FAI Arbitral Tribunal's Decision concerning the Disqualification of Counsel in Arbitral Proceedings

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Introduction

It is generally accepted in international arbitration that an arbitral tribunal has an inherent power, and duty, to preserve the fairness and integrity of the arbitral proceedings and the enforceability of the award. On the other hand, it is equally uncontested that a party to an arbitration has a right to be represented by a counsel of its choice. Occasionally, these two principles may collide, e.g. if one party's counsel engages in some highly inappropriate procedural conduct and the other party raises a request for the disqualification and exclusion of the counsel from the proceedings. Can the arbitral tribunal entertain such a request?

The historical view has been that arbitral tribunals do not have the power to disqualify or sanction counsel (see the case law and literature referred to in Rogers, Catherine A.: *Ethics in International Arbitration*, Oxford University Press, 2014, p. 135-136). However, a well-known procedural ruling in ICSID case *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24, May 6, 2008) is often viewed as supporting a conclusion that tribunals have inherent power to disqualify counsel in order to protect the integrity of the proceedings. In said case, the arbitral tribunal disqualified a British barrister retained by respondent from representing the latter in a situation where he was added to the respondent's legal team after the tribunal had been constituted, and where his involvement was disclosed only ten days before the final hearing; the barrister in question was a member of the same Chambers as the president of the tribunal. In reaching its decision, the arbitral tribunal referred to an overriding principle of the immutability of properly-constituted tribunals, which in the tribunal's opinion meant that a party cannot amend its legal team after the constitution of the tribunal in such a fashion as to imperil the tribunal's status or legitimacy.

The issue that lies at the heart of the *Hrvatska/Slovenia* case is now specifically addressed in Guidelines 5 and 6 of the IBA Guidelines on Party Representation (the "IBA Guidelines"). According to the IBA Guidelines, also other forms of counsel misconduct may lead to sanctions set forth in Guideline 26. These include admonishment, the drawing of adverse inferences, and the allocation of costs. Interestingly, however, exclusion or disqualification of counsel is not explicitly mentioned as a remedy for other misconduct than breach of Guideline 5, which provides that "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". Still, exclusion of counsel arguably falls within the ambit of the general rule contained in

Guideline 26(d), which gives the arbitral tribunal the power to "take any other appropriate measure in order to preserve the fairness and integrity of the proceedings". This catch-all provision probably empowers the tribunal to disqualify a counsel in extreme instances of manifest misconduct, subject to any applicable mandatory rules.

In practice, requests for disqualification and exclusion of counsel have occasionally been made also in circumstances not directly covered by the IBA Guidelines. For example, in a recent case governed by the **Arbitration Rules of the Finland Chamber of Commerce** (the "FAI Rules"), Respondent B (i) first nominated Mr. X – counsel for Claimant A – as a fact witness in the arbitration on the grounds that Mr. X had also participated in the negotiation and drafting of the contract that constituted the subject-matter of the dispute, and (ii) then requested that the arbitral tribunal exclude him from appearing as Claimant's counsel at the hearing where Respondent was going to ask questions to him.

The arbitral tribunal dismissed the request but ordered that, at the hearing, Mr. X shall be examined as the first fact witness immediately after the parties' opening statements with a view to ensuring that Claimant will not enjoy any procedural advantage on account of Mr. X's involvement in the contract negotiations. Below is an anonymized extract of the arbitral tribunal's reasons and ultimate decision.

Reasons for the arbitral tribunal's decision

In its Statement of Defence, Respondent B stated as follows: "B nominates Mr. X as one of its witnesses with the evidentiary themes noted later on (…) Mr. X has central first-hand information (he actually created a part of the central information) important to this arbitration. B's position is that Mr. X cannot act as a counsel of A in the upcoming oral hearing. This is based on general procedural principles in western democracies related to fair trial, and the Finnish Procedural Code 17:50.2 §."

Claimant A has objected to M. X not being able to represent Claimant at the hearing. In its submission of [date], Claimant states: "Mr. X is willing to testify on all non¬-privileged matters relating to the negotiations. A nevertheless respectfully requests the Arbitral Tribunal to order that Mr. X is allowed to be present during the Parties' opening presentations [and that he] is examined as the first witness and thereafter allowed to be present in the hearing room (…) Respondent should not be allowed to interfere with A's selection of its legal representation (…)"

The Parties have exchanged submissions on [dates]. In its submission of [date], Respondent, inter alia, makes the following statement: "Respondent notes that it is highly unusual that an attorney-at-law acts as counsel in both negotiating a contract and litigating the same contract. Normally a counsel negotiating a contract would act as a witness, and litigation would be handled by another counsel (…) Respondent does not dispute A's freedom to choose its own representation. However, in case the representation chosen by Claimant limits Claimant's options or has other consequences, those (…) shall be borne by Claimant."

The Arbitral Tribunal has carefully considered the arguments relied on by the Parties and hereby unanimously renders the following decision regarding the possible exclusion of Mr. X to act as counsel to Claimant at the hearing and his presence at the hearing:

The Finnish Procedural Code ("FPC") 17:50.2 § contains the following provision: "A person who has been called as a witness (…) may not be present during the consideration of the case beyond what is necessary for his or her examination". First of all, the Arbitral Tribunal notes that the provisions in the FPC, including FPC 17:50.2 §, do not apply as such to this international arbitration. The Arbitral Tribunal further notes that neither the Finnish Arbitration Act nor the FAI Rules contain provisions similar to the FPC.

Moreover, it is a general and fundamental principle in international arbitration that a party may be represented by a legal representative chosen by that party. In this regard, the Arbitral Tribunal refers to e.g. Born: International Commercial Arbitration (2nd Ed 2014) at pages 2833 ff. and 2845 ff. This principle is acknowledged by Respondent in its letter of [date] (…) This entails that only if the representation violates the integrity of the arbitration, will an arbitral tribunal have reason to interfere in this regard. Furthermore, outside possible egregious instances of misconduct, it is not for an international arbitral tribunal to police any possible professional ethics rules (in casu bar ethics rules) applicable under the lex arbitri.

Although the Arbitral Tribunal agrees with Respondent that it is unusual for a person who has been involved in drafting and negotiating a commercial contract to appear as counsel to a party in a subsequent dispute relating to that same commercial contract, the Arbitral Tribunal does not find sufficient grounds for excluding Mr. X from acting as counsel to Claimant in the hearing and Mr. X may be present during the Parties' opening statements which should, in any event, reflect the submissions made by the Parties in their written pleadings.

However, the Arbitral Tribunal is mindful that this should not entail that Claimant will enjoy any, even very remote or merely theoretical, procedural advantage during these proceedings. In order to dispose of any such risk arising from the fact that Claimant elects to be represented by Mr. X, who was also to a certain extent involved in the drafting and negotiation of the suite of documents, the construction/interpretation of which is at the centre of this dispute, entails that, at the hearing, Mr. X must be examined before any other witnesses, i.e. as the first witness of fact immediately after the opening statements.

After giving evidence, Mr. X may resume his role as counsel to Claimant and participate in the hearing, including making submissions etc. on behalf of Claimant. Moreover, Mr. X is not prevented from examining witnesses but he must, obviously, respect the different roles of a witness and counsel to one of the parties. Respondent's counsel will be able to object to a certain line of questioning or the way a question is framed and the Arbitral Tribunal will be vigilant in making sure that due process is observed and adhered to by all parties and their counsel and expects and requests that counsel conduct themselves accordingly.

Decision

Mr. X may act as counsel to Claimant in the hearing and Mr. X may in this capacity be present during the Parties' opening statements and subsequent parts of the hearing. Mr. X shall be examined as the first witness immediately after the Parties' opening statements.