SHOULD ARBITRATORS HAVE THE POWER TO DISQUALIFY OR SANCTION ATTORNEYS (NOT PARTIES)? POTENTIAL ADVANTAGES AND PROBLEMS WITH SUCH A POWER*

Abstract

Questions abound in International Arbitration (IA), one of which is whether arbitrators have the powers to disqualify or to sanction attorney-representatives appearing before them in arbitral proceedings. The uncertainty of the response to this question is exacerbated by the lack of a robust structure in IA for the effective regulation and assessment of attorneys' conduct.[1] Consequently, the subject of arbitrators' power to disqualify and sanction attorneys in IA has been a burgeoning conversation in the past few years. Commentators share bifurcated views on whether arbitrators should have the powers to disqualify and to sanction attorneys in IA. While some argue that arbitrators do not have such powers,[2] others argue otherwise. Rogers succinctly captures this dilemma by noting that jurisdictional and doctrinal questions abound as to whether arbitrators have the powers to sanction or regulate attorneys.[3] Hence, the issue of arbitrators' powers to disqualify and to sanction attorneys in IA is the crux of this paper. In confronting this issue, this paper will answer the polarised question of whether arbitrators should have the powers to disqualify or to sanction attorneys in IA. The attempt to answer this question is important in view of the current uncertainty concerning the existence and extent of the use of the power. In answering the question, this paper will be divided into three main sections. Section one introduces the subject and argues that arbitrators should have the power to disqualify and to sanction attorneys. It also analyses the possible sources of the power. In demonstrating the advantages of arbitrators having this power, section two argues among others that it would prevent the sanctioning of innocent parties for their attorneys' misconduct. It further evaluates the potential problems with such powers. Among others, it argues that arbitrators may choose to use this power partially or arbitrarily against unpopular attorneys. This paper concludes by suggesting that pending the promulgation of a transnational ethical regulation in IA, various arbitral institutions should amend and embed these powers in their rules.

Keywords: Arbitrators, Power to Disqualify Attorneys, Advantages, Problems, Parties

1. Introduction

Although some states place restrictions on who can represent parties in arbitrations conducted within their jurisdictions. However, IA forums give the parties the liberty to either represent themselves or choose representatives as they deem fit. The chosen representative could either be a local or foreign attorney or perhaps someone that is not a qualified attorney.[4] In acknowledging the use of party representatives, the International Bar Association Guidelines (The Guidelines) for instance, states that such a person may appear, make submissions and arguments on behalf of a party in arbitral proceeding.[5] As a result, (coupled with globalization), parties in IA tend to appoint attorney representatives from different states, who are subject to varying and potentially conflicting rules and norms.[6] An illustration of a varying practice is the English system which recognises that barristers from same chamber can represent opposing parties in same cases; thereby permitting a member of an arbitral tribunal to arbitrate in the same proceeding with an attorney-representative from the same chamber with such arbitrator. The rationale is that both attorneys are independent practitioners and not partners, albeit being in the same chambers.[7] This may warrant an opposing

***By Loveth C. OKOCHA, LLM (Queen Mary University of London), BL (Nigerian Law School), LLB (Nnamdi Azikiwe University, Awka)**

[1] Catherine A Rogers, 'Ethics in International Arbitration' (2014) OUP, p 132.

[2] Jarred Pinkston, 'The Case for Arbitral Institutions to Play a Role in Mitigating Unethical Conduct by Party Counsel in International Arbitration' (2017) 32 CJIL 177, p 177 and 191, <https://heinonline.org/HOL/Page?handle=hein.journals/conjil32&collection=journals&id=197&startid=&endid=236> accessed 8 July 2021 (Pinkston suggested that Catherine Rogers is the leading advocate).

[3] Rogers (n 1) p 135.

[4] Kluwer Arbitration, '16. Commentary on the ICDR International Rules, Article 16 [Party Representation]', in Martin F. Gusy and James Milton Hosking, A Guide to the ICDR International Arbitration Rules, 2nd edition (2019) OUP, 173–175, <https://www.kluwerarbitration.com/document/kli-ka-gusy-2020-ch16?q=right%20to%20party%20representation> accessed 9 August 2021.

[5] IBA Guidelines on Party Representation in International Arbitration, 2013, Guideline 4; a similar provision is contained in Article 16 of the ICDR IA Rules, 2014.

[6] Catherine R. Rogers, 'The Ethics of Advocacy in international Arbitration', (2010) Penn Studies Legal Research Paper, p 1, <https://ssrn.com/abstract=1559012> accessed 15 August 2021.

[7] Michael Hwang, 'Arbitrators and Barristers in the Same Chambers - An Unsuccessful Challenge' (2005) 6 Bus L Int'l, 235, p 236,

non-English party to seek for the disqualification of the party-representative by the tribunal on the ground of conflicts of interest between the attorney and the arbitrator.[8] The question then is whether arbitrators have such powers in IA. According to Rogers, though the view is shifting now, the prevailing view was that arbitrators have no powers to sanction or directly regulate attorneys that appear before them.[9] Just like different standards on conflicts of interests between attorneys and arbitrators, the differing standards of attorney conduct can also cause disruptions in arbitral proceedings. Moreover, in some cases, attorneys exploit the autonomous nature of IA to act unscrupulously resulting in disruption of proceedings. Hence the question of whether arbitrators should have the power to sanction such attorneys. While some argue that arbitrators should ignore such attorneys and proceed with the proceedings,[10] others suggest that arbitrators may sanction unscrupulous attorneys. Consequently, IA is faced with reoccurring issues like, what ethical rules should apply to dictate the practitioners conduct;[11] how to match the ethical rules to the attorneys' role in that context.[12] And whether arbitrators should have the powers to assess attorneys conducts and discipline attorneys for misconducts etc.[13] While this paper will not attempt to answer all these questions, which the IA is still groping to find answers to,[14] it will attempt to answer the question of whether arbitrators should have the powers to disqualify or sanction attorneys in IA in the paragraphs that follow.

2. Should Arbitrators have the powers to disqualify and sanction attorneys?

At a descriptive level, the reason arbitrators were urged to disqualify attorneys in IA was based on conflicts of interest between attorneys and a member of the tribunal.[15] However, as Rogers and Wiker rightly observe, the issue of conflicts of interest between attorneys and parties is now contemplated in applications for disqualification.[16] In contrast, conducts of attorneys necessitating arbitrators' sanctions relate to ethical conducts arising from the examination of witnesses, argument of cases and tendering of evidence etc.[17] Given that the foregoing reasons/conducts impact on the arbitral process and the just determination of the disputes, this paper argues that arbitrators should have the powers to address them. Therefore, arbitrators should have the powers to disqualify and sanction attorneys in IA. As would be demonstrated, the importance of this power cannot be overemphasised. Sakr observes and rightly so, that arbitrators have no other choice than determine applications for disqualification of attorneys.[18]

3. Sources of the Power

In any debate relating to powers of arbitrators to disqualify and sanction attorneys however contentious, one question is common; from where can arbitrators derive such powers. Presently, it appears that most arbitrators operating under various institutional rules lack a direct source of power to assess and address attorneys' ethical conducts. Only the Guidelines and the London Court of International Arbitration Rules 2020 (LCIA Rules) give express powers to arbitral tribunals to disqualify and sanction attorneys respectively. Unfortunately, the Guidelines are not binding rules and only apply when adopted by the parties and the

<https://heinonline.org/HOL/Page?handle=hein.journals/blawintnl2005&collection=journals&id=239&startid=&endid=261> 5 August 2021.

[8] Nigel Tozzi, 'Challenges to Counsel in International Arbitration' (2011) 43 B L J 11, p 11, 13, 15, <https://heinonline.org/HOL/Page?handle=hein.journals/braclj43&collection=journals&id=17&startid=&endid=30> accessed 4 August 2021.

[9] Rogers (n 1) p 104.

[10] Pinkston (n 2) p 177, 191.

[11] Matthew T Nagel, 'Double Deontology and the CCBE: Harmonizing the Double Trouble in Europe' (2007) WUGSLR v 6:455, Issue 2, p 456, <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1143&context=law_globalstudies> accessed 10 August 2021.

[12] Catherine A Rogers, 'Lawyers without Borders' (2009) 30 U Pa J Int'l L 1035, p 1076, <https://heinonline.org/HOL/Page?handle=hein.journals/upjiel30&collection=journals&id=1059&startid=&endid=1110> accessed 14 August 2021.

[13] Catherine A Rogers and Alexander Wiker, 'Fraport v. Philippines, ICSID, and Counsel Disqualification: The Power and the Praxis' (2014) 15 JWIT 716, p 717, <https://heinonline.org/HOL/Page?handle=hein.journals/jworldit15&collection=journals&id=720&startid=&endid=729> accessed 10 August 2021.

[14] Tozzi (n 8) p 11.

[15] Guidelines 5 and 6.

[16] Rogers and Wiker (n 12) p 717.

[17] Rogers and Wiker (n 12)

[18] Marwan M Sakr and Jennifer Keyrouz, 'Disqualifying Counsel for Conflict of Interest in International Arbitration: Tribunals' Powers and Limits' (2015) Arbitragem CBAr & IOB; Kluwer Law International, V. XII Issue46, pp 67 – 81, p 67, <https://www.kluwerarbitration.com/document/kli-ka-rba-1246006-n?q=Disqualifying%20Counsel%20for%20Conflict%20of%20Interest%20in%20International%20Arbitration%3A%20Tribunals%27%20Powers%20and%20Limits&publicationtype=journal> accessed 2 August 2021.

tribunal, whereas the LCIA Rules applies only to proceedings before the LCIA tribunals. Moreover, the LCIA Rules is silent on the issue of disqualification of attorneys.[19] The general principles and sources of arbitrators' powers to disqualify or sanction attorneys are examined below.

IBA Guidelines

The Guidelines permits arbitral tribunals to exclude new party-representative from proceedings where the tribunal finds that it has the authority to do so.[20] This provision is an attempt to resolve issues relating to conflict of interest that may result from the appointment of a party-representative after the tribunal has been constituted.[21] In cases where the Guidelines are adopted, this provision recognises the need for tribunals to exercise such powers to protect the integrity of the proceedings. Some commentators have criticised this provision by arguing that the comment requiring the tribunal to determine if it has the authority to exercise such powers suggests that tribunals have no such powers.[22] This essay argues otherwise. Granted that the wordings of the Guidelines can be better framed to give clarity, if nothing, the recognition of the need for arbitrators to exercise this power represents the guide towards harmonization and elimination of the uncertainty in this area. According to Datilo, 'the Guidelines attempts to address the issues that arise when parties are governed by conflicting ethical norms and note that a means to sanction counsel for ethical misconduct is needed'.[23] Comparably, Rogers observes that the obvious source of enforcement of the Guidelines is the arbitral tribunals, because they are charged with the responsibility of controlling the proceedings before them.

LCIA Rules

Likewise, the LCIA Rules gives LCIA tribunals the power to determine whether any of the LCIA Guidelines have been violated by party-representatives and to sanction attorneys for violations of the LCIA Guidelines.[24] Where the tribunal establishes an issue of misconduct, it may issue orders like a written reprimand, a written caution as to future conduct in the arbitration, and any other measure necessary to fulfil within the arbitration the general duties required of the tribunal under the Rules. In effect, the Rules clearly empower LCIA arbitrators to sanction attorneys for misconducts alleged during proceedings. It may be argued that the legitimacy of this power is because the LCIA Rules is binding on the representatives as part of each party's agreement to arbitrate at the LCIA.[25]

Immutability of a tribunal and Inherent powers

Arbitrators may derive their powers to assess attorneys' conducts from their inherent powers as arbitral tribunals in the absence of express provisions. To maintain autonomy of its proceedings and avoid external interference, international courts and tribunals are clothed with immutability and inherent powers, whether embedded expressly or not in the rules. An inherent power could be said to be powers derived from an office, position, or status.[26] On this note, the International Law Association Report (ILA Report) acknowledges the general understanding that arbitrators in IA cases have some measure of inherent and implied powers in addition to their expressly enumerated and defined powers.[27] A perfect illustration is the provision of the ICSID Convention and procedural powers granted under Article 44 of the Convention relating to the immutability of properly constituted tribunals established under Article 56(1).[28] The Convention authorizes a tribunal to decide any question of procedure not expressly dealt with in the Convention, the ICSID Arbitration Rules or any rule agreed by the parties. As posited by Kroll, the concept of inherent powers become relevant only when the arbitral tribunal wants to rely on powers that are neither expressly granted

[19] Vincent S Dattilo, 'Ethics in International Arbitration: A Critical Examination of the LCIA General Guidelines for the Parties' Legal Representatives' (2016) 44 GJICL 637, p 646, https://heinonline.org/HOL/Page?handle=hein.journals/gjicl44&collection=journals&id=651&startid=&endid=678

[20] Guidelines 6.

[21] Guidelines 5.

[22] Felix Dasser, 'A Critical Analysis of the IBA Guidelines on Party Representation' (2015) in 'Sense and non-Sense of Guidelines, Rules and other Para-Regulatory Texts in International Arbitration' Daniel Favalli, ASA Special Series, No 13. p 39.

[23] Dattilo (n 19) p 646.

[24] Article 18.6.

[25] Dattilo (n 19) p 646.

[26] Black's Law Dictionary (abridged 7th edn, 2000) 953.

[27] Committee on International and Commercial Arbitration, 'Report of the Biennial Conference in Washington D.C' (2014) note 1, p 2.

[28] ICSID Rules of Procedure for Arbitration Proceedings (2006).

to it nor can be derived through interpretation of general empowerments.[29] For instance, the cases of Hrvatska Elektropriveda d.d. v Republic of Slovenia[30] (Hrvatska) and Rompetrol Group N. V. v Romania[31] (Rompetrol)) recognised and illustrated when this power can be exercised by arbitrators. The International Centre for Settlement of Investment Disputes (ICSID relied on the immutability and inherent jurisdiction of tribunals to decide on the issue of disqualification of attorneys in these cases.[32] Hrvatska and Rompetrol involved conflicts of interest between the party-representatives and a member of the tribunal. The parties requested the tribunal to disqualify the attorneys respectively. While the tribunal granted the application in Hrvatska, the tribunal in Rompetrol refused to grant the application. In both cases however, the tribunals acknowledged that they had inherent powers to disqualify attorneys, though in Rompetrol, it explained those powers only with some doubts and subject to some qualifications. In Hrvatska, the Tribunal stated that international courts have an 'inherent power' existing independently of any statutory reference to deal with any issues necessary for the conduct of matters falling within its jurisdiction.[33] As rightly noted by Tozzi, regardless of the court's view in Rompetrol, there is no doubt that a tribunal must have some inherent power to control a party's representation in proceeding before it.[34] Moreso, the combined effect of the courts' views in the decisions above, the provision of the IBA Guideline and LCIA Rules demonstrates that arbitrators may disqualify and sanction attorneys in IA. On this note, Dattilo suggests that though the IBA Guideline cover more issues relating to attorney conduct than the LCIA Rules. Both reflect a similar premise that there should be some form of sanctioning to deter attorney misconducts in IA where there may be ethically ambiguous standards for conducts.[35]

4. Advantages of the Power

This section will use three reasons to demonstrate why it is advantageous for arbitrators to have the powers to disqualify and sanction attorneys in IA.

Prevents arbitrators from punishing parties for attorneys' misconduct

Granting arbitrators express powers to disqualify or sanction attorneys will allow them the discretion to address unethical issues of attorneys without punishing innocent parties. In times past, some arbitrators have sanctioned parties for the misconduct of their attorneys where arbitrators need to address reprehensible conducts of attorneys but reason that they lack the powers to do so. This approach is unfair on the innocent parties and insufficient to address the problem.[36] According to Rogers, the greater concern relating to the lack of power by arbitrators to sanction attorneys is that the tribunal may be sanctioning a party for its attorney's misconduct.[37] This was evidenced in *Pope & Talbolt v Government of Canada*.[38] Here the arbitrators found the action of Mr. Appleton's (claimant party-representative) publication of confidential document to the National post highly reprehensible. The tribunal reasoned that the action was either an intentional violation of the Tribunal Procedure Order 1 (confidentiality order) or a reckless disregard of that order. Although the said misconduct was committed by the attorney, regardless, the tribunal ordered the party to pay $10,000 cost to Canada. This essay argues that the punishment on the innocent party could have been avoided if the tribunal had an express power to sanction attorneys' misconduct.[39] On the foregoing issue, Rogers observes that tribunal-imposed sanction for attorneys is beginning to gain popularity. Given that tribunals are becoming frustrated by procedural disruptions resulting from attorney misconduct, while parties are frustrated because of the increase in cost and delay,[40] thereby reinforcing the argument of this essay. Although some commentators argue that it is reasonable to input to parties the consequences of attorneys' misconduct, because attorneys are agents of the parties.[41] This paper argues that punishing parties

[29] Stefan Kroll, 'Inherent and Implied Powers of the Arbitral Tribunals in Connection with Cost-Related Decisions' (2018), JurisNet, p 367, <https://arbitrationlaw.com/library/inherent-and-implied-powers-arbitral-tribunal-%C2%A0connection-cost-related-decisions-chapter-13> accessed 11 August 2021.
[30] ICSID Case No. ARBl05124.
[31] ICSID Case No. ARB/06/3.
[32] Article 44 and 56(1) of the ICSID Convention.
[33] HEP v. Slovenia, supra note 1, para. 33.
[34] Tozzi (n 8) p 22.
[35] Dattilo (n 19) p 652.
[36] Pinkston (n 2) p 190.
[37] Rogers (n 1) p 136.
[38] <https://www.italaw.com/sites/default/files/case-documents/ita0677.pdf> accessed 11 August 2021.
[39] Guideline 26 (6) of the IBA Guidelines suggests that the tribunal should take attorneys conduct into account when ordering cost against parties.
[40] Rogers (n 1) p 137.
[41] Rogers (n 1) p 263.

for the ethical conduct of attorneys violates the principle of fundamental fairness.[42] According to McMullan, punishing parties for the misconduct of attorneys is a breach of natural justice. Apart from punishing parties for an indiscretion that they did not cause, he argues that parties lack the opportunity to make arguments on the matter.[43]

Effective regulation of attorneys

Additionally, the exercise of the power to disqualify and sanction attorneys by arbitrators will help in the effective regulation of attorneys. Rogers and Wiker capture this clearly in positing that the decision in Fraport and other related cases signify the foundations on which the infrastructure for more effective attorney regulation will be built.[44] Because arbitrators have a first-hand experience of the conducts of attorneys that call for assessment, they should have the powers to assess and sanction attorneys in the context of the misconduct. As posited by Rogers, any adjudicatory tribunal must be able to sanction and control the behaviours of attorneys that appear in their proceedings. The ability to apply rules suggests the ability to develop and refine their content.[45] According to Pinkston, arbitrators are the enforcement mechanism in mitigating ethical conduct by attorneys.[46] Notwithstanding, this paper does not suggest that the power of arbitrators to sanction attorneys should constrains the authority of national regulating authorities from assessing or sanctioning attorneys' conduct in IA.[47] Rather, this paper suggests that arbitrators should have the primary power to sanction attorneys alongside other licencing authorities. Given that arbitrators play significant roles in the arbitral proceedings,[48] they are better equipped to address issues of misconduct requiring disqualification or sanctioning.[49] In advocating generally for self-regulation of IA, Rogers rightly observes that national courts provide minimal backstop to regulation rather than providing primary regulatory function.[50] In view of the multifaceted nature of IA, Rogers argues that IA specialists are best suited to develop and produce enforceable outcomes as opposed to the states who cannot replicate such expertise.[51] As suggested, national rules can never provide an adequate substitute for tribunal-specific rules in IA.[52] Similarly, to be effective, the enforcement of tribunal-specific rules in IA would simultaneously require that arbitrators should have the power of enforcement. Additionally, since the move to develop international ethical standards in IA is budding, the importance of clothing arbitrators with the powers to address attorneys' conduct becomes essential. As rightly argued by Rogers, national bar authorities would find it difficult to understand, interpret and apply such unfamiliar ethical obligations developed for IA.[53] As an illustration, it would not be feasible for a UK bar disciplinary committee to sanction or disqualify an attorney on conflicts of interest because they both practice in same chamber. Since this conduct does not violate the attorney's professional rules, apart from arbitrators, the state regulatory authority cannot be relied on to assess and address this sort of conduct in IA.[54]

Protects the Integrity of the proceedings and legitimacy of IA

Arbitrators should have the power to disqualify or sanction attorneys whose continuous representation or conducts threaten the integrity of the arbitral proceedings.[55] Apart from protecting the integrity of the proceedings, arbitrators have a stake in the integrity of the arbitral process. Hence, they should be empowered to control the process from unscrupulous attorneys.[56] As reasoned by Rogers, arbitrators gain reputation

[42] Pinkston (n 2) p 190,

[43] Sam McMullan, 'Holding Counsel to Account in International Arbitration' (2011) 24 LJIL 491, 492, <https://heinonline.org/HOL/Page?handle=hein.journals/lejint24&collection=journals&id=511&startid=&endid=532> accessed 13 July 2021.

[44] Rogers and Wiker (n 13) p 717.

[45] Rogers (n 12) p 1085.

[46] Pinkston (n 2) p 189.

[47] Rogers (n 1) p 270.

[48] Rogers (n 12) p 1040.

[49] Catherine Rogers, 'Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration' (2003) 39 SJIL 1, p 1-2, <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1237&context=fac_works> accessed 17 July 2021.

[50] Rogers (n 1) p 223.

[51] Rogers (n 1) p 239.

[52] Rogers (n 12) p 1040.

[53] Rogers (n 1) p 259; Rogers (n 12) p 1080.

[54] Stephan Wilske, 'Sanctions against Counsel in International Arbitration - Possible, Desirable or Conceptual Confusion' (2015) 8 Contemp Asia Arb J 141, p 152, <https://heinonline.org/HOL/Page?handle=hein.journals/caaj8&collection=journals&id=145&startid=&endid=188> accessed 15 August 2021.

[55] Wilske (n 55) p 167.

[56] Rogers (n 1) p 265.

partly because of their ability to control proceedings, render fair and expedient results. In effect, the reputation of the arbitrator and arbitral process could be impacted adversely where they lack the power to control the proceedings. According to McMullan, the aim of due process is to ensure that the facts and issues in dispute are fully canvassed and elaborated. Ethical obligations accruing to arbitrators help achieve this. Obligations, like candour to a tribunal, help in ensuring that the truth is found. An obligation to be free from a conflict of interest also helps, because attorneys who cannot operate independently cannot effectively discharge their duties to the tribunal.[57] Comparably, Rogers posits that, to resolve important international and transnational legal issues, the arbitral tribunals' power should be supplemented with the power to control and regulate attorneys that participate in those proceedings.[58] Additionally, it is important for arbitrators to have the power to assess attorneys' conducts to avoid undermining due process that may impact on the validity of an award and the perceived legitimacy of IA.[59] According to Pinkston, the duty of ensuring that awards prove enforceable is that of arbitrators and they should be able to protect the integrity of the arbitral award by taking actions to address ethical conducts that arise.[60] Similarly, Rogers argue that it is necessary to develop ethical norms that is backed up by meaningful enforcement (enforcement by arbitrators in this case) to prevent ethical controversies that may result in external efforts at the state level to control attorney conducts in IA, thereby suggesting that lack of enforcement powers from arbitrators could threaten the independence and perceived legitimacy of IA.[61]

5. Potential Problems of Such Powers

One potential problem that may result from arbitrators having the power to sanction attorneys is that they may be partial in exercising it, choosing only to exercise it against unpopular attorneys. In the hope of maintaining goodwill, they would rather not exercise such powers against popular firms or the parties that appointed them.[62] Given that arbitrators are selected through the recommendations of law firms to the clients. Arbitrators would prefer to stay on the good books of big firms so that they can be recommended and nominated by the attorneys in future arbitration cases. According to Rogers, there is the risk that arbitrators may be reluctant to sanction attorneys whom they hope to secure future appointments from.[63] According to her, arbitrators may be more open to sanction smaller firms rather than big players from leading firms. Another mega argument put forward by critiques is that empowering arbitrators to disqualify attorneys would interfere with the party's right to be represented by their counsel of choice,[64] and a breach of the mandate (to resolve disputes) between the arbitrators and the parties.[65] Which may result in the setting aside of an award in line with Articles 34(2)(a)(ii) and 36(1)(a)(ii) of Model Law; Article V(1)(b) of the New York Convention.[66] According to Wilske, there is a strong sentiment that sanctioning attorneys is a task that is strictly against the mission of an arbitral tribunal.[67] In place of sanction, they suggest arbitrators should instead not attach probative value to the evidence submitted by attorneys[68] or even impose cost on parties. Alternatively, attorneys whose conducts amount to a violation of an applicable criminal law or deontological ethical rules should be dealt with by a prosecutor or supervisory authority of the relevant bar respectively.[69] This paper argues that although the potential problems identified above could result when arbitrators are empowered to disqualify or sanction attorneys, they are not persuasive enough to make the powers undesirable. For instance, similar to a parties' right of representation by their counsel of choice, is a tribunal's duty to conduct proceedings effectively. Moreso, a breach of due process could also result to a breach of public policy.[70] Therefore, in considering the parties right of representation, tribunals are also obligated to ensure that unregulated procedures and those essential for the conduct of the proceedings are complied with.

[57] McMullan (n 43) p 497.
[58] Rogers (n 1) p 259; Rogers (n 12) p 1085.
[58] Rogers (n 1) p 265.
[59] McMullan (n 43) p 495.
[60] Pinkston (n 2) p 189.
[61] Rogers (n 1) p 138.
[62] Pinkston (n 2) p 177.
[63] Rogers (n 1) p 266.
[64] Marcin Olechowski, 'The IBA Guidelines on Party Representation in International Arbitration - A Case of Paving Hell with Good Intentions?' (2016) 10 Rom Arb J 58, p 66, <https://heinonline.org/HOL/Page?handle=hein.journals/romabj10&collection=journals&id=66&startid=&endid=75> accessed 13 August 2021.
[65] Dasser (n 22) p 39.
[66] Olechowski (n 65) p 66.
[67] Wilske (n 55) p 156.
[68] Dasser (n 22) p 40.
[69] Dasser (n 22) p 40.
[70] McMullan (n 43) p 497.

6. Conclusion

With the increase of the use of IA and the participation of lawyers who are obligated to varying ethical rules and norms, arbitrators should be empowered to assess and sanction attorneys' conduct to ensure full-functioning attorney regulation.[71] Consequently, this paper argued that arbitrators should have the powers to disqualify and to sanction attorneys in IA and analysed the advantages of the powers. This paper further analysed the potential problems of such powers. In concluding, this paper suggests that pending the promulgation of a transnational ethical regulation in IA, various arbitral institutions should amend and embed this power in their rules. Thereby expressly empowering arbitrators to disqualify and sanction attorneys when necessary. For instance, the LCIA Rules requiring parties to ensure that their representative has agreed to comply with the general guideline in the LCIA Rules[72] illustrates how the rule can be implemented by institutions. This will make the powers of disqualification and sanctioning of attorneys by arbitrators express. Rather than letting them go on a wild guess, as in the Hrvatska and Rompetrol cases where the use of inherent power to disqualify had to be discussed before being used.[73] In the interim, it is submitted that arbitrators have no other choice than determine these matters based on 'soft law' instruments and other professional guidelines which remain the widely accepted international standards in the industry.[74]

[71] Rogers (n 1) p 271.
[72] Rule 18 (2) (5).
[73] Dattilo (n 19) p 652.
[74] Sakr and Keyrouz (18) p 68.