Towards a Uniform Standard of Rules 5 and 6 of the IBA Guidelines on Party Representation in International Arbitration

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ABSTRACT

The rules applicable to arbitration of both hard and soft law share the importance of the independence and impartiality of the arbitrator. A particular treatment of a type of conflict of interest that may occur during the arbitration procedure is that regulated by Rules 5 and 6 of the IBA Guidelines on Party Representation in International Arbitration (2013), referring to a modification in the team of representatives or legal advisors of one of the parties that causes a conflict of interest in one of the arbitrators that seriously questions his independence or impartiality, and that consequently opens the door to his possible disqualification, and to the need to protect the integrity of the arbitration procedure by the arbitrators.

In this paper, we analyze if the standards provided in Rules 5 and 6 to resolve the conflict of interest between lawyers and arbitrators have received a favorable response within the arbitration community. And if so, whether an international consensus can be achieved that can serve as a model for a future Code of Ethics at a truly transnational level.

1. INTRODUCTION

The rules applicable to arbitration of both hard and soft law share the importance of the independence and impartiality of the arbitrator. The principles of independence and impartiality are ethical principles of arbitration[2], upon which its legitimacy depends[3]. The arbitrators are expected to avoid direct or indirect conflicts of interest[4]. Obviously, not only arbitrators should avoid conflicts of interest, but also should lawyers.

A particular treatment of a type of conflict of interest that may occur during the arbitration procedure is that regulated by the IBA Guidelines

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The scholars turn the ethics of the arbitrators in relation to the obligations of disclosure and independence and impartiality. Thus, among others: Ramón MULLERAT, Ethical Rules for Arbitrators, Anuario de Justicia Alternativa, 2005, pp.77 et seq; José Carlos FERNÁNDEZ ROZAS, Clearer Ethics Guidelines and Comparative Standards for Arbitrators, Liber Amicorum Bernardo Cremades, Madrid, La Ley, 2010, p.416; and Silvano DOMENICO ORSI, Ethics in International Arbitration: New Considerations for Arbitrator´s and Counsel, Arbitration Brief, 2013, vol.3, issue 1, pp.92 et seq, proposing the creation of a Global Ethic Code (id., pp.106 et seq).

[3] See: Ignacio MADALENA/Nicolás RIVERA MONTOYA, Función y deberes del árbitro. In FLORES SENTÍES, H., (editor), *Retos contemporáneos del arbitraje internacional*. Ciudad de México: Tirant lo Blanch, 2018, p.76.

[4] Catherine ROGERS, Ética del abogado en el arbitraje internacional. In FLORES SENTÍES, H., (editor), *Retos contemporáneos del arbitraje internacional*. Ciudad de México: Tirant lo Blanch, 2018, pp.285-330; S. WILSKE, y S. HUGHES, Tácticas arbitrales de guerrilla y estándares mínimos de ética en el arbitraje internacional. In FLORES SENTÍES, H., (editor), *Retos contemporáneos del arbitraje internacional*. Ciudad de México: Tirant lo Blanch, 2018, pp.367-394; and Günther J. HORVATH/Stephen WILSKE, *Guerrilla Tactics in International Arbitration*. Wolters Kluwer, 2013, pp.26-27.

on Party Representation in International Arbitration (2013) (hereinafter, Guidelines or Rules), Rules 5 and 6[5], which indicate that:

> *"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".*

As seen, there is a situation where a modification in the team of representatives or legal advisors of one of the parties that causes a conflict of interest in relation to one of the arbitrators that seriously undermines his independence or impartiality[6], and that consequently opens the door to his possible disqualification, and to the need to protect the integrity of the arbitration procedure by the arbitrators.

These are situations in which the Arbitral Tribunal has already been formally constituted, and the legal representatives of the parties have also been fixed or formally determined; Typically, lawyers are already appointed when the arbitrators are chosen, and, in fact, in the request for arbitration and in their response, such data is normally provided[7].

As we said, the question arises when, during the procedure, there is some change or modification in relation to the initially appointed representatives of the parties; several different situations may occur:

i) Inclusion of a lawyer in the legal team that will attend the hearing on the merits of the matter. This was what happened in the famous

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[5] The fact that the comments to these rules indicate that: "In such case, the Arbitral Tribunal may, if compelling circumstances so justify, and where it has found that it has the requisite authority, consider excluding the new representative from participating in all or part of the arbitral proceedings", has led some authors to question whether the guidelines really grant such power to the arbitral tribunal. See. Felix DASSER, A Critical Analysis of the IBA Guidelines on Party Representation. The Sense and Non-Sense of Guidelines, Rules and other Para-Regulatory texts in International Arbitration. ASA Special Series nº37, ASA, Juris, 2015, p.41.

[6] In this work we are not going to make a distinction between the terms independence/impartiality, a debated issue, as it is well known. There is abundant legal literature in this regard, but see: Alfonso GÓMEZ-ACEBO, *Party-Appointed Arbitrators in International Commercial Arbitration*, Wolters Kluwer, 2016, pp.69-96; and Carlos MATHEUS, *La independencia e imparcialidad del árbitro en el arbitraje doméstico e internacional*, Palestra, 2016, pp.179 et seq.

[7] This is the case in most arbitration regulations. For example, Rules of the Court of Arbitration of the International Chamber of Commerce (ICC), arts.4.3. b) y 5.1 b).

Hrvatska Case[8], where, just ten days before the hearing, which had been scheduled for two weeks, the defendant´s legal representation sent the list of people including the name of Mr. David Mildon QC of the Essex Court Chambers in London. The conflict of interest arose between Mr. Mildon and the President of the Arbitral Tribunal which was "a door tenant at the same Chambers".

ii) Modification of the legal team by including a lawyer not initially considered. Unlike the previous case, there is an alteration with the objective of formally introducing a new lawyer into the legal team. This happened in another well-known case, the *Rompetrol Case*[9], where the main lawyer in the case communicated her decision to leave the firm and so a new lawyer began to lead the team. This new lawyer, Mr. Legum, had worked for 4 years and until seven months before at the same law firm of the arbitrator appointed by the plaintiff.

iii) Change of the law firm: without modifying the names of the persons in charge of the defense of one of the parties, there is a variation of the law firm responsible for the defense. It is, consequently, the integration of the original team of lawyers in a new office that creates a conflict of interest with one of the arbitrators. Conflicts of interest that arise may be of greater or lesser intensity: the arbitrator is a partner or works in the firm, the arbitrator is a counsel of the firm, the arbitrator performs advisory work for the firm, the arbitrator has relatives in the firm or friendly relations with lawyers of the new office, etc.

Essentially, the conflict between the arbitrator and the lawyer enters the red list[10] or the orange list of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration[11].

These newly described situations, even though not frequent in practice, are not at all unknown given the duration of the arbitration proceedings and the global framework of the practice and the mobility of lawyers. As the Introduction to the IBA Guidelines on Conflicts of Interest, No. 1 points out:

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[8] *Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia*, (ICSID Case No. ARB/05/24) Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008.

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

[10] Thus, the following circumstances that are related to the issue at hand are listed in the waiver red list: "2.3 Arbitrator's relationship with the parties or counsel.

2.3.1 The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties".

[11] Within the orange list, the circumstances indicated in Guideline 3.3 stand out.

"The growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues".

It is uncertain to what extent, when the conflict reaches an arbitrator and a single lawyer, it must affect all of them without having in view the concrete conflict that arises. However, as a general rule, the situation should be addressed through a conservative solution and only in extreme cases should the removal of the lawyer who created the conflict be decided[12].

Returning to the text of the IBA, the response given by the IBA Guidelines on Party Representation to the problem at hand derives from case law regarding investment arbitration and takes advantage especially of the solution given to this issue in one of the best-known cases, the *Hvratska Case*.

In general terms, The IBA Guidelines on Party Representation has generated a good deal of controversy among international scholars. We do, however, wonder if the standards provided in Rules 5 and 6 to resolve the conflict of interest between lawyers and arbitrators have received a favorable response within the arbitration community. And if so, whether an international consensus can be achieved that can serve as a model for a future Code of Ethics at a truly transnational level. The creation of an International Code of Ethics is a matter of a hot discussion presently and it will be one of the main topics of discussion among the international arbitration community in the coming years.

There are several authors who have supported the idea of a Code of Ethics in international arbitration. We highlight, for the purposes of this work, the authors who conclude on this need by confronting, above all, the cases related to investment arbitration, *Hvratska, Rompetrol* and *Fraport*[13], and the different solutions that the courts reached in these cases[14]. However, it should be noted that the *Fraport Case* refers to a

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[12] Another approach in the US seems to be followed, as noted by A.S. RAU, Arbitrators without powers?. Disqualifying counsel in arbitral proceedings, *The Center for Global Energy, International Arbitration and Environmental Law*, The University of Texas at Austin School of Law. Research Paper No. 2014-01, June 2014, nº38 in relation to USA case law: "In fact, in most cases where a court has decided to "disqualify" counsel, the result is that the entire law firm is expected to withdraw completely from the representation--- the disqualification "radiates" out to disable the firm from accepting the matter, treating those who practice together, no matter how large the firm, as "one lawyer".

[13] *Fraport Ag Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25) (Annulment Proceeding). Decision on application for disqualification of counsel, 18 September 2008.

[14] Doak BISHOP, Ethics in International Arbitration, p.10. The author indicates that: *"the arbitrators found themselves blown out to sea and ill-equipped with nothing more than a coastal chart. And therein lies the problem. The 3 tribunals —faced with similar issues— created 3 different solutions (…). Simply put, the arbitrators needed a sextant and a star chart — a Code of Conduct for Counsel"*

different conflict: the one that arises between the new lawyer and one of the parties to the proceedings due to an issue arising from the duty of confidentiality, and that raises further problems related to the malpractice of lawyers, such as the discussion about whether it is possible to resolve these issues by arbitration, the powers of arbitrators to sanction these behaviors, and interference with the standards of professional ethics.

These issues, and others related to the lawyer's malpractice -such as the so-called *guerrilla tactics*- are the ones that are receiving the most criticism from a sector of the scholars (*infra* 2), and converge with the conflict that concerns us in this paper in the affectation of the integrity of the arbitration procedure and the fair conduct of the proceedings.

2. CONSENSUS IN THE INTERNATIONAL ARBITRATION COMMUNITY: REALITY OR CHIMERA?

Statistics on the use of soft law instruments leave us with less optimistic figures in relation to the IBA Guidelines on Party Representation in international arbitration, as it is the least used instrument, compared to other texts of the IBA[15]. One reason is the fact that, for a reputed sector of the international arbitration community, the inclusion of rules about the professional conduct of lawyers has been very problematic, since they are understood to be beyond the scope of control of the IBA, of the parties and of the arbitral tribunal.

Firstly, the criticisms of the IBA Guidelines on Party Representation are framed in a general debate about the role that soft law instruments can play in practice, especially with regard to the soft law rules that will be applied during the arbitration procedure. This debate, that concerns the very essence of arbitration regulation, is not so much about discussing singular provisions adopted in the soft law texts, but about whether to move towards a regulatory model in arbitration. The debate is about regulation itself[16]. This question, however, is outside the scope of this work.

(id., p.8); and Catherine A. ROGERS, *Ethics in International Arbitration*, Oxford University Press, 2014, nº6.151-6.157.

[15] Report on the reception of the IBA Arbitration Soft Law Products (2016), where it is stated that: "*the 57% of the arbitrations referred/used the IBA Guidelines on Conflict of Interest. This was the most used soft law instrument. 48% IBA Rules on the Taking of Evidence, y 16% IBA Guidelines on Party Representation"*.

[16] Michael SCHNEIDER, President´s Message, Yet another opportunity to waste time and money on procedural skirmishes: The IBA Guidelines on Party Representation, 31 ASA BULLETIN 3/2013 (SEPTEMBER), p.498: "*But the objections which must be raised against the Guidelines go beyond some problematic provisions. It is the regulation itself which causes Mischief"*. And id., p.500: *"However, regulating the conduct of party representatives as the IBA now has done is the wrong answer and one can only hope that the IBA Guidelines on Party Representation quickly fall into oblivion or, better, never are applied"*.

Secondly, another of the criticisms of the IBA's text reaches the amalgam that occurs in its rules between issues that are said to be essentially different: the question of the conflict of interests between lawyers and arbitrators derived from the hypotheses outlined above and that affect questions of independence and impartiality of the arbitrators, and other issues related to conflicts of interest that occur between lawyers and the parties to the procedure, such as those arising from the violation of the duty of confidentiality. In addition, there is another series of conflicts that may occur during the procedure and that affects all of its participants – conflicts derived from a bad practice or inappropriate behavior of one of the parties during the procedure; in these cases, both arbitrators and the other party of the procedure are affected.

Thus, the Swiss doctrine, which has been especially critical towards the IBA Guidelines on Party Representation, both in general and in particular in the case of Guideline 6, which is relevant to the conflict of interest at hand, gives us the key to their main concern about the Rules at this point:

> *"At the origin of this misconception is the amalgamation in the Guidelines between rules of professional conduct and rules regulating the arbitration procedure. While the latter may be regulated by the parties to an arbitration and by the arbitral tribunal appointed by them, the former fall within the responsibility of those professional bodies that regulate the exercise of the legal profession. The IBA has no power to interfere with these professional regulations, nor do the parties and arbitral tribunals. This gives rises to difficulties which are reflected in several provisions of the Guidelines"*[17].

Adding, also, the rejection of the remedies provided, and particularly to the power given to the arbitrators to discipline lawyers by imposing sanctions:

> *"The "remedies" – the term "sanctions" would seem more appropriate – include admonitions, inferences, cost sanctions and "any other appropriate measure in order to preserve the fairness and integrity of the proceedings"; Guideline 6 even provides for the possibility of the "exclusion" of a Party Representative"*[18].

However, the issue is clarified because it is not so much that the arbitrators do not have such powers, when, in fact, it is understood that they have them. Instead, the issue is that those powers are specifically mentioned in the Guidelines, thus opening the door to greater litigation and possibilities of disturbances during the procedure. Thus, it is indicated that:

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[17] SCHNEIDER, President´s Message, p.499.

[18] SCHNEIDER, President´s Message, p.499-500.

> *"Many of the sanctions for misconduct provided by the Guidelines may be available to arbitrators already today as part of an arbitrator's duty and power to ensure the "integrity and fairness of the arbitral proceedings", as specified in Guideline 1. Occasionally such powers may have been recognised or even used in the past. However, once they are spelled out in guidelines and widely publicised, they raise the appetite of litigators and motions for their application risk to become ordinary tools in the proceedings, causing additional waste of time and money and contributing further to the disenchantment of the users with international arbitration as widely practiced today"*[19].

Basically, the aversion of the *Swiss Arbitration Association* (ASA) toward the IBA Guidelines focuses, above all, on the excessive power granted to arbitrators to sanction the misconduct or unethical conduct of lawyers. These are issues that are not the responsibility of the arbitrators, which should focus on the resolution of the merits of the case. They are not competent, in the opinion of the ASA, because those are matters that are regulated by professional associations which are also the appropriate bodies to impose sanctions, or because it is ultimately up to the courts to decide them[20].

That is, the severe criticisms made to the IBA text are not related to the solution given to the conflict of interests that concerns us, which is more linked to the question of the independence and impartiality of the arbitrators than to a question related to the ethics of the lawyers[21]. This does not prevent, but on the contrary, advises that these issues are addressed within a future Code of Ethics because, as already stated, questions of ethics in arbitration can touch upon the nuclear issue of the independence and impartiality of the arbitrators. At the same time, it must be recognized that there is a very thin line of distinction and there may be border situations between these two issues.

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[19] SCHNEIDER, President´s Message, p.500.

[20] Swiss *Arbitration* Association (ASA), ASA Board Position, GEISINGER/SCHNEIDER/DASSER, IBA Guidelines on party representation in international arbitration comments and recommendations by the Board of the Swiss Arbitration Association (ASA), nº5, available at the ASA web site, nº1, y nº2. See also: Elliott GEISINGER, President´s Message, Counsel Ethics in International Arbitration –Could One Take Things a Step Further?, available at the ASA web site, pp.453-454; DASSER, A critical analysis, p.39; and Domitille BAIZEAU, The IBA Guidelines on Party Representation in International Arbitration: A Plea for Caution, BCDR (Bahrain Chamber for Dispute Resolution) International Arbitration Review, 2015, nº2, pp.351-354.

[21] In agreement: Anne-Carole CREMADES, The Creation of a Global Arbitration Ethics Council: a Truly Global Solution to a Global Problem, 24 Noviembre 2015; and Elliott GEISINGER, Soft Law" and Hard Questions: ASA´s Initiative in the Debate of Counsel´s Ethics in International Arbitration, The Sense and Non-Sense of Guidelines, Rules and Other Para-Regulatory Texts in International Arbitration. ASA Special Series, nº37, 2015, p.19. See. General Rule 7 b) IBA Guidelines on the Conflict of Interests.

Few authors have realized this, and curiously enough, there were those in favor of not regulating arbitration excessively[22]. So, even the opponents of the IBA Rules do not question the benefits of Guidelines 5 and 6 (or the other texts that have decided to follow the same solutions, such in the case of the Arbitration Rules of the London Court of International Arbitration) (LCIA) [23]. A different matter is whether the solution must be in the hands of the arbitrators or of the arbitral institutions[24]-although the international consensus is that it is for the arbitrators to decide-, or if these rules are suitable to become the model for a regulation Global international arbitration[25].

Be that as it may, it is found that the arbitration community, including the most critical sectors of the IBA Rules on Party Representation, mostly agree that the arbitrators have the duty to protect the integrity of the procedure when the modification in the legal team causes a conflict of interest with the arbitrator by which its independence and impartiality is called into question and that this is a matter that ought to be subject to regulation.

3. THE CONSENSUS ON SOFT LAW INSTRUMENTS

One of the criticisms made to procedural soft law and particularly the IBA Rules on Party Representation is the possibility that multiple regulations would lead to contradictory or irreconcilable solutions to one another:

> "*initiatives by individual associations like the IBA or arbitration institutions like the LCIA generate a risk of fragmentation between different – and potentially contradictory – "rules" or "codes". This in turn would likely undermine the very legitimacy of the rules/codes that may be adopted, since offending counsel could point to differences to argue that there is no international consensus"*[26].

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[22] In a way, it seems that the critics of the IBA Rules are also in favor, see: for example DASSER, A critical analysis, pp.55-57, that in relation to the conflict of interest between lawyers and arbitrators derived from the situations contemplated in the cases *Hvratska* and *Rompetrol*, the author does believe that they can be addressed through a simple modification of the arbitration rules.

[23] GEISINGER, Soft Law, p.19.

[24] See GEISINGER, Soft Law, pp.19-20, considering that these issues must be kept within the orbit of the independence and impartiality of the arbitrators (reasons why the LCIA approach seems acceptable), and rejecting that the arbitrators are the ones who decide that issue but the arbitral institutions. Id., pp. 22-25 contrary to the arbitrators assuming a decision-making power in relation to issues related to attorney´s ethics.

[25] DASSER, A critical analysis, p.53, considers that they should not be a model, especially, he thinks, not in the case of the Guidelines that are a recipe for additional disputes and disruptions.

[26] GEISINGER, President´s Message, p.454.

In view of the above, it is necessary to assess whether the reported situation occurs in the soft law instruments in relation to the purpose of this work. We anticipate that this is not the case and that an international consensus can be derived among the different instruments that regulate this issue and that are based on the innovative model of the IBA Rules on Party Representation[27].

3.1. THE INCORPORATION BY REFERENCE OF THE IBA GUIDELINES ON PARTY REPRESENTATION

We do not refer in this section to those instruments that expressly regulate the hypotheses object of this work, but those other instruments that indirectly integrate the same solution as the IBA Rules when incorporating by referencing the said instrument and, therefore, Rules 5 and 6 will also apply. Recently, we are watching the indirect incorporation or the incorporation by reference of several instruments of soft law into arbitration rules but also through other kinds of instruments. It is the arbitration institutions themselves that have decided to support the use of arbitration soft law by increasing its visibility and practical importance. This incorporation by reference is made in relation to self-created texts and incorporating texts prepared by other institutions.

For example, Article 5 of the Code of Ethics of the Philippine Dispute Resolution Center (PDRC) adopts several instruments:

> *"PDRCI hereby adopts as its Code of Ethics for Arbitration the: (a) Rules of Ethics for International Arbitrators adopted by the International Bar Association ("IBA"); (b) 2014 IBA Guidelines on Conflicts of Interest in International Arbitration; and (c) IBA Guidelines on Party Representation in International Arbitration, to the extent that they do not conflict with any provision of Philippine law".*

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[27] It is precisely considered that certain ethical standards have been consolidated in the arbitration, analyzing article 21 of the *Rules of Arbitration of the Bahrain Chamber for Dispute Resolution*: James CASTELLO, Party Representation: Does Article 21 Mark a Trend?, Bahrain Chamber for Dispute Resolution, International Arbitration Review, December 2017, vol.4, nº2, p.358. This rule includes also situations different from those contemplated in sections 5 and 6 of the IBA Guidelines related to the behavior of dishonest lawyers, malpractice, and guerrilla tactics, which can be sanctioned by the arbitral tribunal.

In the doctrine it has been considered that Rules 5 and 6 the IBA Guidelines "and now, at least arguably, as reflecting established international arbitral practice" (BAIZEAU, pp.347-348); or what: "is a noteworthy balancing of the competing considerations and may be regarded as groundbreaking in light of the fundamental principle in arbitration that parties are free to select a party representative of their choosing" (Edna SUSSMAN, Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives. Soft Law in International Arbitration. Editors: Lawrence W. Newmann/Michael J. Radine. JurisNet, LLC 2014, pp.253-254).

Other arbitration rules receive similar treatment, although sometimes through formulas that are not as imperative in regard to the application of the rules of soft law but serve the same practical purpose. For example, Article 1.1.1 of the Arbitration Rules of the Lagos Chamber of Commerce International Arbitration Center (LACIAC) (2016):

> *"By accepting to act as Legal Practitioner or party representative in an arbitration conducted under the LACIAC Rules, a Legal Practitioner or party representative agrees to be guided by the above stated overriding objective and by the International Bar Association Guidelines on Party Representation in International Arbitration".*

In addition to the agreement to incorporate the IBA Guidelines on Party Representation in the contract itself, or more appropriately in the arbitration agreement expressly or indirectly by reference, the Guidelines may be included later - once the dispute has arisen on the occasion of the First Procedural Order, and so the agreement will also involve the arbitrators, who sometimes suggest their incorporation to the parties. In addition, there is the recent tendency of arbitral institutions to recommend, with the help of the parties when necessary, the incorporation of soft law instruments either directly in their own arbitration regulations (i) or in line with other instruments (ii):

(i) An example of the first is the Arbitration Rules of The Australian Center for International Commercial Arbitration, ACICA Rules, 2016, which establishes in article 8.2 that:

> *"Each party shall use its best endeavours to ensure that its legal representatives comply with the International Bar Association Guidelines on Party Representation in International Arbitration in the version current at the commencement of the arbitration".*

Likewise, the *Arbitration Rules del Arbitrators' and Mediators' Institute of New Zealand* (AMINZ Rules, 2017), Rule 14.2 on Party representation:

> *"14.2. Unless the Parties agree otherwise and subject to any provision of these Rules to the contrary, the Parties and the Arbitral Tribunal shall have regard to, but will not be bound by, the IBA Guidelines on Party Representation in International Arbitration and on Conflicts of Interest in International Arbitration, in each case as current at the Notice Date"*[28].

[28] And also identical proposal in relation to the IBA Rules on Evidence, art.61.3: *"Unless the Parties agree otherwise, and subject to the provisions of these Rules which may provide to the contrary, the Arbitral Tribunal shall have regard to, but not be bound by, the IBA Rules of Evidence as current at the Notice Date".*

(ii) An example of the latter is the Note to the parties and the arbitral tribunal on the conduct of arbitration in accordance with the ICC arbitration rules of February 1, 2019, No. 48, which, in relation to the conduct of the participants in the arbitration (section IV), encourages the parties and arbitral tribunals to take into account and, where appropriate, adopt the IBA Guidelines on Party Representation in international arbitration.

The fact that the ICC Note draws the attention of the parties and the arbitrators to the IBA Guidelines and therefore the possible inclusion of this soft law instrument as part of the agreement of the parties generates the perception and conviction of the arbitration community about the preferred solution to be given to the conflicts of interest object of this paper.

3.2. THE INFLUENCE OF THE IBA GUIDELINES 5 AND 6 IN OTHER REGULATIONS

Among the texts that follow the model of the IBA Guidelines 5 and 6 on Party Representation, Article 18 of the LCIA Arbitration Rules (2014) is the most important one, since it was also the first arbitration rules to include regulation on party representatives[29]. It states that:

> *18.3. Following the Arbitral Tribunal's formation, any intended change or addition by a party to its legal representatives shall be notified promptly in writing to all other parties, the Arbitral Tribunal and the Registrar; and any such intended change or addition shall only take effect in the arbitration subject to the approval of the Arbitral Tribunal.*
> *18.4. The Arbitral Tribunal may withhold approval of any intended change or addition to a party's legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict 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 a legal 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.*

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[29] The LCIA Arbitration Rules were the first to regulate the ethics of legal representatives: Vicent. S. DATTILO, Ethics in International Arbitration: A Critical Examination of the LCIA General Guidelines for the Parties´ Legal Representatives. Georgia Journal of International and Comparative Law, 2016, vol.44, p.647, p.649 and p.650.
Also included are the arbitration rules that apply the LCIA Rules, such as the *Dubai International Financial Centre*. See. DIFC-LCIA Arbitration Rules, 1 October 2016; or *LCIA/MIAC Arbitration Rules*, 2018.

Subsequently, other arbitration rules or other soft law texts have followed these regulations. For example, article 21, sections 1 and 2, of the Rules of Arbitration of the Bahrain Chamber for Dispute Resolution (1 October 2017)

> *"1. (…) that there shall be no addition to any party's legal representatives following the appointment of the arbitral tribunal without the prior written approval of the arbitral tribunal.*
> *2. The arbitral tribunal may decline to approve an addition to any party's legal representatives if, on proper disclosure, a relationship exists between the proposed additional legal representative and any member of the arbitral tribunal that would create a conflict of interest jeopardizing the composition of the arbitral tribunal or the integrity of the proceedings".*

Likewise, and without prejudice to the incorporation by reference of the entire IBA Rules in section 2, Rule 14.1 on Party representation of the Arbitration Rules of the Arbitrators 'and Mediators' Institute of New Zealand (2017) establishes that:

> *"14.1. Any addition or change to a Party's legal representation after the issue of the Notice of Arbitration and the Answer (as appropriate) must be notified to the other Parties and to the Arbitral Tribunal within 7 days of such addition or change. The Parties agree that, in order to ensure the integrity of the proceedings, the Arbitral Tribunal may refuse to permit a Party's added or changed legal representative to appear where the appearance of such legal representative might arguably require the recusal of a member of the Arbitral Tribunal".*

It is also the focus of the recent Code of Good Arbitration Practices of the Spanish Club of Arbitration of 2019 (CBBPP/CEA), which replaces the previous Code of 2005 that was intended exclusively for arbitration institutions, while the new one makes recommendations to arbitrators, arbitral institutions, lawyers, experts, and third-party funders. The CCBBPP/CEA in relation to the appointment of Lawyers establishes that[30]:

> *"108 The parties shall be free to appoint and dismiss their lawyers.*
> *109 The parties shall identify all of the lawyers who are advising them. This disclosure must be made as soon as possible after their engagement, by providing their names and addresses and attaching their authorisations.*

[30] The English text can be found at: https://www.clubarbitraje.com/wp-content/uploads/2019/01/Code-of-Best-Practices-in-Arbitration-of-the-Spanish-Arbitration-Club.pdf.

110 In the event of the dismissal or resignation of all of a party's lawyers, without the appointment of their successors within a time that is reasonable or otherwise established by the arbitrators, it shall be understood that the party is representing itself.

111 Once the arbitrators have been appointed, if changes occur within the initially appointed legal teams, then the arbitrators may, after hearing the parties, reject those changes in a reasoned decision, with a view to safeguarding the integrity of the proceeding.

112 The integrity of the proceeding shall be deemed adversely affected in the following circumstances:

a) If the party instituting the change is acting with dilatory intent or in abuse of process; or

b) If there is a conflict of interest between the new lawyer and any of the arbitrators".

3.3. THE REGULATIONS UNDER REVIEW: SIMILARITIES

Contrasting the solutions expressly accepted in the aforementioned texts leads us to the conclusion that there is great convergence when addressing the issue at hand, and that the differences are minimal, although it is also worth highlighting that their objective is that the terms of the debate can be established within a future International Code of Ethics (*infra* 3.4).

The different regulations accept the conflict of interest between the legal representatives of the party and the arbitrator when a change is made in the former during the arbitral procedure, but they do not expressly address the reverse situation, which, however, can be treated under the general rules on independence and impartiality, which would imply the duty of the arbitrator to resign from the procedure, and his resistance could imply his removal by the competent body[31].

The essential principle that derives from all the regulations is that there is no absolute and unlimited right of the parties to the arbitration to change or modify the legal representation during the arbitration procedure. Therefore, although at a first sight it seems that there is a contradiction between two opposing rights that seem to be conceived as fundamental and equal -the right of the parties to choose their lawyer and the right to have an independent and impartial arbitrator[32]-, the principle

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[31] In one case, it was indicated that: "It may be said that such conflicts are bound to arise, especially in large international law firms. But this risk is known by their lawyers and such conflicts, whenever they arise, may be best dealt with internally (i.e. within the law firm) and not be resolved at the expense of the opposing party whose trust in the arbitrator's impartiality or independence might be otherwise be broken", LCIA Reference No. 111947, Decision Rendered 4 September 2012, nº42.

[32] On this issue, I have previously written indicating that they are not rights that are on an equal footing either from the constitutional perspective of the rights, nor from the perspective of their analysis under the arbitrations law. See Pilar PERALES VISCASILLAS, Capítulo 2. La integridad del procedimiento arbitral. Anuario de Arbitraje 2019. Madrid: Civitas, 2019.

that prevails is that the right of the parties to modify their legal representation is subject to not creating a conflict of interest with the arbitrators[33].

The second essential principle that is drawn from these regulations is that arbitrators have the power to decide about this conflict of interest and, therefore, they can reach a decision whether to authorize the change or remove the lawyer from the procedure. In the absence of explicit regulation in the arbitration laws[34], it is considered that there is an implicit power of the Arbitral Tribunal to decide those issues that may affect the integrity of the arbitration procedure[35], and for this purpose various arguments have been resorted to: it falls within the inherent powers of arbitrators, it is a reflection of the principles of good faith, the right to due process or an efficient procedure, etc. With greater or lesser nuances, this has been considered in jurisprudence, especially in relation to cases regarding investment arbitration, which has been enthusiastically followed by the doctrine and interest groups, that have expressly accepted that power for the arbitrators in the different instruments of soft law. The

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33 See further: Pilar PERALES VISCASILLAS, La integridad del procedimiento arbitral (El Conflicto de interés entre abogados y árbitros). Anuario de Arbitraje 2019. Civitas: Thomson-Reuters, 2019, pp.43-88.

34 Section 1042 (2) Procedural Civil Code (Germany): "Lawyers ("Rechtsanwälte") may not be excluded from acting as authorised representatives". Simlarly, Canon IV C of The Code of Ethics for Arbitrators in Commercial Disputes, American Arbitartion Association (1 March 2004): "The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party".

35 *International Law Association, ILA Resolution nº4/2016, Inherent and implied powers of International Arbitral Tribunals Recommendations*, adopted at the 77ª ILA Conference, Johannesburg, South Africa, 7-11 August, 2016, 7.c) considering as part of the inherent powers of the arbitrators those that are necessary "to preserve jurisdiction, maintain the integrity of proceedings, and render an enforceable award"; and 2.b) iii): "inherent power: Arbitral tribunals should consider whether the issue before them risks undermining their jurisdiction, impugning the integrity of proceedings, or leading to their issuing an unenforceable award". And Margaret MOSES, 'The Growth of Arbitrator Power to Control Counsel Conduct', Kluwer Arbitration Blog, November 12 2014.

Without considering it irrelevant, but considering that the issue is no longer discussed: "it is now well-established that tribunals have jurisdiction to assess counsel conflicts of interest and, when appropriate, exclude counsel (or experts)": Catherine A. ROGERS, and A. WIKER, "Fraport v. Philippines, ICSID, and Counsel Disqualification: The Power and the Praxis" (November 28, 2014). *Journal of World Investment and Trade*, 2014, p.8.

Even the ASA, especially critical in general with the IBA Guidelines on Party Representation understands this: GEISINGER/SCHNEIDER/DASSER, nº2.1: *"Under most if not all frequently used arbitration rules arbitrators have, expressly or implicitly, the powers to ensure the "fundamental fairness and integrity" of the proceedings".*

clearest example in case law is the *Hrvatska Case*[36], which is not contradicted, despite the harsh criticism made by the *Rompetrol Case*, where it was considered that these powers should only be exercised in extraordinary circumstances[37].

Regarding this inherent power of the Arbitral Tribunal, it must be able to be exercised either when a specific request to change one of the lawyers is made, or when it is made to change the law firm as a whole, which logically also implies the individual lawyers. The distinction between whether the Arbitral Tribunal could only have jurisdiction over individual lawyers, but not over the Law firm will not make sense when the conflict of interest is provoked precisely in relation to the Law firm itself. Otherwise, the change of individually affected lawyers would not be sufficient to resolve certain conflicts of interest.

A third point of coincidence between the texts being compared is that both regulate the protection of the integrity of the arbitration procedure and the protection of the fair conduct of the arbitration proceedings, so that both the conflict of interest object of this paper as well as other situations that relate more to the malpractice of lawyers are jointly regulated. As it has been previously seen, the latest situations are those whose regulation provokes the more radical criticisms to the IBA Guidelines on Party Representation. However, the fact that they are regulated in the same instrument does not mean that the treatment and legal answers to be given to these issues ought to be identical, and indeed,

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[36] See. Also considering positively the powers of the arbitral tribunal on the basis of that case: Alexis MOURRE, Chapter 25: About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration, in SHAUGHNESSY, P., and TUNG, S., (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer*, Kluwer Law International, 2017, p.248: *"The ICSID Arbitral Tribunal in Hvratska was right in considering that "as a judicial formation governed by public international law, the Tribunal has an inherent power to take measures to preserve the integrity of its proceedings", which entails the power to exclude a newly introduced counsel from a hearing when his representation of a party would create a situation of conflict of interest such as to imperil the constitution of the tribunal; We do not see any reason, though, why the same proposition should not be true in commercial arbitration. Depriving the arbitral tribunal of such powers would have highly undesirable consequences"*. See further: Jeffry WAINCYMER, Reconciling Conflicting Rights in International Arbitration: The Right to Choice of Counsel and the Right to an Independent and Impartial Tribunal, *Arbitration International*, 26, 2010, nº4, pp.614 et seq. Commenting precisely on Article 17 of the UNCITRAL Arbitration Rules, it is considered that the doctrine of the implicit powers of the arbitral tribunal may play a residual role when the tribunal proposes an unusual procedural measure as in the case at hand, citing the *Hvratska Case*. See. Jan PAULSSON/Georgios PETROCHILOS, UNCITRAL Arbitration. Wolters Kluwer, 2018, p.122.

[37] *Rompetrol Case*, nº15: "*It plainly follows that a control of that kind would fall to be exercised rarely, and then only in compelling circumstances"*. In fact, the doctrine that has analyzed the case coincides by pointing out that the Court in *Rompetrol* is really considering that it has implicit jurisdiction to decide on the removal of a lawyer in order to preserve the arbitration procedure. See. WAINCYMER, p.608.

as we shall see, the legal situations and the corresponding legal responses can be perfectly separated.

In the absence of legal definitions of what should be understood by the integrity of the arbitration procedure and about the reasons for its special protection, it is useful to refer to the definitions established jurisprudentially or doctrinally. For the integrity of the arbitration procedure we can consider the principle established in the *Hrvatska Case*[38]:

> *"The Tribunal's obligation as guardian of the legitimacy of the arbitral process is to make every effort to ensure that the Award is soundly based and not affected by procedural imperfection".*

The Arbitral Tribunal conveys in the Hrvatska case a known principle in arbitration: the duty of the arbitral tribunal to render an award that is valid and, therefore, enforceable, hence the breach of the duty of independence/impartiality would jeopardize the enforceability of the award[39], which means contrasting this issue with the public order of the State where recognition will be sought.

Although this duty of the Arbitral Tribunal is not always expressly adopted in many Arbitration Laws, including the UNCITRAL Model Law on International Commercial Arbitration, it is an explicit duty in relation to precisely two of the texts we are commenting on: the Rules of the IBA on Party Representation and also Article 18.4 LCIA Arbitration Rules that refer to "the finality of any award". More generally, it is also observed that some arbitration rules, notably the ICC Rules (Art.41), extend said obligation to the Court itself, which is important in the case at hand because the Court is responsible for deciding on the refusal of the arbitrators.

However, the integrity of the arbitration procedure cannot only be related to the enforceability of the award, especially if it is thought that the award could potentially be recognized and executed in multiple countries since it is also connected with the very essence of the arbitration and its legitimacy. The foregoing does not prevent, but rather advises, that the arbitrators have in mind the potential countries of execution when issuing the award and, in particular, the issues related to public order as a reason for denial of the enforcement. Also, the court in the *Hvratska Case* alluded to the principle of immutability of an arbitral tribunal validly constituted to justify the removal of the new lawyer:

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[38] *Hrvatska Case*, nº15.

[39] Fernando PÉREZ LOZADA, Duty to render enforceable awards: the specific case of impartiality and independence, *Spain Arbitration Review*, 2016, nº27, p.72.

> *"Even fundamental principles must, however, give way to overriding exceptions. In this case, the overriding principle is that of the immutability of properly constituted tribunals (Article 56(1) of the ICSID Convention)"*[40].

The other great principle, that of the fair conduct of the procedure, was established in the *Fraport case* where the power of the arbitrators was also considered to control the proper and fair conduct of the procedure (fair conduct of the proceedings):

> *"obligation to make sure that generally recognized principles relating to conflict of interest and the protection of the confidentiality of information imparted by clients to their lawyers are complied with* (Fraport Case)*"*[41].

In *Fraport*, unlike *Hvratska*, the conflict of interest occurred between a party and its lawyer, and on this the Tribunal stated that it could not pronounce on "*the deontological responsibilities or jurisdiction over the parties' legal representatives in their own capacities*"[42], that is to say, that *there is no power to rule on an allegation of misconduct under any such professional rules as may apply"*[43].

The IBA Guidelines mix the different situations of conflict and malpractice under a single instrument and merge the two principles as if they were one: *The Task Force undertook to determine whether such differing norms and practices may undermine the fundamental fairness and integrity of international arbitral proceedings"*[44]. And Rule 1, and its comments: *"the integrity and fairness of the arbitral proceedings"*, to which the effectiveness and enforceability of the award are added in the commentary to Rules 26-27: *"to preserve the integrity, effectiveness and fairness of the arbitration and the enforceability of the award"*.

Logically, the IBA Guidelines do so because, when considering the different approaches under the three investment arbitration cases already referred to, they needed to support and justify the policy legislative decisions adopted in the text, that is, to expressly confer power on arbitrators to punish lawyers in cases of malpractice, and regardless of whether they formally want to maintain deference for professional standards of ethics that are not displaced by the text of the IBA. However, the IBA Guidelines did not intend to invest the arbitrators with powers that are reserved for professional associations[45]. It is thus possible to base a very different result to that derived from both the *Fraport Case* as we have seen, as from the *Rompetrol Case*, since in the latter it was seriously questioned that, on the basis of the *Hvratska Case*, it could be considered

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[40] *Hvratska Case,* nº25.

[41] *Fraport Case*, nº37, also pointing out that: *"Indeed, such principles are of fundamental importance to the fairness of the arbitration process"*.

[42] *Fraport Case*, nº39.

[43] *Fraport Case*, nº39.

[44] Preamble to the IBA Guidelines on Party Representation.

[45] Rule 3. And Preamble to the IBA Guidelines on Party Representation.

a more general principle that allowed to exclude a lawyer from the procedure[46].

That the drafters of the IBA Guidelines seem to have been aware of this merger of the two principles is revealed when examining Rules 4-6, which deal with the cases covered by this work and that only expressly refer to the integrity of the procedure both in the Rule specifically considers (Rule 5) as in the commentary to them, as compared to Rules 26-27, which consider the two principles as a unit. In fact, the IBA Rules, although they certainly regulate both issues in the same instrument, seem to consider them from a different angle and in separate provisions to the other issues that are understood as lawyer´s malpractice.

Moreover, a different perspective of legislative policy is also observed regarding the applicable remedies, possibly because the drafters were aware of the criticisms that would arise from regulating the issues of lawyers' malpractice. While for the breach of Rule 5 the possible exclusion of the representative from his participation, totally or partially, is expressly provided for in the procedure, Rule 26 on remedies for improper conduct fails to mention the possible removal of the representative, although it may be considered within letter d) of Rule 26 which, as a tailor's box, provides that the arbitrators may adopt any appropriate measure aimed at maintaining the justice and integrity of the procedure.

That said, what seems to be evident from the IBA text is that the conflict between lawyers and arbitrators such as that expressed in Rule 5, if necessary, can cause the lawyer to be removed regardless of the reason that generated it, that is, regardless of whether the change has been made legitimately or with another intention: to delay the procedure, boycott it, or any other reckless conduct or in bad faith. When the conflict of interest has arisen between the lawyer and the arbitrator, if it is serious enough, only the removal of the lawyer will be possible. If the conflict is not serious enough to justify the removal, and if, in addition, such change responds to illegitimate or spurious reasons, the lawyer may be sanctioned in milder ways, such as those indicated in Rule 26. Outside these cases, it seems that the malpractice of the lawyer or representative would not justify the extreme sanction of his expulsion.

This approach is also continued by the LCIA text. The Regulation further emphasizes the treatment of different matters, although without directly referring to any principle but by reference to the principle of *"fair, efficient and expeditious means for the final resolution of the parties' dispute"*, since it deals in the same article with all the variety of phenomena (arts. 18.3 and 4, on the one hand, and 18.5, on the other), although in terms of remedies the same approach as the IBA Guidelines is followed. The LCIA Rules regulates the principles and rules of conduct in articles 18.5 and in the Annex, as well as the sanctions in section 6 of article 18, avoiding referring to the possible expulsion of the lawyer. Even in the case of the LCIA

[46] *Rompetrol Case*, nº22-23.

Rules, there is still greater prevention as I will indicate later in the following section.

On the other hand, the new CCBBPP/CEA (2019) only refers to the principle of the integrity of the procedure and giving a definition to it in which the two types of matters or issues are clearly integrated (nº112):

> *The integrity of the proceeding shall be deemed adversely affected in the following circumstances:*
>
> *a) If the party instituting the change is acting with dilatory intent or in abuse of process; or*
>
> *b) If there is a conflict of interest between the new lawyer and any of the arbitrators.*

Undoubtedly, the commented texts could have kept the two issues and the principles separate, since, as indicated very correctly, in relation to the issue at hand, it is not about disciplining the lawyer[47] but to determine if a party that can endanger the integrity of the procedure can be allowed to have an unlimited right to change lawyers[48]. Rather: *"It is that disqualification of counsel must rest on the same basis that---had the argument been made---would justify the disqualification of a member of the tribunal. And this is as it should be, for in either case the gravamen of the complaint is to raise precisely the same doubts about the integrity of the decision-making process"*[49].

Leaving aside a purist perspective in legal interpretation, and if we consider that we are faced with principles that do not have a uniform formulation[50] and that can be interpreted broadly[51], there should not be

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[47] For example, they seem to observe the issue as a sanction: CASTELLO, pp.363-364, commenting art.21 of the Bahrein Arbitration Rules; and Guideline 1.2 SIArb Guidelines on Party-Representative Ethics, 26 April 2018: "A Party Representative shall not abuse the arbitral process or its procedures", pointing out in the Comment to situations related to this paper where: "deliberately timed last-minute amendments, or other applications to the Tribunal or the courts, intended solely to harass the opponent or cause unnecessary delay or disruption to the arbitral process".

[48] WAINCYMER, p.612.

[49] RAU, nº25.

[50] *Legitimacy, in addition to transparency, often evokes notions of good governance and predictability*: Doak BISHOP/Margrete STEVENS, The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy, p.15.
Integrity of the procedure understood as affecting the pillars of the right to due process: MADALENA/RIVERA, p.92.

[51] For example, considering situations that would enter as "guerrilla tactics," the arbitral tribunal in the case of Libananco Holdings Co Limited (Claimant) and Republic of Turkey (Respondent) (ICSID Case, No.arb/ 06/8) Decision on preliminary issues, 23 June 2008, issued one month after the *Hvratska Case*, considered the principle of integrity and that of good, nº78:"it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an

major inconveniences in merging the two issues under the integrity principle of the arbitration procedure, as does the CCBBPP/CEA. For the supporters of its regulation, the unification of both matters under the principle of the integrity of the procedure undoubtedly presents an advantage in that it grants power to the arbitrators and the sanctions to be imposed under the lens of the *Hvratska Case* while trying to get as far away as possible from the interference with the principles and rules of professional ethics that may be applicable. It will not be surprising, therefore, that one of the defenses against critics of the IBA Guidelines affects this point:

> *"The IBA Party Representation Guidelines are strictly limited to matters pertaining to the conduct of the procedure. They do not include anything, for example, about attorney's fees or attorney-client relationship. Every single issue that is dealt with in the Guidelines pertains to the preservation of the integrity and fairness of the proceedings (…). The starting point is that arbitral tribunals have the power to deal with matters of counsel conduct, insofar as measures are necessary to ensure the integrity of the arbitral proceedings"*[52].

These other cases of necessary protection of the integrity of the arbitration procedure may arise on the occasion of a variety of situations related, for example, to the inappropriate conduct of lawyers (verbal or physical aggression, or those known as "guerrilla tactics, for example, in the case at hand, it could be the choice of a lawyer that creates a conflict with the court to "torpedo" the procedure)[53], which may lead to the

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ICSID Member State. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers)".

[52] See. MOURRE, Chapter 25, p.248.

[53] DASSER, A critical analysis, p.41; Tom CUMMINS, The IBA Guidelines on Party Representation in International Arbitration – Levelling the Playing Field?, Arbitration International, 2014, vol.30, nº3, p.439, and p.448; and Edna SUSSMAN/Solomon EBERE, All's fair in love and war – or is it? Reflections on ethical standards for counsel in international arbitration, The American Review of International Arbitration (ARIA), 2011, vol.22, nº4, p.612, who conducted their study in relation to the so-called "guerrilla tactics" and without giving a definition of what should be understood by guerrilla tactics, respondents were free to consider certain behaviors as such, in particular the creation of conflicts, citing as a relevant example the cases of change of lawyer during the arbitration process to create a conflict with an arbitrator.

A curious and possibly almost impossible example in practice would be that of a defendant's lawyer who nominates a series of arbitrators with obvious conflicts of interest in the hope of sabotaging the procedure with the inevitable incidents of recusal. (William W. PARK, A Fair Fight: Professional Guidelines in International Arbitration. Boston

arbitrators having to take measures aimed at ensuring such protection[54]. In these situations, sanctions might be available in the distribution of costs[55]. Otherwise, the conflict must be resolved *ex-ante*.

Accordingly, and depending on the circumstances, arbitrators can deal with issues related to the exclusion of the procedure of a lawyer or an expert[56].

3.4. THE REGULATIONS UNDER REVIEW: DIFFERENCES

Regarding the different perspectives adopted by the texts mentioned, and while recognizing that some arbitration rules have decided not to regulate these situations[57], it has been rightly pointed out that: "*The LCIA*

University School of Law Working Paper, nº14-53 (October 7, 2014), p.14, who seems, however, to forget that this also requires the cooperation of successive arbitrators).

[54] In favor of considering that arbitrators not only have the power but also the duty to sanction unethical conduct or contrary to the ethics of the lawyer based on the safeguard of the integrity of the arbitration procedure: MADALENA/RIVERA, pp.91-94; and Ignacio MADALENA, Ethics in International Arbitration, Int. A.L.R., 2012, 15(6) pp.251-254, both in general and in particular in the case of the conflict of interest object of this work, also indicating that the powers of the arbitrators would not be extended to lawyers if these are issues that do not have a direct impact on the procedure. There are, however, jurisdictions contrary to the arbitrators being able to decide on the removal of lawyers in cases of conflict of interest between the lawyer and the party, as is the case in the US legal system, see: O. FRANCO PUJOL/O. MUÑOZ ROJO, La remoción del abogado en el arbitraje internacional. ¿Una alternativa viable?. *CIARGlobal*, abril 2018, pp.16-17.

[55] This type of conflict and its reflection in costs is referred to by The *ICC Commission Report, Decisions on costs in International Arbitration*. ICC Dispute Resolution Bulletin 2015, Issue 2, p.16: *"(iii) Post-formation conflicts aimed at destabilizing the tribunal and the arbitration. These result, for example, from counsel appointments late in the proceedings that create a conflict of interest for an arbitrator. The arbitrator in question may be forced to resign, otherwise the enforceability of the award could be jeopardized. The tribunal may take into account any tactic deployed by a party to create such a conflict, and any costs arising out of such conduct"*.

[56] *Flughafen Zürich AG v. Venezuela*, ICSID Case No ARB/10/19, Decision on Proposal for Disqualification of Expert Witness and Exclusion of Evidence, 29 August 2012. The arbitral tribunal, under the chairmanship of Juan Fernández-Armesto, considered a case where the expert had received confidential information from the plaintiff so that he could present his financial offer of professional services, being that he finally served as the defendant's expert. The Court considered its jurisdiction on the basis of rule 34.1 that empowers the Court to decide on the admissibility of the evidence, and considered that it was not appropriate to exclude the expert because the information was not given confidentially, and the expert acknowledged that there was no read or disposed of it (nº34-38).

[57] FRANCO PUJOL/MUÑOZ ROJO, footnote 83 refer to the Arbitration Rules of The *Hong Kong International Arbitration Centre* (HKIAC) that, although they initially foresaw the power of the arbitral tribunal to exclude a representative, they did not include it in the final text. It also does not appear in the new Regulation of November 1, 2018 that

'approval' and IBA 'exclusion' would normally lead to the same result. However, the LCIA formulation may have the merit of connoting respect for the parties' original position, and certainly sounds less aggressive than disqualification'[58].

They escape, however, from that approach, not being indifferent the orientation of the announced rules, the situations in which the change of law firm occurs, which are not contemplated under the IBA Rules or under other texts that follow its formulation as art.21.1 *Rules of Arbitration of the Bahrain Chamber for Dispute Resolution* (1 October 2017). On the other hand, those situations could be understood within the scope of the LCIA that refers to *any intended change (...) by a party to its legal representatives*. Or under the CCBBP/CEA which refers in general to *any modification in the legal representation*.

However, in this case, neither the formulation of the LCIA[59] nor that of the CCBBP/CEA serve to resolve the conflict of interest when there is a change of law firm for an elementary reason: they follow a preventive model based on authorization, and it is more than evident that the arbitral tribunal has no power to authorize or disallow the professional destiny of the group of lawyers; furthermore, it seems that both the formulation of the LCIA and of the CCBBP/CEA[60] do not give powers to the arbitrators to decide on the expulsion of the lawyer.

In this regard, it is to be noted that the text of the LCIA, as well as the CCBBPP/CEA, avoids referring expressly to the exclusion of the lawyer as one of the measures that could be taken in the case of non-compliance with the ethical rules. Even in the case of the CCBBPP/CEA, it could have been understood differently if this power of the arbitrators had finally been adopted expressly in the CEA Model Arbitration Rules of the same date, since in accordance with article 26.2, it is established that among the powers of the arbitrator are *Adopting measures to maintain the*

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establishes in its articles 13.6 and 13.7 the free election of the representatives, although subject to the principles of a fair and effective conduct of the procedure, as well as the obligation to promptly communicate the change in legal representation once the Arbitral Tribunal has been constituted.

[58] PARK, A Fair Fight, p.24; W.W. PARK, Equality of Arms in Arbitration: Costs and Benefits, in V. Heuzé et al. (eds.), *Mélanges en l'honneur de Pierre Mayer* 663 (LGDJ 2015), p.24. See also: FRANCO PUJOL/MUÑOZ ROJO, p.12.

[59] Nor that of other Regulations as derived from Article 21.2 of the *Rules of Arbitration of the Bahrain Chamber for Dispute Resolution* (1 October 2017).

[60] Later the Code refers to possible penalties without specifically mentioning the possible removal of the lawyer:*132 If a lawyer breaches any of the duties described in this Section, then the arbitrators, after hearing both parties and the lawyer concerned, may adopt any of the following measures:*
a) Caution the lawyer verbally or in writing;
b) Draw adverse inferences when evaluating the evidence;
c) Take the lawyer's conduct into consideration when awarding costs;
d) Notify the matter to any Bar Associations with which the lawyer is registered, for the determination of ethical responsibilities; and
e) Adopt any other measure in order to preserve the integrity of the proceedings.

integrity of the proceeding, including written or verbal cautions to the lawyers, but the last sentence of this rule *or order the change of lawyers or experts* was finally deleted in the final draft

Continuing with the differences, the aforementioned texts adopt different solutions to solve the problem that oscillate between preventive measures (*ex-ante*) (or authorization model) aimed at requesting authorization from the arbitral tribunal to authorize/reject the modification of the legal equipment (example of the LCIA and CCBBPP/CEA), and resolving measures (or sanctioning model) that even pointing out the duty of not creating inappropriate relationships resolves the conflict (*ex-post*) preventing the participation of the representative (example, IBA Guidelines), without prejudice to a mixed criterion[61].

4. CONCLUSIONS

The analysis carried out in this paper leads us to the following conclusions:

(i) A trend in international arbitration has been consolidated by which, under the principles of protection of the integrity of the arbitral procedure and immutability of the arbitral tribunal that has been validly constituted and that of the fair conduct of the procedure, arbitrators have the power to resolve the conflict of interest that arises between the right to an independent arbitrator and the right to choose a lawyer when there is an intention to change the latter. This right of the parties is subject to the duty of not creating inappropriate relationships with the members of the arbitral tribunal.

(ii) The arbitrators, in deciding on the indicated conflict, have the power to decide the removal of the lawyer.

(iii) The differences between the rules of arbitration and other soft law instruments, as they have been analyzed, do not have enough weight or entity to distort the conclusions reached.

(iv) Future regulation of this issue either in line with the arbitration regulations themselves or in an Code of Ethics for Arbitrators or Lawyers should respond broadly to the problem at hand by means of a wording that includes both the situations of incorporation of a new lawyer and the change of the law firm, while accepting a preventive (*ex ante*) and conflict resolution (*ex post*) approach.

[61] In a way, this approach is found in the *Arbitration Rules del Arbitrators' and Mediators' Institute of New Zealand* (2017), Rule 14 on *Party representation*.