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Chapter 1. What Duties do Counsel Owe to the Tribunal and Why?

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1. Introduction

It is perhaps trite—but not without importance—to state that the main objective of an international commercial arbitration procedure is to ensure the fair and efficient handling and resolution of international commercial disputes.

Attaining this objective requires not only the provision of a satisfactory and reliable service to the parties involved but also the meeting of certain systemic expectations of the general public—potential arbitration users—in order to maintain its respect. Arbitrators have an interest in attaining this objective not only because of the detrimental effect on the parties of failing to provide such a service but also because their reputation and the reputation of international commercial arbitration as the best method for the settlement of international commercial disputes would certainly suffer if they fail to meet certain expectations.

An important part of these expectations—both systemic and those of the parties to the arbitration—is that certain standards of mutual respect, loyalty courtesy integrity dignity good faith conduct and professionalism are observed by counsel in their interaction with the arbitral tribunal (the "tribunal"), since an arbitration can best be carried out efficiently and in an orderly manner when counsel act in good faith and with a cooperative spirit within the context of the appropriate procedural surroundings.

Living up to such standards is an essential part of the duties owed by counsel to the tribunal as the guardian of the efficient and fair management and conduct of the arbitration and the preservation of its integrity. In fact, the duties of counsel regarding the efficiency and integrity of the arbitral proceedings are duties not only to the tribunal but also to the opposing counsel and party, which are equally entitled to an efficient and fair arbitration. It is also possible that counsel who do not properly fulfil these duties would consequently also fail to fulfil their duties vis-à-vis the appointing party, since their misconduct could adversely affect the tribunal's vision of their client's case. In certain situations, it would therefore be artificial to attempt to make a clear distinction among or isolate such duties.

In performing such duties, however, counsel have to strike a balance between the duties owed to the tribunal and the specific duty of advancing the case of the party they represent. Ethical rules governing lawyers' conduct partly reflect the need to *page "10"* strike such a balance. For example, article 4.3 (Demeanour in Court) of the Code of Conduct for Lawyers in the European Union approved by the Council of the Bars and Law Societies of the European Union[(1)] provides that:

> *"A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of his client honourably and fearlessly without regard to his own interests or to any consequences to himself or any other person."*[2]

The Code further provides that counsel "must always have due regard to the conduct of the proceedings" and "not make contact with the judge without first informing the lawyer acting for the opposing party" (article 4.2). Article 4.4 of the Code provides: "A lawyer shall never knowingly give false or misleading information to the court."

Although not specifically intended to apply to lawyering in international commercial arbitrations, another example of such rules appears in the International Bar Association's International Code of Ethics.[3]

Reference may be also made to the more recent IBA General Principles for the Legal Profession,[4] which provides in Principle 2 (Honesty, integrity and fairness):

> *"A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the Court, his or her colleagues and all those with whom he or she comes professionally into contact."*

Furthermore, Principle 5 (Clients' interest) provides:

> *"A lawyer shall treat the interests of his or her clients as paramount, subject always to his or her duties to the Court and the interests of justice, to observe the law and to maintain ethical standards."*

In the official Commentary,[5] the term Court or tribunal used in the Principles is defined as including "an arbitrator in a binding arbitration proceeding".

A more specific statement of counsel's duties in arbitration and the balance to be struck in fulfilling them was made in a recent arbitral decision:[6]

> *"Counsel's duty is to present his Party's case, with the degree of dependence and partiality that the role implies, so long as he does so with diligence and with honesty, and in due compliance with the applicable rules of professional conduct and ethics."*

2. Failure of Counsel to Exhibit Proper Conduct

Experience generally proves that counsel exhibit courteous and respectful conduct in respect of the tribunal, although the interaction between counsel of the parties to an arbitration does not always display the same civility.

However, courtesy is only one of the standards of conduct to be met by counsel in regard to the tribunal and the efficiency and integrity of the arbitral procedure. In addition, the above-mentioned standards are couched in language that is too open-ended, lack sufficient substance to be useful[7] or do not specifically cover matters arising in international commercial arbitration scenarios because they generally address counsel conduct before national courts.

For example, ethical codes do not capture in sufficient detail counsel's duties towards the tribunal in connection with the efficiency and fairness of the arbitral procedure, such as avoiding unnecessarily time-consuming conduct, reducing costs often associated with delays or the ill-use of time and maximizing the ratio of material information and evidence presented to the arbitrators over information or evidence that is immaterial or irrelevant.[8] Moreover, counsel's duties in regard to the integrity of the arbitral proceedings, which the tribunal is obliged to safeguard, also need to be specifically considered and addressed.

Real problems arise when counsel exhibit procedural conduct that negatively affects the efficiency of the arbitration, thus failing to properly comply with their duties either:

(a) because of a lack of experience in international commercial arbitration or a lack of adequate preparation, including a lack of thorough knowledge of the case in question; or

(b) because counsel are advancing procedural strategies that are specifically aimed at—or, if not intentionally aimed at, in any case have the practical effect of—advantaging their case and disadvantaging the case of their opponents, with the effect of introducing delays or disruptions into the swift conduct of the arbitral proceedings.

a. Lack of experience and/or preparation

International arbitration counsel have the professional duty to be properly equipped and trained in the area of international commercial arbitration, for example to free themselves from the influence of parochial procedural concepts ill-adapted to international arbitration cases, as well as the professional duty to properly prepare their case. Although problems in both areas are probably on the wane because counsel are increasingly well informed about their expected role in international commercial arbitration and increasingly well prepared to deal with international arbitration cases, the following are some real life scenarios intended to illustrate the above-mentioned problems.

The first one concerns an ICC international arbitration that was conducted in Spanish and whose seat was located in a Latin American country. Because counsel to both parties, which were nationals of this country, insisted on handling the arbitration as they would a local court litigation, they requested of the tribunal that:

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(1) all questions to the witnesses and experts, including questions coming from opposing counsel, be submitted in writing to the chairman of the tribunal, who would then put the question to the expert or fact witness, with only the chairman having the ability to reformulate or not formulate such questions if he or she considered them to be improper or inadequate;

(2) both counsel refused to provide written statements for fact witnesses and only accepted to present in advance short summaries of the matters to be covered by witness testimony; and

(3) in addition to the party-appointed experts, the tribunal would have its own expert, who would issue his or her own separate expert report after considering the expert reports of the party-appointed experts. After the submission of the third expert's report, the parties' experts and their counsel would be afforded the opportunity to comment on the third expert's report.

Obviously, the technique for questioning witnesses pushed by counsel is far removed from international arbitration practices, according to which cross-examination carried out by opposing counsel plays an important role in the understanding of the case by the arbitrators. However, the tribunal was confronted with a difficult situation, not only because counsel for both parties had agreed on the above procedures and did not wish to depart from them but also because it became clear that they lacked cross-examination skills. The tribunal's chairman and the other members of the tribunal were thus forced to attempt to overcome this deficiency by formulating questions on their own initiative. This was not ideal, since their knowledge of the parties' respective cases most likely did not match the parties' counsel's own knowledge and ensuing ability to examine the witnesses.

After looking into the facts of the case and the expert witness reports submitted by the parties' experts, the tribunal was of the view that the appointment of the third expert was not needed. However, the tribunal had to give in to the firm request of both counsel to appoint the third expert, which, in addition to an unnecessary increase in arbitral costs and loss of time, in any case brought about the following negative effects:

(1) Potential candidates had to be selected from a pool of local experts with experience in an industry with few local experts and players. For these reasons, it was very difficult to find an expert who was independent of both parties.
(2) It was not easy to have the parties agree on the expert's remuneration.
(3) The third expert's testimony turned out to be useless, since it did not add much to the opinions of the other experts or throw significant light on the matters on which the latter did not coincide. Part of the problem seemed to be that, prompted by *esprit de corps*, the third expert avoided saying anything that conflicted radically with the other experts' opinions.

The need for the tribunal to deal with the above matters and the absence of counsel's predisposition to depart from their rigid and pre-conceived ideas on how to structure an international commercial arbitral procedure significantly conspired against both the efficient management of the case and its understanding by the arbitrators, and added unnecessary complications to the conduct of the arbitration.

The second example, which I have seen in both ICC and ICDR arbitrations, is the insistence by counsel in international cases on adhering to forms of production of evidence (US style discovery) that are clearly inappropriate for international commercial arbitration.

This may happen, for example, if both counsel agree on US style discovery (e.g., by expressly indicating that the US Federal Rules of Procedure shall apply), despite the tribunal's suggestions to the contrary. In extreme cases, this may involve not only a full disclosure of documents at the beginning of the case but also the use of admissions, interrogatories, depositions and aggressive applications for the production of documents from the opposing party. Not infrequently, counsel also agree on having live direct testimony without written witness statements in lieu of direct examination, which leads to protracted hearings, sometimes lasting several weeks, with the accompanying increase in the costs and time devoted to the case. Such evidentiary tools, designed to present cases before juries—that is to say inexperienced triers of fact that often lack legal training and/or have never (or only

occasionally) been confronted with the task of deciding disputes—are ill-adapted to pleading a case before legally trained and experienced arbitrators.

In such situations, the tribunal may have to issue directions aimed at somewhat attenuating the use of discovery, such as limiting the number of depositions and their length, defining with precision their role and providing for a tight schedule for interrogatories, admissions and the deposition exercise. For example, rather than using depositions to highlight contradictions between the live testimony of the witness before the tribunal and his or her deposition, the tribunal can limit their purpose to identifying additional evidence not so far produced through information gathered during the deposition, while retaining discretion to call the party or witness making the deposition for live testimony to the hearing. However, such efforts by the tribunal only partially succeed in reducing the adverse impact on the efficient management of the case brought about by the above-mentioned counsel-imposed discovery practices.

In this context, moreover, counsel not infrequently insist on being allowed to request the production of documents under the control of the opposing party on a rolling basis. As a result, the tribunal is often called to decide document production disputes and to repeatedly use its discretion to reasonably moderate requests for the disclosure of documents in order to prevent this exercise from becoming an unduly oppressive, time-consuming and expensive burden on the party to which the request is addressed.

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b. Counsel strategy and tactics

Situations falling under this category may turn out to be more problematic, since they often directly concern counsel's duty to advocate in good faith and without harming the integrity of arbitral proceedings. Such situations particularly require counsel, in fulfilment of their duties, to strike a proper balance between their obligation to advance the interests of their client and their obligation to contribute to having efficient arbitral proceedings that are fair to all parties involved in the dispute. In extreme scenarios, rather than as a consequence of lack of experience, failure to strike such a balance may be the result of a specific counsel strategy that involves inappropriate conduct or even misconduct.

Such problems may present themselves in different scenarios, some of which will be considered below.

The first tactic may consist of intentionally abusive or aggressive unilateral applications by counsel of one of the parties for the production of documents under the control of the opposing party more aligned with US-style discovery.

This tactic is not infrequently pursued by non-US lawyers, with the aggravation that, unlike US lawyers, they seem unaware of the limitations that, within a US setting, attenuate or exclude US discovery tactics in arbitration, domestic or otherwise,[9] as well as those prevailing in international arbitral practice.[10]

This tactic becomes particularly disruptive when, due to a lack of cooperation, counsel do not meet and confer to resolve differences arising from evidentiary matters, including document production, which would normally exclude or substantially minimize the need to involve the tribunal in the resolution of such differences. Failure to do so translates into repeated applications to the tribunal to decide

on such differences, sometimes requiring the consideration by the tribunal of privilege and confidentiality issues. This has a negative impact on the efficient conduct of the arbitration, although in many instances those differences could have been more expeditiously and effectively resolved, or at least reasonably reduced, through counsel's direct cooperative efforts.[11]

Other tactics consist of repeatedly raising objections to the questioning of witnesses, which may require an answer from opposing counsel and/or a determination of the tribunal. One way of dealing with such conduct—which in itself disrupts the hearing—is just to take note of the objection when manifestly unjustified and invite opposing counsel to continue with the questioning of the witness. It may be helpful, in connection with certain types of objections and in order to avoid their repetition, for the tribunal to clarify certain matters, such as the admissibility in international arbitration of hearsay evidence and—within certain limits—leading questions. However, other objections may be part of a sandbagging strategy aimed at laying traps to be used in a future attempt to challenge the arbitral award or the arbitrators. In such cases, objections need to be fully ventilated and decided *page "15"* during the hearing or before it comes to an end, even if this results in a loss of time and a deterioration in the cooperative atmosphere that should ideally be present throughout the hearing.

But perhaps the more problematic situations, which strain the conduct of the arbitral proceedings and the interactions of those involved in it, come about when certain issues are raised in the course of the arbitration that cast doubts on the integrity of counsel and—potentially—on the integrity of the arbitral proceedings. Such situations are particularly delicate, since they require the tribunal to find a prudent balance between the right of a party to choose its own counsel and the right of counsel, as part of their duty to render proper services to their client, to incorporate into the counsel's team those who are best equipped to present and defend the client's case, on the one hand, and the counsel's duty to contribute to the integrity of the arbitral proceedings, on the other.

Not infrequently, such situations lead to delays and even disruptions in the efficient handling of arbitral proceedings, since they require the elucidation of difficult issues, such as whether counsel has been involved in the spoliation of evidence, like the destruction of documents or electronic data, or identifying the rules or requirements applying to the preservation of documents and data that may later prove relevant in arbitration or litigation.[12] They often also require several rounds of written submissions or evidence, including the presentation of expert evidence, the consideration of complex matters, including choice-of-law matters,[13] and the adoption of partial decisions or awards not dealing with, delaying a decision on or distracting efforts that would otherwise be applied to deciding the merits of the case. They may lead to strained interactions between parties or their counsel, and also have the potential to create otherwise avoidable complications in the management of the case by the tribunal. Such situations may concern conduct that, in principle, is attributable to counsel, the party they represent or both, with the accompanying difficulty of discerning who is responsible and who is not.

Finally, such situations not only raise issues concerning the fulfilment of counsel's duties in respect of the integrity of the arbitral proceedings and the tribunal's duty of guarding this integrity but also make it necessary to define the authority and jurisdiction of the tribunal in order to determine matters such as the exclusion of counsel from the arbitration.

Two ICC arbitrations may be mentioned in this connection.

c. Examples

The first arbitration[14] concerned a law firm that, prior to the initiation of arbitral proceedings, had given advice to the claimant regarding a comapny that later became the respondent in arbitration proceedings between the two parties. As part of this advice, the law firm issued an opinion that found the future respondent's by-laws to be valid under the applicable law. After the initiation of arbitral proceedings, the page "16" same law firm appeared as counsel for the respondent and raised as one of the defences against the claimant's claims the invalidity of the respondent's by-laws.

The second arbitration—a construction case—concerned sanctions requested in an ICC arbitration against the claimant and its counsel because of the incorporation into the joint bundle prepared for a hearing on the merits of internal documents from the opposing party that were allegedly confidential or subject to privilege and had allegedly been obtained by the claimant outside of the document production process and from sources unknown. Such documents had apparently been received through electronic means or in the form of a hard copy anonymously delivered to officers of the claimant. An initial search of back-up tapes and metadata did not result in an unequivocal conclusion regarding the source of the documents conveyed by electronic means. The source of the hard-copy documents could not be identified either.

In addition to delicate issues affecting the integrity of the arbitral proceedings, one of the difficulties common to both situations is the applicable law or rules to be observed by the arbitrators. Such law or rules define both the arbitral jurisdiction to discipline counsel misconduct and the arbitrators' duties in this regard. So far, there does not seem to be a unified approach to these issues.

In the first case, the arbitrators held that the matters before them involved the consideration of criminal conduct or the application of sanctions under national law or national bar disciplinary rules for inappropriate or illicit counsel conduct and that the responsibility for the enforcement of those sanctions did not lie with the arbitrators but with the national courts or bar authority. Furthermore, the arbitrators concluded that the issue in question fell outside their jurisdiction and that excluding counsel would go against the fundamental principle that parties are entitled to the counsel of their choice. In the end, no sanctions were imposed, and counsel were not excluded from the case.

In the second case, the potentially applicable laws or rules included the laws or disciplinary rules of the bar authority corresponding to the jurisdiction in which the counsel accused of improper or illicit conduct was registered and the laws and ethical or disciplinary rules of the seat of the arbitration. As in the previous case, the tribunal concluded that it was not its role to enforce such rules or laws. However, the tribunal stated that it was its obligation to protect the integrity of the arbitral proceedings in accordance with standards of fairness and due process, laid down in article 15(2) of the—then applicable—ICC Arbitration Rules, and at the same time to respect the public policy principles (in the sense of *ordre public international*) underlying the laws of the seat of the arbitration aimed at protecting the integrity of the arbitration process.

The tribunal also noted that one of the paramount objectives of the law of the seat was precisely to safeguard the integrity and fairness of the arbitral procedure and that, under the law of the seat, the sanctions for improper conduct damaging these protected values

included disqualification of counsel, dismissal of the claims of page "17" the party responsible for the inappropriate or bad-faith conduct, and exclusion of the evidence obtained through improper means. Both parties accepted that such sanctions could come into play if the existence of such conduct were verified.

The tribunal found that there was no body of universally accepted principles in the area of international commercial arbitration to deal with such issues except for the obligation of the tribunal to ensure that the arbitral procedure be carried out in a fair way that allowed all parties to be sufficiently heard.(15) The tribunal also held that this obligation, an essential part of the mission entrusted to it, entitled the tribunal to assert jurisdiction on the matters that—like those before it—directly concerned the integrity of the arbitral proceedings. However, the tribunal made clear that such standards were not to be evaluated in the abstract but had to be applied against the backdrop of the specific expectations and conduct of the parties in question and previous rulings of the tribunal on document production.

Although the tribunal was of the view that the mere fact of obtaining documentary evidence under the control of the opposing party outside of the document production process pursuant to the procedural orders issued by the tribunal was not *per se* irregular or illegal, it found that the relevant standards included the obligation of a party to inform the opposing party about the receipt of documents outside of the discovery process and that could be considered as privileged as soon as they were identified, to cease further review or use of such documents, and to exclude from the proceedings documents in respect of which there was a valid assertion of privilege or confidentiality. The tribunal's final conclusion was to exclude from the evidence most of the documents obtained outside of the normal production process without imposing sanctions on the claimant or its counsel.(16)

The problem presents itself in a different dimension when the conduct of counsel may have a bearing on the appearance of impartiality of the tribunal in discharging its duties. Such a situation was the subject of the decisions of two ICSID tribunals in *Hrvatska Elektroprivreda d.d. v. The Republic of Slovenia* (hereinafter, the Hrvatska case)(17) and *The Rompetrol Group N.V v. Romania* (hereinafter, the Rompetrol case).(18)

The issue in the *Hrvatska case* was whether English counsel belonging to the same chambers as the chairman of the tribunal, who had been incorporated into the respondent's counsel team shortly before the hearing and had attended the hearing without first disclosing this relationship, should be allowed to participate in the case. In the *Rompetrol case*, the issue was the replacement of the lead counsel in charge of the case on behalf of the claimant with a professional who had recently been a member of the same law firm to which the arbitrator appointed by the claimant belonged. In neither of these instances did the opposing party seek the removal of the chairman of the tribunal or the claimant's arbitrator, as the case may be. In the *Hrvatska case*, the tribunal excluded the controversial counsel from the proceedings; in the *Rompetrol case*, it did not.

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Without entering into the factual differences between both cases, which in part account for the different outcome,(19) it is worth comparing the rationale followed by the respective tribunals in reaching their conclusion.

In the *Hrvatska case*, the tribunal first noted that the ICSID Convention and Arbitration Rules do not expressly vest arbitrators with the authority to exclude counsel and that the general principle was the freedom of parties to select the counsel of their choice.[20] However, it also pointed out that this principle was subject to exceptions when other overriding principles are at stake, such as the immutability of ICSID tribunals once properly constituted,[21] which could not be negatively affected by the supervening circumstance created by adding a lawyer to the respondent's counsel team. Another fundamental principle accounting for the tribunal's jurisdiction to decide in favour of the exclusion of counsel[22] is the tribunal's obligation and inherent power to preserve the integrity of the proceedings and its award under international law and the ICSID Convention,[23] which would be tainted if any justified doubt as to the impartiality or independence of any member of the tribunal could exist in the eyes of a reasonable and independent observer. The tribunal concluded that such circumstances were present in the case at hand.[24]

In the *Rompetrol case*, the tribunal was certainly more doubtful as to its power to exclude counsel.[25] Although apparently ready to accept it in exceptional circumstances, the carefully chosen and cautious wording in the decision dealing with this issue evidences the reluctance of the *Rompetrol* tribunal to fully endorse the *Hrvatska* tribunal's approach.[26]

Be that as it may, it is plausible, as highlighted by the *Rompetrol* tribunal,[27] that a different perception in the *Hrvatska case* of how claimant's counsel's duties in respect of the fairness of the arbitral proceedings (and towards the arbitral tribunal as guardian of such fairness) had been fulfilled was determinative for the different outcome in both cases. In other words, the balance struck by counsel between their perception of their duties towards the party appointing them, on the one hand, and the duties towards the arbitral procedure and the tribunal regarding the integrity of the arbitration, on the other, was judged to be inappropriate by the *Hrvatska* tribunal and to be appropriate by the *Rompetrol* tribunal.

It is also worth mentioning that, in apparently similar but in fact quite different situations, appointing counsel that have or had a significant professional connection to one of the members of the tribunal during the course of the arbitral proceedings may be a bad faith tactic designed to create grounds for challenging the tribunal member by showing this connection to be in violation of counsel's good faith duties towards the integrity of the proceedings and the arbitrators. Of course, this was not the case in the *Hrvatska case* or the *Rompetrol case*, in which no removal of an arbitrator was sought. In the particular context of the Rompetrol case, there is no reason to believe that the claimant was seeking to create grounds to remove its own appointed arbitrator.

3. Conclusion

The different situations considered in this paper are exceptional and no attempt is made to present an unrealistically gloomy picture or cast an unnecessarily negative shadow on the large majority of able and honest practitioners composing the international arbitral bar.[28]

The fact that such situations are not the general rule makes one wonder if it is really necessary as an increasingly copious literature suggests, to create a more specific body of international ethical rules for arbitral counsel not only with regard to their relationship to

the tribunal but also in respect of all those involved in international commercial arbitrations. To legislate or provide abstract guidelines in the absence of a concrete and pressing need and substantial experience gleaned from international commercial arbitration practice addressing such situations may prove counterproductive, not least because of the difficulty of dealing through general rules or guidelines with an often unpredictable combination of circumstances and issues that often defies the imagination.

It may well be that it would be better, for the time being, to allow tribunals to address such situations as they present themselves on a case-by-case basis. In any event, this is not a matter to be left to conjecture or an abstract comparison of national legal systems or local bar regulations governing the conduct of lawyers. Prior to issuing rules or guidelines, a field study of actual international commercial arbitration practice, necessarily including consultations with practitioners, arbitrators and other players with proven experience in this area of the law, appears to be in order.[29] However, like other questions in the always-challenging field of international commercial arbitration, this is open to debate.

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[1] Adopted at the CCBE Plenary Session held on 28 October 1988, and subsequently amended during the CCBE Plenary Sessions on 28 November 1998 and 6 December 2002. Articles 1.4 and 1.5 of the Code limit its application to lawyers of the European Union and the European Economic Area and, *ratione materiae*, to professional contacts among member states' lawyers or to the activities of a lawyer in a member state other than his or her own.

[2] According to article 4.5 of this Code: "The rules governing a lawyer's relations with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on occasional basis."

[3] First adopted in 1956, last amended in 1988. According to Rule 6: "Lawyers shall always maintain due respect towards the Court. Lawyers shall without fear defend the interests of their clients and without regard to any unpleasant consequences to themselves or any other person. Lawyers shall never knowingly give to the Court incorrect information or advice which is to their knowledge contrary to the law." Rule 1 provides: "A lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted. He shall also observe all ethical standards which apply to lawyers of the country where he is working."

[4] Adopted by the International Bar Association on 20 September 2006.

[5] Adopted by the International Bar Association at the Warsaw Council Meeting on 28 May 2011.

[6] ICSID case no. ARB/06/3 *The Rompetrol Group N.V. v. Romania*, at para. 19.

[7] V.V.Veeder, 'The 2001 Goff Lecture—The Lawyer's Duty to Arbitrate in Good Faith', *Arbitration International* 18 (2002) p. 431.

[8] C. Clarke, 'Missed Manners in Court Room Decorum', *Maryland Law Review* 50 (1991) p. 945.

[9] For example, section 17(c) of the US Uniform Arbitration Act provides: "An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected

persons and the desirability of making the proceeding fair, expeditious, and cost effective." The official comment on this provision states: "Most commentators and courts conclude that extensive discovery, as allowed in civil litigation, eliminates the main advantages of arbitration in terms of cost, speed and efficiency … At the same time, it should be clear that in many arbitrations discovery is unnecessary and that discovery contemplated by Section 17(c) … is not coextensive with that which occurs in the course of civil litigation under federal rules or state rules of civil procedure. Although Section 17 (c) allows an arbitrator to permit discovery so that parties can obtain necessary information, the intent of the language is to limit discovery by considerations of fairness, efficiency and cost."

In a similar vein, article 1(a) of the ICDR Guidelines for Arbitrators Concerning Exchanges of Information provides: "The tribunal shall manage the exchange of information in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly." Article 6(a) further provides: "Arbitrators should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines." In addition, article 6(b) provides: "Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration."

[10] For example, article 3(3) (defining the contents of a request to produce documents) and article 9(2)(c) (exclusion from the evidence of documents the production of which would be unreasonably burdensome) of the IBA Rules on the Taking of Evidence in International Arbitration (2010).

[11] The above should not prevent the tribunal, on the application of counsel or on its own initiative, from exceptionally allowing depositions in international arbitration proceedings in specific situations in which a deposition may help to avoid unnecessary costs and loss of time. This recently happened in an ICC arbitration in which the deposition of a witness in his country of origin was provided for by the tribunal. The deposition took place exclusively in the presence of counsel for both parties and a court reporter and served the purpose of testing the search for documents that the witness had carried out in his capacity as an officer of one of the parties in response to an order for the production of documents addressed to said party It should be noted that the tribunal reserved the right to call the witness to testify before it if it deemed this was necessary (but this was ultimately not the case).

[12] S. Hammond, 'Spoliation in International Arbitration: Is It Time to Reconsider the "Dirty Wars" of the International Arbitral Process?', *Dispute Resolution International* 3 (2009) p. 5.

[13] Including double deontology issues. See, for example, paragraphs 1.3 and 2.3 (among others) of the above-mentioned Commentary on the IBA International Principles of Conduct for the Legal Profession.

[14] Reported and commented upon in H. Grigera Naón, 'Choice-of-Law Problems in International Commercial Arbitration', *Hague Academy of International Law: Collected Courses 289* (2001) pp. 157-161.

[15] As provided for in article 15(2) of the 1998 ICC Arbitration Rules and article 22(4) of the 2012 ICC Arbitration Rules.

[16] One of the many delicate issues confronted by the tribunal in this case was how much time and effort was to be devoted in the

arbitral procedure to investigating whether actual counsel or party misconduct had taken place, at the risk of seriously delaying and perhaps derailing the normal course of the arbitration, whose primary objective should be to decide the case on the merits. The tribunal put certain limits on how far the investigation exercise could go by indicating that its functions did not include the public function of protecting the administration of justice and the duty to investigate and ultimately punish conduct prejudicial to the integrity of judicial proceedings. Instead, the tribunal's sole purpose was to safeguard the integrity of the arbitration and the equality of the parties and make a decision on the basis of an adequate arbitral record. This suggests that one of the considerations of the tribunal was not to get involved in an inquisitorial exercise that would substantially delay its decision on the merits of the case.

[17] ICSID case no. ARB/05/24, Ruling of 6 May 2008.

[18] ICSID case no. ARB/06/3, Decision of 14 January 2010.

[19] Highlighted in the *Rompetrol case*, para. 25.

[20] *Hrvatska case*, para. 24.

[21] ICSID Convention, article 56(1). *Hrvatska case*, para. 25.

[22] The tribunal strongly asserted its jurisdiction to decide on the issue before it: “The Tribunal disagrees with the contention of Respondent that it has no inherent powers in this regard. It considers that as a judicial formation governed by public international law, the Tribunal has inherent powers to take measures to preserve the integrity of the proceedings. In part, that inherent power finds a textual foothold in Article 44 of the Convention, which authorizes the Tribunal to decide ‘any questions of procedure’ not expressly dealt with in the Convention, the ICSID arbitration rules or ‘any rule agreed by the parties. ’ More broadly, there is an ‘inherent power of an international court to deal with any issues necessary for the conduct of matters falling within its jurisdiction;’ that power ‘exists independently of any statutory reference.’ In the specific circumstances of the case, it is in the Tribunal's view both necessary and appropriate to take action under its inherent power.” (Hrvatska case, para. 33, footnotes omitted)

[23] ICSID Convention, article 52(1)(d).

[24] *Hrvatska case*, para. 30.

[25] *Rompetrol* case, para. 15: “The Hrvatska decision is not of course a binding precedent. The Tribunal observes simply that, if it indeed be correct to attribute to an ICSID Tribunal the powers implied by the *Hrvatska* Tribunal, they would remain powers to be exercised only in extraordinary circumstances, these being circumstances which genuinely touch on the integrity of the arbitral process as assessed by the Tribunal itself…”. The tribunal also placed great emphasis on article 6(3) of the European Convention on Human Rights, including among an individual's basic rights the right to “defend himself in person or through legal assistance of his own choosing”, although referring to criminal proceedings (at para. 20).

[26] Rompetrol case, para. 16: “… One would normally expect to see such a power specifically provided for in the legal texts governing the tribunal and its operation. Absent express provision, the only justification for the tribunal to award itself the power by extrapolation would be an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process. It plainly follows that a control of that kind would fall to be exercised rarely and then only in compelling circumstances.”

[27] *Rompetrol case*, para. 25: “… What is however plain beyond a shadow of doubt is that the *Hrvatska* Tribunal was influenced to a material degree by the late announcement of the new appointment as counsel, coupled with the light that had been cast on the surrounding circumstances by the adamant refusal of the appointing Party's representatives to make any disclosure until the very last

minute—which they themselves acknowledged before the Tribunal had been an error of judgment. Viewed from this perspective the *Hrvatska* Decision might better be seen as an *ad hoc* sanction for the failure to make proper disclosure in good time than as a holding of more general scope."

28 Counsel that indeed fits the ideal pattern of being "… nimble adapter(s) … ready to try every case in an entirely new way depending on rules of play and the identity and predilections of the decision makers. He or she embraces the challenge of contending with laws and rules, customs and manners that are not his or her own, and is able to appear equally comfortable before any arbitrator in any hearing room in any region of the world". See Y Fortier and S. Drymer, 'Advocacy from the Arbitrator's Perspective', in D. Bishop and E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* (2010) p. 611.

29 This would require "[s]ystemic cooperation that involves all relevant actors—parties, counsel, arbitrators, arbitral institutions, and national and international regulatory authorities—… to not only developing the content of the new ethical rules, but to implement them and ensure their meaningful enforcement". See K. Rogers, 'The Ethics of Advocacy in International Arbitration', in D. Bishop and E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* (2010) p. 66.

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