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**ARBITRATORS' AUTHORITY: SCOPE AND LIMITATIONS**

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**I. External and Internal Factors Fashioning the Scope of Arbitral Authority**

The authority of arbitrators has external and internal limitations that have, as a common denominator, the fact that the immediate source of arbitral authority is the will of the parties and not governmental power.

Arbitration is limited by external factors because, unlike national judges, arbitrators are not part of any government and therefore lack imperium to enforce their decisions. Their decisions only become effective to the extent that applicable national laws and courts lend their support to arbitral determinations and awards. In some instances, arbitrators lack the authority to make certain decisions. For example, arbitrators may issue provisional measures in the form of orders addressed to the parties in the dispute. However, unlike national judges, they cannot attach property or otherwise issue orders addressed to non-parties like banks or public registries.

Arbitral power is also limited by internal factors because although party autonomy is the basis, *inter alia*, of arbitral authority to make procedural determinations, weighing the different factors that affect its exercise and limitations is often more art than science. Perhaps the most relevant of internal factors is that, although vested with a certain degree of authority to conduct proceedings and decide administrative matters in the absence of the parties' agreement,<sup>1</sup> when addressing procedural

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<sup>1</sup> See Article 19, 2012 ICC Arbitration Rules (as amended as of 1 March 2017, ("ICC Rules")) ("*[t]he proceedings before the arbitral tribunal shall be*

matters arbitrators have to persuade (or induce) of their legitimate authority, rather than impose it.

Persuasion, or the ability to induce compliance, is not a given and has to be built up step-by-step from the very inception of the arbitral procedure. The extent to which an arbitral tribunal can induce compliance largely depends on the reasonableness of arbitral procedural determinations and the arbitral tribunal's demeanor during exchanges with the parties. A tribunal will be most successful when its members are courteous and firm and are able to ensure that each party has been properly heard in connection with each procedural determination. The tribunal must show the parties that the arbitrators know and have studied the record, that arbitral decisions will not be made carelessly or irreflexively, and that the parties can rely on the final judgment.

Another element that contributes to the persuasive nature of arbitral procedural determinations, and thus reinforces arbitral authority, is conveying to the parties that the arbitral tribunal operates as a united team when it addresses procedural matters. Showing internal disagreements to the parties and their counsel, rather than addressing these disagreements within the four corners of the internal interactions among the members of the tribunal, undermines arbitral authority and erodes the parties' and their counsels' trust and respect. Of course, this disconnect is more dramatic and harmful when one of the members of the arbitral tribunal openly takes strong positions (for example, through questions during the hearing) favoring the party that appointed him or her. At that point harm is done without reaching the level at which a party would feel comfortable challenging the arbitrator after carefully balancing the resulting disruption of the normal course of the arbitration and the risk of alienating the challenged arbitrator if the accusation failed. That kind of attitude should prompt a private conversation between the president of the arbitral

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*governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration"), INT'L CHAMBER OF COM., 2012 Arbitration Rules (effective March 1, 2017), [https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_19](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_19).*

tribunal and the arbitrator, even if that requires pausing the hearing. The president should clearly impress on the arbitrator that he or she must refrain from such conduct that, if not ended, could taint the authority and integrity of the tribunal at large.

There is also a psychological factor that positively contributes to the persuasiveness of arbitral procedural determinations. This includes the parties' and counsels' awareness that the fate of their case is in the hands of the arbitral tribunal and that it would be a mistake to alienate the tribunal by observing improper conduct during procedure with the intention or potential side effect of challenging arbitral authority. Some examples of improper conduct include attempting to delay the procedure through baseless applications; unjustified requests to extend procedural deadlines, requests for the production of documents well after the deadline without a show of good cause; multiplying procedural objections in the hearing; or trying to create procedural land mines for future use to set aside the award.

In this respect, certain external factors (particularly the laws of the seat of the arbitration), combine with the already-described internal ones to enhance arbitral authority and concomitantly deter parties from resorting to improper tactics. Because of the limited means to appeal or set aside arbitral determinations, at least in national jurisdictions that are interested in attracting arbitrations, parties and counsel know that arbitral decisions will finally settle the cases on their merits, leaving very limited chances to attack such determinations before a court of law. For this reason, parties and their counsel may be inclined not to undermine arbitral authority by resorting to procedural tactics that could have a boomerang adverse effect on the outcomes of their cases.

## **II. Arbitrators' Coercive Powers**

In theory, depending on the laws of the jurisdiction of the arbitration, the argument could be made that arbitrators may impose comminatory sanctions, known as *astreintes*, to induce a party to enforce arbitral procedural determinations. However, even if the tribunal had the authority to do so under the applicable law, it would most likely lack the authority to enforce the sanctions, which would be delegated to a national court of law. Be that as it

may, I have never been confronted with a situation requiring *astreintes* or situation where a tribunal was asked to impose *astreintes*. I do not believe this to be a common occurrence, as that type of uncooperative conduct would normally pave the way for the arbitral tribunal to draw adverse inferences regarding the case of the recalcitrant party.

Another facet of arbitral authority, in addition to the ability of arbitrators to persuade or induce as referred to in Part I, is using arbitral powers to police the proceedings. Such powers cannot be equated with those of judges in a court of law. Perhaps the most evident power that courts have, and arbitrators lack, is the authority to hold a party or counsel in contempt, to impose fines on counsel, or even to exclude counsel from a proceeding. However, in an exceptional circumstance that arose in a bilateral investment treaty arbitration, the arbitral tribunal decided to exclude counsel from the case where the presence of the excluded counsel could potentially undermine the fairness of the proceedings.<sup>2</sup>

Even if it was accepted that arbitrators have the right to exclude counsel under the applicable law, arbitration rules, or arbitration guidelines, such power would need to be exercised with the utmost care and caution, and only to safeguard the integrity and fairness of the arbitral procedure.<sup>3</sup>

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<sup>2</sup> See *HEP v. Slovenia (Hrvatska Elektroprivreda v. Republic of Slovenia)*, ICSID Case No. ARB/05/24 (Award) (Dec. 17, 2015), available at: [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C69/DC7132\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C69/DC7132_En.pdf). But see, *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Award) (May 6, 2013). In a later case, the arbitral tribunal took a much more cautious approach regarding the same issue, perhaps partly because the facts were different and did not justify the exclusion of counsel.

<sup>3</sup> See generally Int'l B. Ass'n, *Guidelines on Party Representation in International Arbitration* (2013), available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F>; see also, INT'L CHAMBER OF COM., *2012 Arbitration Rules (effective March 1, 2017)*; see also Article 22 (4): *Conduct of the Arbitration*, available at: [https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_22](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_22). The guidelines apply if so agreed by the parties or if after consulting with the parties the arbitral tribunal wishes to rely on them "after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the

The party's freedom to have and maintain counsel of its own choice is closely associated with due process since it is part and parcel of a party's fundamental right to present and defend its case by hiring a person who enjoys the party's trust because of their personal qualities and professional proficiency. Such right cannot be denied or limited except in extreme circumstances in which the very principle of due process would suffer because maintaining a particular counsel could compromise the integrity of the proceedings and work to the detriment of the opposing party's rights and legitimate expectations.

Another area in which the arbitrators' authority may be tested is within their power to collect evidence. Arbitration rules feature open-ended wording that suggest that arbitrators have such power. However, in practice they are seldom used and should be exercised sparingly.<sup>4</sup> It would be one thing to require the incorporation of the full text of an incomplete document that was already in the record, or of a document that was cross-referenced in another document that was already in the record. It would be a different matter for the arbitral tribunal to *sua sponte* launch evidentiary collection to establish an arbitral record to satisfy its own investigative inclinations. Arbitrators should be ill-advised to involve themselves in such conduct for at least two reasons. First, by so doing they are likely to advantage one party's case to the detriment of the opposing party's case, thus upsetting the apple cart in ways

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arbitral proceedings." Guidelines 5-6 address, precisely, the *Hrvatska* scenario (*supra* note 2 and corresponding text): "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." Int'l B. Ass'n, *Guidelines on Party Representation in International Arbitration* (2013),

<https://www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F>.

<sup>4</sup> See INT'L CHAMBER OF COM., *2012 Arbitration Rules (effective March 1, 2017); Article 25 (1): Establishing the Facts of the Case*,

[https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_25](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_25); see also Article 22 (5).

contrary to due process and the impartial, independent nature of arbitrators. Second, evidentiary measures are usually costly and time-consuming, and carried out on the parties' dime; thus, arbitrators must be very careful not to increase the arbitral procedure costs and duration by taking actions that neither party asked them to take.

### **III. The Arbitral Tribunal's Internal Chemistry: Dissenting Opinions**

Finally, another area in which the authority of the arbitral tribunal may be at issue is when problems arise with the internal chemistry of the members of the arbitral tribunal. This matter has already warranted some attention in Part I of this paper.

Differences of opinion on legal and evidentiary matters among the members of an arbitral tribunal are not unusual when exchanging views on the complex legal and factual questions that usually constitute the subject matter of the disputes at issue. This becomes problematic, however, when disagreements transform into conduct that is designed to derail the arbitration or favor either the setting aside or non-enforcement of the award. Such would be the case, for example, if an arbitrator leaked the substance or direction of deliberations to the party that appointed them, had *ex parte* communications with his or her appointor, or submitted a dissenting opinion to weaken the majority's award, with the intention of exposing it to possible annulment by a court of law on appeal. Such actions have been aptly characterized as "arbitral terrorism."<sup>5</sup>

There are two different views regarding dissenting opinions. The first advocates that dissenting opinions are impermissible because they tend to betray the secrecy of deliberations, undermine the persuasive value and the binding force of arbitral awards, and fail to contribute to the evolution of a non-existent arbitral jurisprudence, as there is no arbitral case law (commercial arbitral awards in principle do not become public) or arbitral *stare decisis*. Further, statistics show that, in almost all cases, dissenting

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<sup>5</sup> Yves Derains, *The Arbitrator's Deliberation*, 27 AM. U. INT'L L. REV. 911, 918 (2012).

opinions are made by the arbitrator chosen by the losing party. These statistics could be used to argue that arbitrators are invariably partial to the case made by the (losing) party that appointed them.

The second view, which I endorse, takes a more moderate approach. This view asserts that not all dissenting opinions belong in the same category: there are the good and proper dissents, but there are also the bad and ugly. The dissenting opinions that fall into the latter are unprincipled in terms of the consideration of legal arguments put before the arbitrators and the record of the case. Their only purpose or consequence is to weaken the award. The dissenter may also be prompted by the desire to signal to the party that appointed him or her that she or he sided with and staunchly defended the appointing party's views with the expectation of future appointments or as *quid pro quo* within the context of a preexisting relationship. Such dissents find little to no support in reasoning that is based on the legal and factual questions raised in the dispute.

The good dissents are those with honest conviction that the majority is getting something wrong either on the law, on the facts, or on both. Professional integrity in fulfilling the arbitral function is at the core of the overarching arbitral mission. An arbitrator's integrity—and also his or her reputation—suffer when he or she begins endorsing awards that the arbitrator considers fundamentally wrong on the law or on the facts. In such circumstances, particularly when the law is not applied or is misapplied by the majority, a dissent is justified and even morally required.<sup>6</sup>

Finally, in this, as in many other respects, there may be numerous reasons why statistics are not convincing. As Mark Twain once said: “[t]here are three kinds of lies: lies, damn lies,

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<sup>6</sup> Despite the absence of precedential value of commercial arbitration awards, the following words of Justice Ruth Bader Ginsburg still ring true for international commercial arbitration: “[t]o sum up, although I appreciate the value of unanimous opinions, I will continue to speak in dissent when important matters are at stake.” Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 7 (2010).

and statistics.”<sup>7</sup> In the area of arbitration, particularly regarding dissenting opinions, there is much wisdom in Mark Twain’s words. In many instances, statistics are unable to capture the inner workings of the arbitral tribunal that may lead to a dissent: from a weak or inexperienced president who is led by the nose by an astute and partial arbitrator to get to an incorrect or biased decision and thus prompting a dissent by the other arbitrator; to an opinionated president who has a pre- and ill-conceived vision of the case, which is promptly endorsed by one of the arbitrators who immediately sees that the party that appointed him or her will have the upper hand. Either one of these situations, as well as a multitude of others not outlined here, leave the other arbitrator no option but to dissent. These are just examples of possible scenarios justifying a dissenting opinion that are not captured by statistics.

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<sup>7</sup> Gary Martin, *The Meaning and Origin of the Expression: There are Three Kinds of Lies: Lies, Damned Lies, and Statistics*, The Phrase Finder, <https://www.phrases.org.uk/meanings/lies-damned-lies-and-statistics.html>. (last visited Nov. 18, 2019).