

5-1-2013

Stop! In the Name of Ethics, Before You Break My Bank Account: The "Conflicting" Rights Guaranteed to Parties in International Arbitration by *Hrvatska v. Slovenia* and *Rompetrol v. Romania*, and Their Potential as Tactical Weapons

Misbah Farid

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [International Law Commons](#)

Recommended Citation

Misbah Farid, *Stop! In the Name of Ethics, Before You Break My Bank Account: The "Conflicting" Rights Guaranteed to Parties in International Arbitration by Hrvatska v. Slovenia and Rompetrol v. Romania, and Their Potential as Tactical Weapons*, 20 U. Miami Int'l & Comp. L. Rev. 163 (2013)
Available at: <https://repository.law.miami.edu/umiclr/vol20/iss2/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

STOP! IN THE NAME OF ETHICS, BEFORE YOU BREAK MY BANK
ACCOUNT: THE “CONFLICTING” RIGHTS GUARANTEED TO
PARTIES IN INTERNATIONAL ARBITRATION BY
HRVATSKA V. SLOVENIA AND *ROMPETROL V. ROMANIA*,
AND THEIR POTENTIAL AS TACTICAL WEAPONS

Misbah Farid

ABSTRACT

International arbitration offers many rights, such as the right to counsel of choice and the right to an independent and impartial arbitration panel and proceeding. However, these guarantees, while they ensure the rights of parties and allow international arbitration to be a viable dispute resolution forum, can also be used as weapons. The viability of these rights as weapons is what reconciles the seemingly conflicting cases of *Hrvatska v. Slovenia* and *Rompetrol v. Romania*. *Hrvatska* sets forth an arbitration tribunal’s inherent right to ensure and regulate the proceedings so as to guarantee the rights offered by international arbitration, while *Rompetrol* limits the arbitration tribunal’s inherent powers to ensure and guarantee these rights. This article seeks to argue that, while the limitation of the rights in *Hrvatska* by the *Rompetrol* Tribunal is an implicit recognition of the viability of those rights as weapons and, in turn, a need for an international code of ethics, such a pursuit may prove fruitless.

TABLE OF CONTENTS

I.	INTRODUCTION AND SCOPE	165
II.	THE HISTORY OF INTERNATIONAL ARBITRATION.....	165
	A. THE ADVANTAGES OF INTERNATIONAL ARBITRATION.....	166
	B. THE DISADVANTAGES OF INTERNATIONAL ARBITRATION.....	167
III.	INTERNATIONAL COMMERCIAL ARBITRATION: A VIABLE DISPUTE RESOLUTION FORUM BECAUSE OF THE RIGHTS IT GUARANTEES...	167
	A. FIRST IN TIME: AN ANALYSIS OF THE RIGHTS GUARANTEED BY INTERNATIONAL ARBITRATION	168
IV.	CASE ANALYSIS: GUARANTEEING RIGHTS IN INTERNATIONAL COMMERCIAL ARBITRATION, ONE DISPUTE AT A TIME.....	168
	A. HRVATSKA V. SLOVENIA: WHEN CHAMBERMEN GO WRONG..	169
	B. ROMPETROL V. ROMANIA: WHEN A LITIGATION TACTIC GOES WRONG.....	172
V.	THE RIGHTS GUARANTEED TO PARTIES IN AN INTERNATIONAL ARBITRATION: RIGHTS IN THE RIGHT HANDS, WEAPONS IN THE WRONG HANDS	177
	A. RECONCILING SEEMINGLY CONFLICTING RIGHTS: INHERENT LIMITS	177
	B. RECONCILING SEEMINGLY CONFLICTING CASES: SETTING LIMITS ON RIGHTS.....	179
VI.	THE NEED FOR A BINDING ETHICAL GUIDELINE	180
	A. ATTEMPTS AT ETHICAL GUIDELINES	181
	1. THE APPLICATION OF THE INTERNATIONAL BAR ASSOCIATION'S ETHICAL GUIDELINES TO <i>HVRATSKA</i> AND <i>ROMPETROL</i>	181
	B. THE NECESSITY FOR A BINDING BODY OF LAW CONCERNING ETHICS	182
	C. ALLOWING A CHALLENGE UNDER AN ETHICAL GUIDELINE MAY ACTUALLY BE A DOUBLE-EDGED SWORD: WITH THE GRANT OF A RIGHT COMES THE AVAILABILITY OF A NEW TOOL.....	182
	D. ATTEMPTS AT ETHICAL GUIDELINES: STOP, IN THE NAME OF ETHICS, BEFORE LAWYERS BREAK A CLIENT'S BANK ACCOUNT... OR, AT LEAST STOP IN THE NAME OF CYNICISM.....	183
VII.	CONCLUSION.....	187

I. INTRODUCTION AND SCOPE

“International arbitration dwells in an ethical no-man’s land.”¹ This is how Doak Bishop started his Keynote Speech to the International Council for International Arbitration on the need for an international ethics code.² By reminding the audience of the questionable extraterritorial effect of national ethical codes, the non-existence of a supra-national authority to oversee attorney conduct, and the lack of established ethical norms in international arbitration, Bishop laid the foundation for his thesis on why there should be ethical regulations.³

This paper seeks to further Doak Bishop’s argument, and expand upon and analyze a later scholarly article by Jeff Waincymer, by warning of the double-edged sword nature of both the rights and limits to a party’s choice of legal counsel in an international tribunal. Instead of strictly citing to the insufficiency of present codes as a reason for the establishment of an international code of ethics, this paper will seek to highlight the ramifications of the rights and limitations that were recently solidified by *Hrvatska v. Slovenia*⁴ and *Rompetrol v. Romania*, and then will seek to query the fruitfulness of a binding international code of ethics.⁵

II. THE HISTORY OF INTERNATIONAL ARBITRATION

In arbitration, a dispute is submitted to the decision or award of an impartial third party for a binding settlement.⁶ While one may think that arbitration came about as a reaction to judicial settlement,

¹ Doak Bishop, Keynote Speech at the International Council for Commercial Arbitration: Ethics in International Arbitration at 1 (Jun. 11, 2010) (transcript available at http://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf).

² *Id.*

³ *Id.*

⁴ *Hrvatska Elektroprivreda v. Republic of Slovenia*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ 201 (2009).

⁵ *The Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ 232 (2009).

⁶ History of the International Court of Justice, International Court of Justice, available at <http://www.icj-cij.org/court/index.php?p1=1&p2=1>.

arbitration actually preceded judicial settlement in history.⁷ Examples of it are found in ancient Greece and China, medieval Europe, and in Papal practice.⁸ The modern history of international arbitration dates to the Jay Treaty of 1794 between the United States of America and Great Britain, which created mixed commissions as a dispute resolution mechanism.⁹ These commissions have slowly grown into what today is the field of arbitration.¹⁰

A. The Advantages of International Arbitration

International arbitration offers many advantages to parties seeking to resolve their disputes in an alternative dispute resolution forum.¹¹ Parties can avoid the uncertainty associated with national courts while tailoring arbitral procedures to the individual case.¹² A “neutral” forum may then furnish a binding decision, which will be enforceable in most states.¹³ The primary instrument governing the enforcement of commercial international arbitration awards is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”), which was drafted under the auspices of the United Nations.¹⁴ An international award originating in a signatory state will be enforced by any other signatory state.¹⁵ This Convention has over 120, or most, member states as signatories.¹⁶ An international award therefore has substantially greater force than an award from a domestic court.¹⁷

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*; see also Carla S. Copeland, *The Use of Arbitration To Settle Territorial Disputes*, 67 FORDHAM L. REV. 3073 (1999).

¹¹ See Kathryn Helne Nickerson, *International Arbitration*, March 2005. Available at <http://www.osec.doc.gov/ogc/occic/arb-98.html>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Kathryn Helne Nickerson, *supra* note 11.

¹⁷ *Id.*

B. The Disadvantages of International Arbitration

The only disadvantage of international arbitration that is relevant for the purposes of this paper is related to the advantages of international arbitration. International arbitration, much like any other viable dispute resolution forum, grants a host of rights to the parties to a dispute. However, shrewd counsel can, and have, utilized those very rights as weapons as against opposing counsel to delay proceedings and undercut what may otherwise have been a winning argument.

III. INTERNATIONAL COMMERCIAL ARBITRATION: A VIABLE DISPUTE RESOLUTION FORUM BECAUSE OF THE RIGHTS IT GUARANTEES

International commercial arbitration, an increasingly common forum to resolve disputes, offers a number of fundamental rights to parties in a dispute.¹⁸ One such fundamental right is the right of a disputant to an adequate opportunity to present its case.¹⁹ That right extends to a party's right to choose counsel of its choice in order to do so.²⁰

A seemingly non-conflicting right also offered to disputants in international commercial arbitration is the right to have one's dispute decided by an arbitration tribunal that is independent and impartial throughout the duration of the arbitration proceedings.²¹ Thus, not only do disputants in international commercial arbitration proceedings have the right to adequately present their cases, they must be guaranteed the right to present their cases to an independent and impartial tribunal.²² In order to ensure that the tribunal is independent and impartial, it has been argued that the tribunal must

¹⁸ *Hrvatska*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ 201 ¶ 15, ¶ 30; Jeff Waincymer, *Reconciling Conflicting Rights in International Arbitration: The Right to Choice of Counsel and the Right to an Independent and Impartial Tribunal*, 26 Arb. Int'l 597, 598 (2010).

¹⁹ *Rompetrol*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ 201 ¶ 21; see also Waincymer, *supra* note 18, at 598.

²⁰ Waincymer, *supra* note 18, at 598.

²¹ *Id.*

²² *Id.*

not only ensure that it is not biased, but also that it does not even give off an appearance of bias.²³

A. First in Time: An Analysis of the Rights Guaranteed by International Arbitration

Typically, parties will first select counsels to represent themselves and then nominate an arbitrator of their own choice to sit on the arbitrator panel.²⁴ This procedure makes it so challenges to arbitrators, and not the initially chosen counsel, are the norm.²⁵ This article, however, will look to cases where a challenge to a party's right to choose its own counsel was more appropriate than a challenge to an already properly constituted, immutable tribunal.²⁶ In these cases, an arbitration panel was already set up when new counsel, who caused either actual or an appearance of bias, were later added. This set-up will allow for a closer analysis of a party's right to counsel while other rights that international arbitration guarantees are kept constant.²⁷ This in no way suggests that a tribunal cannot be challenged if counsel is added later; this analysis is limited to the alternative choice of barring a counsel after an arbitration panel is already properly constituted.

IV. CASE ANALYSIS: GUARANTEEING RIGHTS IN INTERNATIONAL COMMERCIAL ARBITRATION, ONE DISPUTE AT A TIME

Two recently published cases from the International Centre for Settlement of Investment Disputes located in Washington, D.C., specifically address counsel conduct and, implicitly, a party's right to choose its representation.²⁸ Both of these cases were governed by international treaty—The International Centre for Settlement

²³ *Id.*; see also *Hrvatska*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ at 208 ¶ 15.

²⁴ Waincymer, *supra* note 18, at 598.

²⁵ *Id.* at 598–99.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Bishop, *supra* note 1, at 4.

Investment Disputes Convention—and involved the application of international law.²⁹

A. *Hrvatska v. Slovenia: When Chambermen Go Wrong*

In the first case, *Hrvatska v. Slovenia*, the Claimant asked the Tribunal to “recommend to the Respondent that it refrain from using the services of a British barrister who belonged to the same Chambers as the President of the Tribunal.”³⁰ The barrister was added after the case began; his involvement was disclosed only shortly before the final hearing.³¹ While the Tribunal recognized that there was no explicit authority to allow a tribunal to remove a counsel and that there was a fundamental principle that parties may use the lawyers of their choice, the Tribunal went on to say that a party’s right to counsel of its choice was subject to override by the immutability of properly-constituted tribunals.³² The Tribunal went on to find that it had an inherent power to take measures to preserve the integrity of the proceedings. In this instance, a party compromised the integrity of the proceedings by amending its legal team after the constitution of the Tribunal; the Tribunal was permitted to cure the issue. The Tribunal qualified its holding by saying that there was no “hard and fast rule” preventing barristers from the same Chambers as acting as arbitrator and counsel in the same case.³³

It should be noted that the arbitrator and counsel in this case had no personal relationship; their professional relationship strictly flowed from their membership to the same Chambers.³⁴ Furthermore, the arbitrator previously arbitrated numerous arbitrations where one of the parties was represented by counsel from the same chambers, but there was no challenge to his or the Tribunal’s independence or

²⁹ *Id.*

³⁰ *Id.*; see also *Hrvatska*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ at 207 ¶ 10.

³¹ *Id.* at ¶ 21; see also Bishop, *supra* note 1, at 4; Waincymer, *supra* note 18, at 599–600.

³² *Hrvatska*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ at 211 ¶ 25–28; see also Bishop, *supra* note 1, at 5.

³³ *Hrvatska*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ at 212 ¶ 31.

³⁴ *Id.* ¶ 5..

impartiality. Nevertheless, this Tribunal found that the arbitration proceedings could not go on without a change. Pray tell, why?

Important factors in this case which may have had a substantive impact on the Tribunal's decision included the Respondent's refusal to disclose when Respondent had retained its counsel, or the specific role the individual in question was to play on its legal team.³⁵ It was later conceded by the Respondent that it could have made an earlier disclosure about its questionable addition to its legal team.³⁶

Thus, perhaps the Tribunal was pushed over the edge by the Respondent's uncooperative behavior.³⁷ Perhaps it was Respondent's dodgy, secretive behavior aimed at disadvantaging Claimant. Regardless of the underlying factors, the Tribunal in *Hrvatska* chose to remove counsel on the sole basis of a distant, seemingly harmless professional relationship³⁸ with an arbitrator in the face of absolutely no express provision allowing it to do so.³⁹

In making its ruling, the tribunal in *Hrvatska* cited to⁴⁰ the applicable ICSID Rules.⁴¹ Rule 18(1)⁴² requires disclosure of the identity of counsel, which Respondent was in clear violation of.⁴³ But that was not the rule which gave this tribunal the primary substantive support for its finding of an inherent authority to remove

³⁵ Waincymer, *supra* note 18, at 600.

³⁶ *Id.*

³⁷ *Id.*

³⁸ The Tribunal took a close look at the concept of a "Chamber" and what belonging to a Chamber meant. The Tribunal followed the guidance set forth in the IBA Guidelines by likening a membership to the same "chamber" to belonging to the same firm. *Id.* at 601–02.

³⁹ *Id.* at 600.

⁴⁰ While the cases analyzed by this paper were decided under ICSID provisions, the author of this paper assumes the (sometimes inarguable) wide applicability of the ICSID guarantees mentioned here as central to most, if not all, dispute resolution forums.

⁴¹ Waincymer, *supra* note 18, at 600.

⁴² Rule 18(1) of the ICSID provisions is as follows: "Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party." See, *Rules of Procedure for Arbitration Proceedings*, International Centre for Settlement of Investment Disputes, Rule 18.

⁴³ Waincymer, *supra* note 18, at 600.

a counsel who tainted the impartiality or independence of an arbitration proceeding.⁴⁴ Instead, the Tribunal chose to cite to the ever-elusive Rule 19,⁴⁵ common in many arbitration rules, allowing the Tribunal to “make the orders required for the conduct of the proceeding,”⁴⁶ to bolster its claim of a newly founded inherent power.⁴⁷

This rule is the be-all and end-all of procedural arbitration rules. Shrewd counsel can utilize this rule quite quickly to their advantage, coercing the Tribunal into a ruling that it had never been promulgated to make.⁴⁸ However, it would be silly to strictly utilize the “inherent power” of the Tribunal by itself as a weapon when it can be donned whilst being supported by a written, broad, but codified rule that essentially forces a tribunal to ensure the adequacy of a proceeding. Hence, the Tribunal bolstered its ruling by hiding under the cloak of its responsibility to “ensure that the [a]ward is soundly based and not affected by procedural imperfection.”⁴⁹

So what happened to Respondent’s right to counsel of its choice? Here, it was a war between Respondent’s right to counsel of its choice and Claimant’s right to challenge the award, if even the impermissible appearance of partiality existed. The Tribunal knew it could fight Respondent’s right to counsel of its choice with the unfair detriment it would have upon Claimant; Claimant’s right to

⁴⁴ *Id.*

⁴⁵ This rule was used in conjunction with ICSID Arbitration Rule 44, which states, “If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.” International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings, Article 44, Apr. 10, 2006, ICSID/15, available at [http://icsid. Worldbank.org/icsid/staticfiles/basicdoc/CCR_English-final.pdf](http://icsid.Worldbank.org/icsid/staticfiles/basicdoc/CCR_English-final.pdf).

⁴⁶ Rule 19 of the ICSID provisions is as follows: “The Commission shall make the orders required for the conduct of the proceeding.” International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings, Rule 19, Apr. 10, 2006, ICSID/15, available at http://icsid. Worldbank.org/icsid/staticfiles/basicdoc/CCR_English-final.pdf.

⁴⁷ *Hrvatska*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ at 201 ¶ 15.

⁴⁸ Waincymer, *supra* note 18, at 600.

⁴⁹ *Hrvatska*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ at 201 ¶ 15, ¶ 33; *see also* Waincymer, *supra* note 18, at 600.

challenge the award, however, was a weapon that would not be easily trumped.

Thus, by allowing a Tribunal to remove counsel that tainted the proceedings, the Tribunal simultaneously qualified the right of a party to seek representation as it saw fit,⁵⁰ particularly where it would imperil a legitimate tribunal.⁵¹

The Tribunal then went through more analysis to establish why it was permissible, necessary in fact, for an arbitration tribunal to be vested with the inherent authority to remove counsel, as opposed to allowing such challenges to automatically go to another tribunal or commission. The only other option available, which the Tribunal disqualified, would be to allow individual national bodies to regulate professional service providers; such discrepancies between individual national laws would make for greater inconvenience and questionable stability.⁵² Neigh, the Tribunal must be vested with the inherent power to remove counsel where it saw fit. This was the decision put forth by *Hrvatska v. Slovenia*.

B. Rompetrol v. Romania: When a Litigation Tactic Goes Wrong

In *Rompetrol v. Romania*, the Respondent asked the ICSID Tribunal to disqualify the counsel for the Claimant who had, like in *Hrvatska*, been added after the case began.⁵³ Here, however, Claimant's attorney previously practiced at the same law firm as the arbitrator appointed by the Claimant.⁵⁴ Furthermore, unlike *Hrvatska*,

⁵⁰ It should also be considered that this Tribunal opted to remove Counsel because Claimant argued that removal of counsel would eliminate any existing problems. Claimant never argued that the involvement of Respondent's counsel tainted Respondent's case. Perhaps if Claimant argued the latter, the Tribunal would have considered a challenge to the composition of the Tribunal itself, and not simply one party's counsel. Waincymer, *supra* note 18, at 603–04.

⁵¹ *Id.* at 602.

⁵² *Hrvatska*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ at 201 ¶ 2; *see also* Bishop, *supra* note 1, at 4.

⁵³ *The Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ at 232–233 ¶ 1–5 (2009); *see also* Bishop, *supra* note 1, at 5–7.

⁵⁴ *Rompetrol*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ at 233–234 ¶ 4–7.

the Tribunal was reluctant to endorse any notion of a Tribunal’s inherent power to remove counsel.⁵⁵

Despite its reluctance to endorse any notion of a Tribunal’s inherent power to remove counsel, the Tribunal noted that where such a power did exist, it should only be used in rare and compelling circumstances.⁵⁶ This Tribunal’s view of the restricted nature of a Tribunal’s inherent right to remove counsel was as a direct result of the non-existence of any express rule to support its very existence.⁵⁷ This dicta, however, was unnecessary. The Court did not need any of these words to conclude that Claimant’s counsel did not need to be removed. Here, the Tribunal found that Claimant’s counsel’s presence would not cause the arbitrator to be biased and partial because his relationship⁵⁸ with the arbitrator was too far removed.⁵⁹ Thus, it seems the integrity of the proceedings were not sufficiently threatened to warrant an invocation of a Tribunal’s inherent power to remove counsel.⁶⁰

A few interesting facts of this case warrant attention to understand why the Tribunal did not allow for removal in this case, and how this case can be further distinguished from, or reconciled with, *Hravtska*. In *Rompetrol*, Claimant’s counsel retired from practice during the proceeding.⁶¹ The Claimant was thus placed into a compromising position, finding itself in need of new counsel. However, Claimant did not choose its retired counsel’s questionable

⁵⁵ *Id.* at 238–39 ¶ 22.

⁵⁶ *Id.* at 240–41 ¶ 25.

⁵⁷ *Id.* at 236 ¶ 16.

⁵⁸ The issue is specifically whether counsel has an insight into a particular tribunal member’s way of working. It has been argued that this is not the case, but this may be the crux of the issue. Litigation tactics, much like chess moves, are motivated by the desire to get an edge over the opponent party. Getting an insight into the decision maker’s head or thought process would be a highly desirable litigation tactic, indeed. *See id.* at 240 ¶ 24 (“the question is not whether particular counsel have an insight into a particular tribunal member’s way of working or thinking.”).

⁵⁹ Waincymer, *supra* note 18, at 604–06.

⁶⁰ *Rompetrol*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ at 242 ¶ 27.

⁶¹ *Id.* at ¶ 3.

replacement.⁶² The law firm of Claimant's retired counsel, instead, chose the questionable replacement counsel.⁶³

First, it was beyond Claimant's control to have to replace its counsel after the arbitration panel had already been constituted.⁶⁴ Second, Claimant's retired counsel's firm chose the replacement, not Claimant.⁶⁵ That the replacement had a conflict of interest with the arbitrator was beyond the control of Claimant and, in fact, quite incidental.⁶⁶ This was not a case where Claimant had misused its rights as a tool; to the contrary, Claimant was placed in a compromising position through no ill-intention of its own.⁶⁷

While Claimant could have requested another counsel, there was no need for other counsel by the time of the arbitration proceedings. Unlike in *Hrvatska*, the questioned counsel no longer belonged to the same firm as the arbitrator.⁶⁸ Moreover, Claimant here, cooperated with the Tribunal in disclosing the disputed counsel's dealings with the Tribunal member during the time arbitrator and the attorney were at the same firm.

Perhaps it was Claimant's refusal to use its rights as a weapon against opposing counsel that caused this Tribunal's reluctance to further any inherent right to remove Counsel. Perhaps it was this Tribunal's method of recognizing limitations upon rights guaranteed in arbitration. After all, the party who lost in this case had perverted its right to present its case fairly and turn it into a weapon against opposing counsel by challenging counsel's right to be in the case. Perhaps this Tribunal was correct in questioning Respondent's intentions when it made a claim to exercise its rights of challenging counsel.

Another means of distinguishing *Rompetrol* from *Hrvatska* was *Rompetrol's* failure to recognize any codified support for a Tribunal's inherent power to regulate its proceedings. Instead, *Rompetrol* found that the *Hrvatska* Tribunal had "award[ed] itself the

⁶² *Id.* at ¶ 4.

⁶³ *Id.* at ¶ 3–4.

⁶⁴ *Id.*

⁶⁵ *Rompetrol*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ at ¶¶ 3–4.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at ¶ 4.

power by extrapolation.”⁶⁹ The *Rompetrol* Tribunal, instead, chose to emphasize the lack of an express power to remove counsel by saying that “[t]his silence cannot be accidental, and surely derives from the fundamentally different duties inherent in the roles of arbitrator and of counsel.”⁷⁰

However, *Rompetrol* did not entirely dismiss the findings of the *Hrvatska* Tribunal. In making its decision, the *Rompetrol* tribunal noted that *Hrvatska* was not binding.⁷¹ However, the *Rompetrol* Tribunal specifically refused to abrogate the inherent right of a tribunal to remove counsel by stating that if such a right did exist, that it ought to be limited to certain situations that “genuinely touch on the integrity of the arbitral process.” The Tribunal then went on to provide a gauge for what situations would “genuinely touch on the integrity of the arbitral process”. The *Rompetrol* Tribunal suggested one test would consider “whether [a] fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased,”⁷² or, “if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.”⁷³

Another interesting aspect to the *Rompetrol* case was the Tribunal’s note that counsel is not required to be impartial; only an arbitrator bears this requirement.⁷⁴ While this is correct, an arbitrator can fail to maintain the required impartiality because of the

⁶⁹ *Id.* at ¶16.

⁷⁰ *Rompetrol*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ at ¶19.

⁷¹ *Id.* at ¶15.

⁷² This test was originally set forth in the UK House of Lords decision of *Porter v. Magill*. While this case was not binding upon this Tribunal, it is apparent that the Tribunal found it quite persuasive. *Porter v. Magill* [2002] 2 WLR 37, per Lord Hope; see also, general standard 2(c) in the IBA Guidelines ([I]f a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.); Waincymer, *supra* note 18, at 606.

⁷³ IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2(c), 22 May 2004, Council of International Bar Association

⁷⁴ *Rompetrol*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ at 7 ¶19.

relationship between counsel and the tribunal.⁷⁵ Furthermore, Respondent's challenge to Claimant's counsel was in regards to the relationship between counsel and arbitrator, which would be impugned upon the arbitrator; it was not to the Claimant's counsel's impartiality. Perhaps Respondent utilized the wrong tool here; perhaps Respondent should have directly challenged the Arbitrator. But where the panel was already properly constituted, and where such a challenge would likely be unsuccessful, Respondent may have thought twice before facing the alternative of going through a proceeding with an arbitrator that it had unsuccessfully accused of bias.

The Tribunal went on to address the tension between a party's right to counsel of its choice and the right to an independent and impartial tribunal.⁷⁶ The Tribunal immediately dismissed any notion of reconciling the two, noting that if the two came into collision, then the tribunal would have to find a way to bring them into balance and not assign priority over the other.⁷⁷ The Tribunal's note on "the [T]ribunal's duty" to bring rights into balance can, however, be easily utilized to argue that the Tribunal impliedly accepted some inherent or implied power to remove counsel, particularly in light of the Tribunal's confirmation of its inherent power to preserve the integrity and effectiveness of the Tribunal proceedings.⁷⁸

While repeatedly warning that there were no express provisions to allow removal of counsel, the Tribunal nevertheless went on to consider the use and effects of a tribunal's inherent power to remove counsel. *Rompetrol* warned of the difficulty of effectively controlling counsel's involvement, noting how difficult it would be to make sure that the removed counsel did not provide any assistance.⁷⁹

The two cases mentioned may have come out in two different directions, making it seem as if *Rompetrol* invalidated the earlier decision. However, the *Rompetrol* Tribunal was quick to make sure that the decision it set forth would not be utilized as a weapon

⁷⁵ Waincymer, *supra* note 18, at 606.

⁷⁶ *Rompetrol*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ at 9 ¶ 21–22.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at ¶ 24.

against those who wished to cite to *Hrvatska*.⁸⁰ The *Rompetrol* Tribunal dismissed the idea that its decision and reasoning made it seem that the *Hrvatska* Tribunal was inadequate or insufficient.⁸¹ After the *Rompetrol* Tribunal dismissed the idea that it was rejecting the *Hrvatska* Tribunal’s decision, it went on to try to distinguish the two cases by pointing out the secondary role that would be given to the newly appointed counsel, the request that removing counsel would cure all issues, and the late announcement and disclosure of the new appointment of counsel.⁸²

V. THE RIGHTS GUARANTEED TO PARTIES IN AN INTERNATIONAL ARBITRATION: RIGHTS IN THE RIGHT HANDS, WEAPONS IN THE WRONG HANDS

What follows are examples of how shrewd counsel can use the rights mentioned in this article that are guaranteed in international arbitration to its own advantage or, even better, to the detriment of opposing counsel. The themes throughout the following discussion are not necessarily limited to international arbitration as a dispute resolution forum. Instead, they can be applied to any right guaranteed to a party in any dispute.

A. *Reconciling Seemingly Conflicting Rights: Inherent Limits*

One way to reconcile the seemingly irreconcilable rights set forth in this article is to consider which right was exercised first, or to consider the order of events. A related but distinct method of reconciling the rights set forth here would be to prioritize them.⁸³

Some argue that the most direct method to reconciling the irreconcilable rights set forth in this article, without prioritizing one over the other, are to draft an ethical code which will bind all parties

⁸⁰ *Id.* at ¶ 22.

⁸¹ *Rompetrol*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ at 9 ¶ 22.

⁸² *Id.*

⁸³ “If the right to counsel of choice comes from a mandatory rule and the right to exclude counsel only comes from a broad discretion such as is found in Article 19, then the right to choose would naturally appear to dominate.” Waincymer, *supra* note 18, at 614.

in international commercial arbitration. Perhaps through restricting the rights themselves, abusive challenges designed to undermine the arbitration tribunal or the proceedings would be discouraged or prevented.⁸⁴

Thus, a good way to reconcile the conflicted rights set forth in this Article, aside from prioritizing one or the other, is to recognize that each has inherent limits.⁸⁵ No right set forth within this Article ought to be unlimited. Making rights unlimited only gives more room to parties in a dispute to utilize that right as a weapon against opposing counsel.

For example, not only can a party utilize the right to choose counsel of its own choice to possibly taint the impartiality and independence of an already constituted arbitration panel, a party can also choose counsel who may not be available for a number of years.⁸⁶ Citing its right to counsel of its choice, the offending party can easily delay the proceedings by bullying the Tribunal into giving it an adjournment. That adjournment would be argued for on the basis that the party would otherwise not receive a full opportunity to present its case through counsel of its choice.⁸⁷

Examples of the above possibilities can be found in the cases cited within this article. For example, in *Hrvatska v. Slovenia*, the Claimant asked the Tribunal to "...recommend to the Respondent that it refrain from using the services" of a British barrister who belonged to the same Chambers as the President of the Tribunal.⁸⁸ The barrister was added after the case began, and his involvement was only disclosed shortly before the final hearing.⁸⁹ By seeking a Counsel with the same professional involvements as the Presiding Arbitrator of a party's case, that party can easily seek an unfair advantage over its opposing party by infiltrating the arbitration with bias, partiality, and dependence. By utilizing these tactics to gain an

⁸⁴ *Id.* at 610.

⁸⁵ *Id.* at 609.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 AM. REV. OF INT'L ARB. 1-4 (1992); see also Bishop, *supra* note 1, at. 4.

⁸⁹ *Id.*

unfair advantage, however, a party subjects any award rendered by the Tribunal to non-enforcement.⁹⁰

Just as a party can strategically use its right to choose counsel of its choice as a tactic to advantage itself, counsel can use its rights to fairly present its case to delay the proceedings. For example, a party can use its right to counsel of its choice as a tactic to delay the proceedings where counsel of its choice is beyond what is affordable; crafty parties can then request to delay the hearing so it can save up more money to hire the counsel of its choice.⁹¹ Opposing counsel's rights to challenge an award can also be used to delay the enforcement of an award, further prolonging the litigation.

B. Reconciling Seemingly Conflicting Cases: Setting Limits on Rights

Recognizing the danger in an inherent power to remove counsel to cure irregularities to an arbitration tribunal, the Tribunal in *Rompetrol v. Romania* was reluctant to endorse any notion of a Tribunal's inherent power to remove counsel.⁹² It further confirmed its fear of tactical moves by parties in an arbitration by noting that even if such a power did exist, it should only be used in rare and compelling circumstances.⁹³ Hence, the reconcilability of two seemingly irreconcilable cases lies in the dangers of the rights guaranteed within them. Thus, one Tribunal gave a right, and another Tribunal that dealt with very similar fact patterns ruled in the exact opposite manner so as to set forth limits. It seems, in essence, that the Tribunal implicitly acknowledged the argument this article advances: that these rights were weapons that needed to be limited. What has been argued is necessary, however, is not for Tribunals to set forth rights, and then to limit them; instead, an international body ought to come together to formulate a reliable and binding ethical guideline. But is that really case?

⁹⁰ See The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

⁹¹ See *Waincymer*, *supra* note 18, at 609–11.

⁹² *Rompetrol*, ICSID Case No. ARB/06/3, 24 ICSID Review – FILJ at 9–11 ¶ 22–25; see also Bishop, *supra* note 1, at 5–6.

⁹³ *Id.*

VI. THE NEED FOR A BINDING ETHICAL GUIDELINE

In the end, all of these tactical procedures cost money.⁹⁴ Counselor conduct, therefore, also turns on the availability money.⁹⁵ Not only can each counsel use cost to control opposing counsel, but arbitrators also use this weapon to control the conduct of lawyers.⁹⁶ But such a practice of using money to control counselor behavior will target and negatively impact the parties, not counsel.⁹⁷

However, if the rights addressed by this paper are not guaranteed, then there could be significant harm to international arbitration as a viable dispute resolution forum.⁹⁸ If a Tribunal is allowed to remain biased, then either counsel or arbitrator could mistreat confidential information, inadequately prepare witnesses, fail to consult or follow a clients' instructions, and fail to timely respond to orders and directions.⁹⁹ On the other hand, allowing parties to exercise the rights mentioned in this article may give parties an additional tool to engage in disruptive and guerilla tactics. Disallowing parties to exercise these rights, however, would quite possibly have the same exact effect.

As Jan Paulsson has warned, "[i]n cases where counsel come from two different countries where standards are quite inconsistent on a given point, does the client whose lawyer is subject to the lowest standard have an unfair advantage?"¹⁰⁰ Perhaps, despite the tactical advantages it may lend to, there is a need for a codification of ethical standards and limitations on a party's right to choose its counsel in international arbitration proceedings.

⁹⁴ See Bishop, *supra* note 1, at 9; see also Waincymer, *supra* note 18, at 611.

⁹⁵ See Bishop, *supra* note 1, at 9.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Waincymer, *supra* note 18, at 589–99.

⁹⁹ *Id.*

¹⁰⁰ Paulsson, *supra* note 88, at 1–4; see also Bishop, *supra* note 1, at 2.

A. Attempts at Ethical Guidelines

The International Bar Association¹⁰¹ has published Guidelines on Conflicts of Interest in International Arbitration (hereinafter “IBA Guidelines”) that, while non-binding, are widely approved and are influential.¹⁰² The Guidelines includes a list of common situations which are categorized by the level of the severity of the threat they pose to an independent and impartial tribunal.¹⁰³

1. The Application of the International Bar Association’s Ethical Guidelines to *Hrvatska* and *Rompetrol*

The situation in *Hrvatska*, where the arbitrator and counsel for one of the parties were members of the same barristers’ chambers, can be found within the “Orange List.”¹⁰⁴ The Orange List consists of situations that are potentially, but not necessarily, conflicted situations.¹⁰⁵ The situation found in *Rompetrol*, where counsel had previously been employed by an arbitrator’s law firm, is not found anywhere within the IBA Guidelines.¹⁰⁶ While the situation in *Hrvatska* was disallowed, the situation in *Rompetrol* was allowed.¹⁰⁷ This paper in no way dismisses the theory that each tribunal came to its decision while being guided by the IBA Guidelines, even if the cases do not cite to these guidelines as the controlling law or factors to their decisions. Rather, this paper looks beyond the guidance set forth within the IBA Guidelines primarily because they are not binding.¹⁰⁸

¹⁰¹ The International Bar Association was established in 1947 and it consists of more than 45,000 individual lawyers and over 200 bar associations and law societies spanning all continents. http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx.

¹⁰² See generally International Bar Association Guidelines on Conflicts of Interest in International Arbitration, 2004.

¹⁰³ *Id.*

¹⁰⁴ *Hrvatska*, ICSID Case No. ARB/05/24, 24 ICSID Review – FILJ at 201, ¶ 4 (2009).

¹⁰⁵ Waincymer, *supra* note 18, at 599.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

B. The Necessity for a Binding Body of Law Concerning Ethics

The two conflicting cases analyzed in this paper further the need for a governing body to come together and, in a sense, legislate a binding ethical guideline for international arbitration. International dispute resolution forums cannot be governed by two seemingly conflicting cases; allowing these two cases to stand without a governing body subsequently addressing the issues that seem to be in conflict will simply allow parties to use both the rights they are guaranteed in international arbitration and cases as weapons. Between these two cases, each side to a dispute has substantive law to support its cause. What's to help an arbitrator come to a conclusion?¹⁰⁹

Disallowing specified relationships between counsel and an arbitrator in a binding authority would prevent wasted hearing time and prevent the need for a new or truncated tribunal.¹¹⁰ It would also increase the fairness¹¹¹ that ought to be inherent to an arbitration proceeding by allowing parties to a proceeding to easily know what is permissible and what is not permissible.¹¹²

C. Allowing a Challenge under an Ethical Guideline May Actually Be a Double-Edged Sword: With the Grant of a Right Comes the Availability of a New Tool

While this article analyzes conflicting rights guaranteed to parties by looking at previous ICSID cases, and supports the contentions set forth by previous scholarly work regarding the necessity of a binding international code of ethics, there must be something else going on here as to why there is no such thing. The lack of a binding international code of ethics and the lack of an

¹⁰⁹ Doak Bishop & Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, at 4 (Available at http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/ethics/ethics_in_int_arb_-_icca_2010_-_bishop.pdf).

¹¹⁰ See Waincymer, *supra* note 18, at 610.

¹¹¹ See Bishop & Stevens, *supra* note 109, at 15.

¹¹² See Waincymer, *supra* note 18, at 610; see also Bishop & Stevens, *supra* note 109, at 24.

international governing body that reviews improper counselor conduct, must say something beyond simply “we need a change.” The international community has fought with lit torches, preaching the idea of going onward and forward with change, but there must be some reason why change has not occurred. Establishing some sort of governing body, which would apply a binding code of ethics would at the very least, create a number of jobs that would employ the recently unemployed. So, why not?

The “why not” is precisely wherein lies our answer. Certain scholarly works have stuck out as sore thumbs regarding the necessity of change.¹¹³ But upon a closer analysis masked with goggles of cynicism, this article will encourage the reader to ponder what an established and binding code of ethics would do for the world.

*D. Attempts at Ethical Guidelines: Stop, in the Name of Ethics,
Before Lawyers Break a Client’s Bank Account... Or, at Least
Stop in the Name of Cynicism*

The scope of this article has thus far viewed the actions taken in *Rompetrol* and *Hrvatska* as powers and rights. However, these were not simply powers as previous scholarly work would suggest;¹¹⁴ this was either the grant of an additional legal tactic or an international tribunal condoning the existence of a legal tactic such as challenge to counsel, or thereby limiting the tactic. In fact, contrary to previous findings that the reconciliation of these two seemingly conflicting

¹¹³ See, e.g., Waincymer, *supra* note 18; Otto L O de Witt Wijnen, Nathalie Voser & Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration* 5 BUS. L. INT’L 433 (2004); Catherine A Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration* 23 MICH. J. INT’L L. 341 (2002); Gary Born, *A Code of Conduct for Counsel in International Arbitration*, Kluwer Arbitration Blog (Apr. 19, 2013 3:49 P.M.), <http://kluwerarbitrationblog.com/blog/2010/11/16/a-code-of-conduct-for-counsel-in-international-arbitration/>.

¹¹⁴ See Waincymer, *supra* note 18, at 605 (“The *Rompetrol* tribunal first considered whether there is an inherent or implied power to control party representation; then analyzed the scope and extent of that power; and then considered whether the particular circumstances necessitated the exercise of such a power, were it to exist.”).

cases was based upon balancing conflicting issues,¹¹⁵ the reconciliation may lie in an implicit acknowledgement by the tribunal that the rights previously granted were weapons that either needed to be taken away or dulled. While some would argue that this acknowledgement by the *Rompetrol* Tribunal shows us the need for an international code of ethics,¹¹⁶ it may be the Tribunal's implicit acknowledgement that an international code of ethics may not even help. Instead, the only way to help the situation created by *Hrvatska*, should be to somehow cut back on the rights previously granted. And while some may think the way to do this would be to have a binding international code of ethics or an independent governing body reviewing counselor conduct, perhaps the Tribunal in the latter case acknowledged the inadequacy of these ideas by acting on its own to curtail the rights granted by *Hrvatska*.

The relevant consideration, which is whether to have some kind of attorney code of ethics, has been almost irrelevant to previous case studies done on this issue.¹¹⁷ Previous relevant case studies have argued that disciplining the attorney may not solve the issue because excluding counsel would, while disciplining the attorney, also deprive the party from their right to choose.¹¹⁸ But with the deep pockets many clients seem to have, and the massive supply of attorneys, perhaps excluding counsel would make no difference to a party; the party would simply find other counsel to argue the same or similar arguments. Perhaps Waincymer is correct in his calculation that disciplining attorneys is not the correct solution for the problems specifically contained in *Hrvatska* and *Rompetrol*, but not because it would punish clients instead of attorneys.¹¹⁹

Contrary to previous scholarly belief that "it is the relationship that is subject to challenge, not the ethics or attributes of

¹¹⁵ *Id.* at 609.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 612 ("While there are many domestic cases which suggest that attorney discipline should be left for judges and not arbitrators, this is not the relevant consideration in the context of this article.")

¹¹⁸ *Id.* ("A tribunal excluding new counsel simply because of their close connection to an existing tribunal member is not disciplining the attorney. It is simply refusing to allow the party to have an unconstrained right to choose which would allow it to impugn the tribunal itself.")

¹¹⁹ See Waincymer, *supra* note 18, at 612.

the individual,”¹²⁰ it should be the ethics or attributes of the individuals that are challenged. The actions that took place in the two cases addressed herein were litigation tactics that were decided upon by shrewd counsel. This is not just the relationship of counsel and arbitrator that was in issue; it was a challenge to the actions of counsel, which caused the questioned relationship. Contrary to what previous scholarship have argued, the crux of the issue is not on “party choice” or “party autonomy.”¹²¹ Respondent and Claimant, lay persons when it comes to the law, were not the devious minds behind the actions that took place in *Hrvatska* or *Rompetrol*. The actions that were at issue were counselor actions, or actions where an attorney attempted to control or create a situation. Counsel, educated individuals considered officers of the court, have a greater understanding of litigation than their common layperson clients do. They control the reigns of the litigation and the direction it will go in. The actions in question in *Hrvatska* and *Rompetrol* were and are decisions made by counsel, not the clients on behalf of whom they were acting. Indeed, it is not just the relationship between arbitrator and counsel that are in question; it is the ethics or attributes of the attorneys involved, whether as counsel or arbitrator, that are in question.

Thus, contrary to scholarly encouragement of the necessity of change, perhaps there is no need for change.¹²² Perhaps Waincymer is correct in his evaluation that disciplining an attorney is not the correct solution, but not only because it would not have helped with the issues in *Hrvatska* and *Rompetrol*. Perhaps creating a governing body regulating attorneys and a binding international code of ethics would be useless for greater reasons. Perhaps there is no need for change. Attorneys have prided themselves on getting whatever they

¹²⁰ *Id.* at 619–22.

¹²¹ *Id.* at 612.

¹²² See, e.g., Waincymer, *supra* note 18; Otto L O de Witt Wijnen, Nathalie Voser & Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration* 5 BUS. L. INT’L 433 (2004); Catherine A Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration* 23 MICH. J. INT’L L. 341 (2002); Gary Born, *A Code of Conduct for Counsel in International Arbitration*, Kluwer Arbitration Blog (Apr. 19, 2013 3:49 P.M.), <http://kluwerarbitrationblog.com/blog/2010/11/16/a-code-of-conduct-for-counsel-in-international-arbitration/>.

want, whenever they want. Why would getting around a binding code of ethics be any different? Previous scholarly work may be correct in the essential need for some international code of ethics applicable to attorneys, but perhaps there is a reason that it does not exist.¹²³ Perhaps we do not want to give attorneys the opportunity to find or create loopholes in an idealistic code of ethics. Maybe our legal torches really do need to be put down and out.

Contrary to argument that "the better view ought to be implied or inherent powers are sufficient for such purposes,"¹²⁴ perhaps neither is enough. Perhaps we do need an explicit, express, and binding authority, on how to take sanctions against misbehaving counsel. Or perhaps none of that will work. Perhaps attorneys, like shrewd chess players, will find a devious next move. Perhaps our fear is that this devious next move may be so devious that it will turn a seemingly honorable binding code of ethics unto itself, rendering it worthless. And then where would we, as a legal profession, be if we turn our ideals against and unto ourselves?

Perhaps analyzing the logistics of rules applicable to counsel and how they would be executed is worthless because, even if were to assume that there is a viable and working framework of a binding code of ethics in place, the rules would still be worthless. That is just the price of the litigation game. Attorneys will find ways to get around the code of ethics, manufacturing new weapons at the price of increased billable hours and clients' wallets.¹²⁵ Perhaps this cynical view is why the author tired of litigation. Perhaps this cynical view explains the rush that litigators experience when they come up with devious arguments dressed in justice and fairness to circumvent their opposing counsel's devious arguments (which also masquerade in justice and fairness).

While "all rule systems allow for changes to be made," perhaps "[t]he added costs, delay and disruption would offend both

¹²³ *Id.*

¹²⁴ *Waincymer*, *supra* note 18, at 614.

¹²⁵ Julian D.M. Lew, L.A. Mistelis and S.M. Kroil, *Comparative International Commercial Arbitration* (2003), n. 3 at p. 268, para. 11–37 ("Increased challenges to arbitrators has been seen by many practitioners as at times being motivated by tactical advantages.").

fairness and efficiency principles.”¹²⁶ While previous scholars may encourage reform, would reform even help the situation of shrewd counsel doing whatever they can to win?¹²⁷

VII. CONCLUSION

Perhaps we need to put down our blazing torches that we have run so far with and stop chanting for a binding international code of ethics. No ethical guideline will curtail a party from utilizing the rights it has been guaranteed as a tactical tool to delay or trip opposing counsel. In fact, perhaps an ethical guideline set forth by a legislative body will allow a party to have even more tactics than those set forth in *Hrvatska* and *Rompetrol* to delay the tribunal or invalidate an opposing counsel’s legitimate arguments.

Thus, perhaps there is no need for change. Perhaps we need to stop arguing for change. Perhaps a binding code of ethics would be worthless. Perhaps the only worth of a binding code of ethics would be to create more work for attorneys in an attempt to get around each rule, thereby creating even more devious tactics. The legal field may applaud the creation of work, and in turn the creation of more billable hours, but our clients may not be so happy with us. Or, at least, their bank accounts should not be.

Even a seemingly benign rule such as the requirement to notice opposing counsel of one’s motion within a specified number of days can be used to invalidate opposing counsel’s un-noticed motion and, in turn, what could have been a viable or winning argument. But who will accuse a counsel of tactical delay or taking advantage of the rules when they are allegedly fighting against abuse of the system’s fair time limits? Perhaps this is cynicism, or perhaps it is just sheer exhaustion on the part of the author with the field of litigation. But isn’t cynicism a form of sanity?

¹²⁶ Waincymer, *supra* note 18, at 622.

¹²⁷ *Id.* at 623 (“[R]eforms in that arena should confirm the rights espoused here and address the mismatch between determinative bodies that would arise under some *lex arbitri*.”); see Otto L O de Witt Wijnen, Nathalie Voser & Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L. INT’L 433 (2004).