independent and impartial adjudicators places the adjudicators in the center of the analysis of conflict of interest. In that sense, a relevant conflict of interest exists as long as the adjudicator (or one of the members of the adjudicative body) is involved:

- Party-adjudicator conflict of interest

[2] James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30 ARB. INTL, 2, 189, 193 (2014).

- Counsel-adjudicator conflict of interest
- Expert-adjudicator conflict of interest

Thus, in adjudicative dispute resolution mechanism, the figure of the adjudicator is central to any analysis of conflict of interest:

> In fact, the dispute-settlement mechanism revolves around the entity that decides the case. It does not matter if the case is decided either by a single judge or by a tribunal, or if it is a case brought before a domestic court or an international one. In all cases, those who are in charge of deciding the case are going to be the ones who will have the last word in a controversy. Therefore, although the parties and counsel are essential to the proceedings, their performances, pleadings and the evidence provided by them are chosen so as to convince the adjudicator that their claims are well founded.[3]

Both the text of the ICSID Convention of 1968 ("ICSID Convention") and the text of the ICSID Arbitration Rules ("ICSID Rules") offer a unique remedy to deal with relevant conflicts of interest: disqualification of the conflicting arbitrator. None of these instruments provide an alternative remedy.

In this regulatory scenario, the tribunal in the case *Hrvatska Elektroprivreda d.d. v. The Republic of Slovenia*[4] ("*Hrvatska* case") found before itself a request to exclude counsel who had an apparent conflict of interest with one arbitrator from participating in the arbitration proceedings. Here, the challenged counsel was a barrister at the same court chamber as the president of the tribunal. According to the challenging party, this circumstance created a possible lack of impartiality to the said arbitrator, which may, in the end, compromise the conduct of the whole arbitration proceeding. Note that the challenge was not against the conflicting arbitrator, nor was the remedy sought the disqualification of the said arbitrator. Rather, the interested party challenged the conflicting counsel and sought his exclusion from participating in the arbitration proceedings. Due to such request, the tribunal had to answer a seminal question: do ICSID tribunals have the power to

[3] Pablo Agustin Alonso, *Impartiality and Independence of Arbitrators in International Arbitration: Issue Conflicts as Grounds for Disqualification with Special Regard to ICSID Arbitrations*, 20 MAX PLANCK YRBK. UNL, 537, 538 (2016).

[4] Hrvatska Elektroprivreda d.d. v. Republic of Slovenia. ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (May 6, 2008).

remove party counsel in events of conflict of interest with an arbitrator? First, the tribunal identified a lacuna in both the ICSID Convention and the ICSID Rules in that regard. Then, the tribunal held that there might be conflicts of interests between party counsel and arbitrators. Then, interpreting Article 44 of the ICSID Convention, the tribunal held that ICSID tribunals have the power to resolve an existing counsel-arbitrator conflict of interests by removing the challenged counsel. That was the first time in ICSID adjudication history that a tribunal vested in itself the power to remove a conflicting party counsel from further participating in the arbitral proceedings.

Before that case, it was clear that the only procedural remedy for dealing with conflicts of interests relating to an arbitrator and any participant in the arbitration was challenging and eventually removing the conflicting arbitrator. However, the *Hrvatska* case opened the door to a brand-new remedy for—exclusively—counsel-arbitrator conflicts of interests: challenging and eventually removing the conflicting counsel.

Given its novelty, not many ICSID arbitrations have dealt with challenges against conflicting counsel. One of the few cases dealing with a challenge against a conflicting counsel was *The Rompetrol Group N.V. v. Romania*.[5] Here, the law firm representing the claimant assigned the leadership of the case to a partner who had previously worked at the same law firm with one of the arbitrators. For the respondent state, this circumstance created a conflict of interest between the said counsel and the arbitrator and, in consequence, requested the tribunal "*to remove Mr. Legum* [the conflicting counsel] *from the case and to forbid him from participating in it in any way*." Addressing this request, the arbitral tribunal analyzed three issues: (i) whether ICSID tribunals have an inherent or implied power to control party representation; (ii) what is the applicable standard to remove a party counsel in case of conflict of interest; (iii) whether the standard was satisfied in the present case. First, the tribunal noted that the texts of both the ICSID Convention and the ICSID Rules do not provide for the challenge of party counsel and that the only source of

[5] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel (Jan. 14, 2010).

authority in this matter was the *Hrvatska* case. Additionally, the tribunal remarked that such a power should ideally be expressly comprised "*in the legal texts governing the tribunal and its operation.*"[6] Second, the tribunal did not set the applicable standard to exercise the power to exclude party counsel in a clear manner. However, one may consider that the tribunal intended to set a high substantive standard, which is not satisfied by "*the mere subjective claim by one party to an arbitration that a professional association between counsel and an arbitration might be misunderstood*,"[7] but it requires "*some objective and dispassionate assessment of the circumstances of the individual case*,"[8] especially considering the lack of sufficient legal authority and the principle of liberty of the parties to select their legal representation. Finally, the tribunal found that the alleged facts did not constitute a material conflict of interest that could affect the integrity of the arbitration proceedings, *i.e.*, that the high standard was not satisfied in that set of events.

In the *Bridgestone Licensing Services, Inc. and Bridgestone Americas Inc. v. Republic of Panama* case,[9] the claimant investor requested the tribunal to exclude an expert in Panamanian domestic law appointed by the respondent due to an apparent conflict of interest with the respondent's counsel. Here, the alleged conflict of interest did not relate an arbitrator. The interested party tried to extend by analogy the application of the *Hrvatska* case (*i.e.*, the power of the tribunal to exclude conflicting party counsel) to exclude a party-appointed expert. The tribunal considered that general standards on evidence granted a sufficient remedy for conflicts of interest involving an expert but not an arbitrator: "*it falls within our competence to rule that his evidence is not to be admitted.*"[10] So, the tribunal did not resort to the ruling of the

[6] *Id.* ¶ 16.

[7] *Id.* ¶ 15.

[8] *Id.*

[9] Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34, Tribunal's Ruling on Claimants' Application to Remove the Respondent's Expert as to Panamanian Law (Dec. 18, 2018).

[10] *Id.* ¶ 13.

Hrvatska case. In the end, the tribunal dismissed the request due to a lack of a current conflict of interest affecting the expert appointed by the respondent state.

The scarcity of decisions dealing with challenges against a conflicting party counsel somehow demonstrates that the power to exclude such a counsel is not deeply rooted in ICSID arbitration yet.

III. STATUS QUO – TWO SEPARATE REMEDIES IN ICSID ARBITRATION

A. *ICSID Arbitration*

Before the *Hrvatska* case, several tribunals dealt with challenges against arbitrators due to alleged conflict of interest with party counsel. The only remedy at hand was challenging and removing the conflicting arbitrator.

However, the *Hrvatska* tribunal created a brand-new remedy for counsel-arbitrator conflicts of interest (*i.e.*, challenging and eventually removing the conflicting party counsel). Nevertheless, it is clear that an arbitral tribunal does not have the authority to modify either the ICSID Convention or the ICSID Arbitration Rules. Thus, one may preliminarily conclude that the power to remove party counsel is a kind of *equitable remedy* in ICSID arbitration.

In that sense, two separate remedies to resolve counsel-arbitrator conflict of interests exist and are available to the parties: (i) disqualification of arbitrators under Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules; (ii) disqualification of counsel under the *Hrvatska* case guidelines. The differences between those remedies will be discussed in Part IV.

B. *Other Arbitration Rules*

The power to remove party counsel due to conflicts of interests with arbitrators is not exclusively present in ICSID arbitration. Other renowned arbitral institutions have granted, in their arbitration rules, powers for the arbitral tribunals to deal with the discussed conflicts of interest.

1. London Court of International Arbitration

That is the case of the London Court of International Arbitration 2020 Arbitration Rules ("LCIA Rules"). These rules grant the arbitral tribunal ample powers to take measures against conflicting party counsel:

> 18.6 In the event of a complaint by one party against another party's authorised representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that authorised representative a reasonable opportunity to answer the complaint, whether or not the authorised representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the authorised representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.1(i) and (ii).[11]

It is remarkable that the counterparty need not be the complainant against a party counsel. The arbitral tribunal may also raise such complaint *ex officio*. It is also the arbitral tribunal in full that decides whether there exists a violation of the LCIA General Guidelines or a conflict of interest that may impair the proceedings. These guidelines are contained in an annex to the LCIA Rules and establish a set of fair standards of conduct applicable upon party counsel "*to promote the good and equal conduct of the authorised representatives of the parties appearing by name within the arbitration.*"[12] Finally, LCIA tribunals have broad discretion in sanctioning improper conduct from party counsel. Even though removing conflicting counsel is not expressly provided for in the rules, one may consider that LCIA tribunals have such power under Article 18.6(iii).

However, the LCIA tribunals have other competences to control party representation and, in consequence, avoid counsel-arbitrator conflicts of interest. After the constitution of the tribunal, any change on party representation must be informed to all the participants in the proceedings, including the tribunal. Then, the tribunal has the power to reject a modification in party representation due to a conflict of interest or other grounds.

> 18.4 The Arbitral Tribunal may withhold approval of any intended change or addition to a party's authorised representatives where such change or addition could

[11] LCIA Rules, art. 18.

[12] LCIA Rules, Annex, General Guidelines for the Authorised Representatives of the Parties.

> compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict of interest or other like impediment). In deciding whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to the circumstances, including: the general principle that a party may be represented by an authorised representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition.[13]

Thus, it is clear that the LCIA is heavily concerned about the effectiveness of its arbitration proceedings as it has granted arbitration tribunals the power to control counsel-arbitrator conflict of interest in advance. In that way, one may consider that LCIA tribunals seldom exclude party counsel due to conflicts of interest because of the prevention authority they have under Article 18.4 of the Rules.

The other remedy existing to deal with counsel-arbitrator conflict of interest– and other circumstances affecting the independence and impartiality of arbitrators– under the LCI Rules is challenging the conflicting arbitrator, the traditional remedy.

> 10.1 The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: (i) that arbitrator gives written notice to the LCIA Court of his or her intent to resign as arbitrator, to be copied to all parties and all other members of the Arbitral Tribunal (if any); (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act; or (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.[14]

The LCIA Court of Arbitration is the deciding authority of challenges against appointed arbitrators. The origin of the complaint may be either the LCIA Court of Arbitration on its own initiative, the co-arbitrators, or the parties. The arbitrator may be excluded from the proceeding if he or she "*(i) acts in deliberate violation of the Arbitration Agreement*; *(ii) does not act fairly or impartially as between the parties*; *or*

[13] LCIA Rules, art. 18.

[14] LCIA Rules, art. 10.

(iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry."[15]

Here, one may notice that the decision-making authority is different for both remedies. In case of challenges against a conflicting counsel, it is the arbitral tribunal in full. In case of challenges against a conflicting arbitrator, it is the LCIA Court of Arbitration.

2. ICC International Court of Arbitration

The International Chamber of Commerce 2021 Arbitration Rules ("ICC Rules") provide a similar approach to counsel-arbitrator conflict of interest, granting the arbitral tribunal the power to exclude the conflicting counsel from participating in the proceedings.

> 17.2 The arbitral tribunal may, once constituted and after it has afforded an opportunity to the parties to comment in writing within a suitable period of time, take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings.[16]

The ICC Rules are unclear regarding the origin of the complaint against a conflicting counsel, *i.e.*, whether exclusively the counterparty may present the complaint, or the arbitral tribunal may originate the complaint *motu proprio*. In that sense, a conservative approach would consider that only the counterparty may raise such complaints. Additionally, the text of Article 17.2 grants the arbitral tribunal in full the competence to decide on the existence of a counsel-arbitrator conflict of interest and whether the conflicting counsel must be excluded from the proceedings. Finally, it appears that the only remedy available is excluding the conflicting counsel; no other remedy is contained in the ICC Rules.

In this point, another difference between ICC and LCIA arbitration is that, under the ICC Rules, the arbitral tribunal does not have any controlling power over party

[15] LCIA Rules, art. 5.

[16] ICC Rules, art. 17.

representatives' appointment as far as preventing their appointment, unlike under LCIA Rules.

The alternative remedy existing for dealing with counsel-arbitrator conflicts of interest is the traditional challenge against an arbitrator.

> 14.1 A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based. (…).
> 14.3 The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.[17]

Under the ICC Rules, the decision-making authority for challenges against conflicting arbitrators is the ICC International Court of Arbitration ("ICC Court"). Besides, the parties of the arbitration proceedings are the origin of the challenging complaint. However, the ICC Court *motu proprio* may revoke the appointment of an arbitrator when he or she "*is prevented de jure or de facto from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.*"[18]

As noted for the LCIA Rules, the decision-making authorities for both remedies are different under the ICC Rules: In case of challenges against a conflicting counsel, it is the arbitral tribunal in full. In case of challenges against a conflicting arbitrator, it is the ICC Court.

3. International Bar Association

Parties who submit their disputes to non-institutional arbitration (so-called *ad hoc* arbitration) may select the *International Bar Association 2013 Guidelines on Party Representation in International Arbitration* ("IBA GPR") to apply in their arbitration proceedings. In such cases, the parties would grant the arbitral tribunal the power

[17] ICC Rules, art. 14.

[18] ICC Rules, art. 15.

to exclude from participating in the arbitration proceedings a counsel who has a current conflict of interest with an arbitrator.

> 5. Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.
> 6. The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings.

However, this power may be vested by parties on tribunals constituted under institutional arbitration rules, as long as Guidelines 5 and 6 do not contradict mandatory provisions of those institutional rules.

> 1. The Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings. (...).
> 3. The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a Party representative's primary duty of loyalty to the party whom he or she represents or a Party representative's paramount obligation to present such Party's case to the Arbitral Tribunal.

In that sense, the deciding authority for challenges against a conflicting counsel would be the arbitral tribunal, whether under institutional or non-institutional arbitration. The decision-making authority for challenges against arbitrators may, from case to case, differ depending on the applicable arbitration clause, that is, it is either the arbitral tribunal, the arbitrator, the arbitral institution, or another authority that excludes the challenged arbitrator.

Despite its apparent procedural advancement, the remedy of excluding conflicting counsel is not harmonized and may generate further issues in international arbitration. This issue will be addressed in Part IV.

IV. WHY AN ADDITIONAL REMEDY TO DEAL WITH COUNSEL-ARBITRATOR CONFLICTS OF INTEREST IS NECESSARY FOR INTERNATIONAL ARBITRATION

Several actors participate in international arbitration proceedings (conflicting parties, arbitrators, counsel, expert witnesses, among others). However, not all actors are equally necessary to the proper resolution of the case. Hence, in the presence of a conflict of interest between some actors, the concept of fungibility is relevant.

Fungibility is *the quality or fact of being fungible*; *interchangeability*. Applying this concept to the issue addressed in this paper, not all participant parties in arbitration proceedings parties are equally fungible in the presence of a conflict of interests. The fungibility level of the parties to the dispute is, for clear reasons, zero. The parties of a dispute cannot be removed or replaced: the parties grant jurisdiction to the arbitral tribunal, and the conflict of legal interest between them is the subject matter of the arbitration proceedings. Hence, the remedy for conflicts of interest between a party and another participant should be resolved in favor of the relevant party, excluding or taking measures against the conflicting participant (either arbitrator, counsel, or expert witness). The fungibility level of arbitrators is low. After all, the appointment of arbitrators by the parties is a cornerstone of international arbitration and a broadly recognized guarantee for the parties. Besides, the ICSID Convention recognizes the principle of immutability of the arbitral tribunal: "*After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged.*"[19] Besides, when removing an appointed arbitrator, "*the principal consequences, both for the parties and the arbitration system, are the increased cost of the dispute and the length of the proceedings.*"[20]

Regarding party counsel, their fungibility is medium or, at least, higher than the fungibility of arbitrators. The liberty of parties to select their representatives for arbitral proceedings is a guarantee established in most legal systems around the

[19] ICSID Convention, art. 56.

[20] Federica Cristani, *Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview*, 13 LAW & PRAC. INTL. CTS. & TRIBUNALS 153, 175 (2014).

world and is tied to the principle of procedural fairness. However, as the *Hrvatska* case demonstrated, this principle may be restricted to guarantee a more fundamental principle, the effectiveness of the arbitration proceedings.

The mentioned guidelines allow reaching a reasonable resolution to conflicts of interest between international arbitration actors. In this sense, in case of conflict of interest between a party and an arbitrator, the arbitrator must be removed. In case of conflict of interest between an arbitrator and a party counsel, the tribunal must remove the conflicting counsel in most cases. This conclusion allows us to understand why the power to exclude party counsel in events of conflict of interest with an arbitrator is a necessary remedy for international arbitration.

In the same way, arbitration rules must offer alternative remedies to conflicts of interest between any participant of arbitration proceedings and an arbitrator beyond the disqualification of the conflicting arbitrator. Considering the fungibility criterion noted above, in some cases, it would be more cost-effective to remove a fungible participant in the arbitration proceeding (*i.e.*, a party counsel or an expert witness) instead of an arbitrator. Remedies to resolve such conflicts of interest may eventually prevent both the annulment or the denial of recognition and enforcement of arbitral awards, as occurred in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. the Kingdom of Spain*.[21] In this ICSID case, the annulment committee set aside the arbitral award upon finding an undisclosed conflict of interest between a party-appointed expert witness and a member of the arbitral tribunal. According to the annulment committee, the demonstrated conflict of interest "*deprived Spain from seeking the benefit and protection of an independent and impartial tribunal which the right to challenge is intended to provide. This affected Spain's right of defense and fair trial, as well. This failure cannot be regarded as a mere inconsequential error or omission or something insignificant having no bearing on the outcome of the*

[21] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Decision on Annulment (June 11, 2020).

proceedings before the Tribunal. Accordingly, the Committee cannot but conclude that there has also been a departure from a fundamental rule of procedure."[22]

The *Eiser* case demonstrates that any kind of conflict of interest affecting an arbitrator may have disastrous effects on the effectiveness of international arbitration and the rule of law when they are not dealt with in a proper manner during the arbitration proceedings.

V. ISSUES ARISING FROM THE CURRENT REMEDY STRUCTURE FOR COUNSEL-ARBITRATOR CONFLICTS OF INTEREST

As Alan Scott notes: "*The abstract 'power' of an arbitral tribunal to 'exclude,' or 'disqualify,' counsel of one of the parties from the proceedings, should not be doubted. But the Devil, as usual, is lurking in the details.*"[23]

The current structure of counsel-arbitrator conflicts of interest management–notwithstanding its perceived necessity for the investment dispute system–brings with it certain issues or difficulties that affect other principles or prevent the effectiveness of this new remedy. The issues identified are (A) lack of uniformity and (B) lack of fairness.

A. *Lack of Uniformity*

The International Centre for Settlement of Investment Disputes ("ICSID") was created in the 1960s to offer a neutral international dispute resolution mechanism focused on investment disputes between private parties and sovereign states. As Sergio Puig notes, "*prior to the ICSID Convention, the cases involving property of aliens abroad were initially treated as domestic conflicts, unless the parties had agreed on compulsory arbitration. Only after spending economic, diplomatic, or military resources could international adjudication follow in a mercantilist (state-to-state) mode.*"[24]

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[22] ¶ 241.

[23] Alan Scott, *Arbitrators Without Powers? Disqualifying Counsel in Arbitral Proceedings*, 30 ARB. INTL., 457, 457 (2014) [hereinafter Scott].

[24] Sergio Puig, *Recasting ICSID's Legitimacy Debate Towards a Goal-Based Empirical Agenda*, FORDHAM INTL. LAW J., 36, 2, 465, 478 (2013).

However, the ICSID is not a permanent international court, as the International Court of Justice or other specialized regional courts (*e.g.*, the Inter-American Court of Human Rights). The ICSID is an international organization that exclusively administers international investment arbitrations, either applying the ICSID Convention, the ICSID Additional Facility Rules, or other arbitration rules (like the UNCITRAL Arbitration rules). For some authors, the ICSID Convention "*constitutes a self-contained machinery functioning in total independence from domestic legal systems*."[25]

Due to its structure, every ICSID arbitration case is settled in an isolated manner, without formal or obligatory consideration to previous decisions rendered in the same system. For that reason, ICSID arbitration lacks a system of binding precedent or *stare decisis* principles. The doctrine is simply that it is the duty of judges and courts to follow established precedents, to adhere to settled law; in other words, to administer the law, *jus dicere*; and not to legislate, *jus facere* or *jus dare*.[26]

In that sense, one may affirm that, in essence, all ICSID arbitration cases are *ad hoc*. As noted by some commentators:

> At any rate, there is no rule of binding precedent in investment treaty arbitration. There is nothing in the ICSID Convention itself or in its travaux préparatoires to indicate the existence of such a doctrine. The decentralized structure of investment treaty arbitration is not well suited to the application of stare decisis. There are over 3000 distinct investment treaties currently in force. There is no hierarchy as between ICSID tribunals, and no mechanism of appeal. There are limited grounds for annulment and the annulment mechanism is not designed to provide consistency or predictability. And the publication of investment arbitration awards is subject to party consent. These factors have occasionally led to divergent and even conflicting awards on the same points of law or similar facts.[27]

[25] Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AJIL, 4, 784, 787 (1983).

[26] DANIEL H. CHAMBERLAIN, DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT, 6 (1885).

[27] Abdulqawi Ahmed Yusuf & Guled Yusuf, *Precedent & Jurisprudence Constante* in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 72 (Meg Kinnear, Geraldine R. Fischer ed., 2015).

As noted above, the power of ICSID tribunals to deal with counsel-arbitrator conflicts of interest by removing the conflicting counsel has been recognized in only a handful of cases. In that sense, such power is not fully consolidated within the ICSID dispute resolution mechanism. However, several authors have identified a kind of *de facto stare decisis*, according to which arbitral tribunals tend to follow previous landmark arbitral decisions: "*Despite these structural limitations and the absence of a textual basis for the doctrine of stare decisis, previous decisions by arbitral tribunals are regularly referenced and relied upon by ICSID tribunals in their holdings*."[28] The issue here is that ICSID tribunals are not compelled to apply rules and standards arising from previous arbitral decisions. Those decisions partake only the nature of an auxiliary source of international law, as recognized by the Statute of the International Court of Justice:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (...) d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[29]

Thus, the lack of *stare decisis* principles ICSID arbitration, the lack of express rules in this sense in both the ICSID Convention and the ICSID Rules, and the scarcity of ICSID arbitrations following the *Hrvatska* case, are reasons that prevent the power to remove conflicting counsel from crystallizing in ICSID arbitration. This, in turn, creates a source of uncertainty. For example, there could be a case with similar facts to those presented in the *Hrvatska* case (a recently appointed party counsel who is a member of the same chamber as one of the members of the arbitral tribunal) where the opposing party raises a challenge due to the alleged existence of a counsel-arbitrator conflict of interest. In this hypothetical case, the arbitral tribunal may consider that it does not have the power to remove said counsel due to a lack of an express rule in either the ICSID Convention or the ICSID Rules. As one may see, this is a totally different yet equally plausible outcome compared to the *Hrvatska* case.

[28] *Id.*

[29] Statute of the International Court of Justice, art. 38, ¶ 1(d).

In conclusion, the current state of ICSID arbitration regarding the removal remedy to deal with counsel-arbitrator conflicts of interest may create uncertainty, diminishing the effectiveness of that remedy in the ICSID dispute resolution mechanism.

To address that situation, a modification of the ICSID Rules is required to expressly grant ICSID tribunals the power to decide on challenges against and eventually exclude from the arbitration proceedings counsel who generates a conflict of interest involving an arbitrator. That would eliminate the uncertainty identified in this paper within the ICSID Arbitration system. This modification is not addressed by the current amendment proceedings that are taking place in ICSID.

On the other hand, an additional solution may arise from the consent of the parties. If parties agree to apply to their arbitration proceedings the IBA GPR, the arbitral tribunal would have ample authority to exclude a conflicting counsel, and it would be mandatory for the tribunal to rule on the merits of a challenge against a conflicting counsel. In that sense, Scott opines that: "*The beginning - and really, I think, the end – of any inquiry into the 'power' of arbitrators is to be found in the scope of the consent of the contracting parties - an inquiry into what they have chosen to submit themselves to. Such a power may be granted to arbitrators through an express submission – or may be granted in the institutional rules that the parties may have voluntarily adopted.*"[30]

B. *Lack of Fairness – Who Should Decide?*

Most arbitration rules confer the decision to disqualify a challenged arbitrator to an appointing authority, usually the arbitral institution administering the arbitration proceedings. On the other hand, the ICSID mechanism confers this decision to the unchallenged arbitrators and, only in the absence of a majority decision, to the Chairman of the arbitral institution.

In that sense, the ICSID Convention provides the following:

> Article 58. The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided

[30] Scott, *supra* note 25, at 459.

> that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

That power to deal with challenges against an arbitrator, as the commentary notes, is an exercise of the *kompetenz - kompetenz* principle:

> The jurisdiction of the co-arbitrators to decide challenges is an application of the Kompetenz Kompetenz principle according to which each tribunal is entitled to decide matters concerning its own competence. Therefore, the Tribunal, or at least the non-challenged members thereof, has the competence to decide whether an arbitrator should be disqualified and thus removed or whether the arbitrator can continue serving. One advantage of giving jurisdiction to the co-arbitrators is that no unnecessary time is lost by submitting the file and briefing an external body. In addition, the coarbitrators have seen the challenged arbitrator in action and may therefore be better placed to evaluate his/her morality, competence or reliability to exercise independent judgment.[31]

On the other hand, as noted above, the LCIA Rules, the ICC Rules, and the IBA GPR grant the arbitral tribunal in full, not the arbitral institution, the power to disqualify a conflicting counsel. Notwithstanding the non-existence of an express rule, as of the *Hrvatska* case, ICSID arbitration tribunals in full decide on the disqualification of the challenged counsel.

Then, under the analyzed arbitration rules, the decision-maker is different for both remedies. For the disqualification of an arbitrator, in ICSID arbitration, the unchallenged arbitrators decide the issue or, in the absence of a majority decision, the Chairman of ICSID. In LCIA and ICC arbitration, the appointing authority decides on the challenge. For the disqualification of counsel, in either ICSID, LCIA, ICC, or IBA rules, the tribunal in full, including the conflicting arbitrator, decides the challenge against the conflicting counsel.

As one may see, in either arbitration rules discussed here (ICSID, LCIA, ICC, IBA), the conflicting arbitrator (*i.e.*, the arbitrator with whom the challenged counsel has

[31] KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION, 170 (2011).

an alleged conflict of interest) participates in the decision-making process to determine: (i) whether there exists a counsel-arbitrator conflict of interest, that is, the conflicting arbitrator decides whether he or she has a conflict of interest with the conflicting counsel, and (ii) whether the proper remedy for dealing with such conflict of interest is to disqualify the challenged counsel, that is, the conflicting arbitrator decides whether excluding the challenged counsel from the proceeding is a better remedy instead of recusing him or herself.

In this sense, an interested party to the conflict of interest (the conflicting arbitrator) intervenes in the resolution of such conflict. As such, allowing the arbitral tribunal in full to decide the challenge against a conflicting party counsel generates a new (second level) conflict of interest. In that scenario, two conflicts of interest exist: a) the primary conflict of interest (*i.e.*, the basis of the challenge against either a counsel or an arbitrator); b) the secondary conflict of interest (*i.e.*, the conflict of interest in deciding the challenge).

Even though party counsel, as analyzed above, are highly fungible participants in the arbitration proceedings, removing a conflicting counsel from further participating in a case directly affects the right of a party to select its legal representation before the tribunal—an aspect considered in the *Hrvatska* case—and indirectly, the right of defense of said party. "*It deprives a party of the sacrosanct 'right to counsel of his choice.' For in a complex civil litigation or arbitration, a party's attorney 'can be just as much an essential part of a properly constituted court as the judge or jury.*"[32]

Further, "*the duties of impartiality and fairness protects the legitimacy of the arbitral process, it maintains the parties' confidence in the functions of the tribunal and, ultimately, in the arbitral award that is rendered. Conversely, a failure to observe these fundamental requirements may be used to challenge either the arbitral award or seek*

[32] Scott, *supra* note 25, at 461.

the court's permission to remove the arbitrator during the arbitral proceedings on the grounds of actual or apparent bias."[33]

Because the removal of a conflicting counsel imposes heavy burdens upon those essential values, the requirements of impartiality, independence, and fairness of the decision-maker must be extended to the application of that remedy. To grant that level of fairness, it is necessary to exclude the conflicting arbitrator from the decision-making body.

It is important to bear in mind that "*any legal system that purports to respect the rule of law must ensure the fair and impartial adjudication of disputes under the law. . . . In any event, no one could claim that courts or entities by that name are always fair and impartial. All legal systems need a guarantee of fair and impartial adjudication that applies to all forms of dispute resolution under law*,"[34] including the decision on ancillary issue like removing party counsel due to conflicts of interest with a member of the arbitration tribunal.

As William Park eloquently opines: "*No one with a dog in the fight should judge the competition. Nor should anyone serve as a referee in a game after having decided which team will win. At least as an aspirational model, legal claims should be decided on their merits, rather than according to a predisposition or interest in the outcome. Consequently, few tasks present the vital urgency of establishing standards for evaluating the independence and impartiality of arbitrators.*"[35]

In that sense, the author does not propose leaving the decision to remove a challenged counsel to an appointing authority, adopting the LCIA Rules and ICC Rules model for challenges against arbitrators. Instead, the author proposes leaving the decision to the non-conflicting arbitrators, excluding the conflicting arbitrator from the discussion, adopting the model of ICSID arbitration for challenges against

[33] Masood Ahmed, *Judicial Approaches to the IBA Guidelines on Conflicts of Interest in International Arbitration*, 28 EUR. BUS. L. REV. 649, 650 (2017).

[34] Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897 (2019).

[35] William W. Park, *Rectitude in International Arbitration*, 27 ARB. INTL., 3, 473, 474 (2011).

arbitrators. Even a conflicting counsel deserves fair and impartial treatment from the tribunal.

VI. CONCLUDING REMARKS

Conflicts of interest are always relative. One cannot have a conflict of interest with him or herself. A conflict of interest exists between at least two individuals. Several conflicts of interest may arise in every adjudicative dispute resolution mechanism (party-adjudicator; counsel-adjudicator, expert-adjudicator). All adjudicative dispute resolution mechanisms must resolve those conflicts of interest by removing one of the conflicting individuals, adopting fungibility criteria.

ICSID arbitration nowadays has two remedies to deal with counsel-arbitrator conflict of interest. First, removing the conflicting arbitrator under Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules. Second, as of the Hrvatska case, to exclude the conflicting counsel from further participating in the arbitration proceedings. For removing the conflicting arbitrator, the unchallenged arbitrators take the decision or the Chairman of ICSID in the absence of a majority decision. On the other hand, for removing the conflicting counsel, the arbitral tribunal in full (including the conflicting arbitrator) decides on the request to remove.

The LCIA Rules, the ICC Rules, and the IBA Rules all have the same remedies and decision-making structure. However, in these rules, the arbitral institution (not the unchallenged arbitrators) decides on the challenge against an arbitrator.

Although removing the conflicting counsel is a cost-effective remedy to deal with counsel-arbitrator conflict of interest, its current structure in ICSID arbitration generates two separate issues. On the one hand, the lack of *stare decisis* principles in ICSID arbitration allows future tribunals to disregard the *Hrvatska* case ruling and consider that ICSID tribunals do not have the power to remove party-appointed counsel. This circumstance eventually generates conflicting decisions in that regard, creating uncertainty in ICSID arbitration.

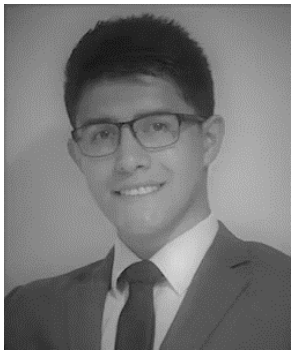
On the other hand, leaving the decision to remove a conflicting party counsel to the arbitral tribunal in full, including the conflicting arbitrator, affects the principles

of impartiality, independence, and fairness against both the conflicting counsel and the appointing party.

To deal with those issues, the author proposes:

(i) Amending the ICSID Rules in order to expressly grant the power to the arbitral tribunal to decide on challenges against party counsel due to conflicts of interest with an arbitrator. The ICSID is not currently addressing this amendment. An alternative and effective remedy is for the parties to select the IBA GPR to apply in their arbitration proceedings. However, this alternative exclusively operates where parties agree on that matter.

(ii) Excluding the conflicting arbitrator from participating in the deliberations about and decision-making of challenges against conflicting counsel. This is applicable to the LCIA, ICC, and IBA rules, as well as to ICSID arbitration.



JUAN PATIÑO FAJARDO is a Lawyer (LL.B.) from Externado University of Colombia (2017). Master (LL.M.) in International Arbitration and Business Law from American University (2021). Admitted to practice law in Colombia.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
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Plano, Texas, 75024-3561
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