Challenges to Arbitrators and Disqualification of Counsel: Who Decides? Exploring the Intersection Between Arbitrator Ethics and Counsel Ethics

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It is now settled that possible attorney disqualification is not capable of settlement by arbitration.

US District Court for the
Southern District of New York
October 3, 2011[2]

The [Arbitral] Tribunal disagrees with the contention of Respondent that it has no inherent powers in this regard.

. . .

[Counsel for Respondent] may not participate further as counsel in this case.

ICSID Arbitration Tribunal
May 6, 2008[3]

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[2] *Northwestern Nat'l Ins. Co. v. Insco, Ltd.*, No. 11 Civ. 1124 (SAS), 2011 U.S. Dist. LEXIS 113626, at *15-16 (S.D.N.Y. October 3, 2011).

[3] *Hvratska Elektropprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Tribunal's Ruling of May 6, 2008 Regarding the Participation of Counsel in Further Stages of the Proceedings, para. 33 and Ruling, para. 1.

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INTRODUCTION

Professor Catherine Rogers observed in her seminal 2002 article concerning ethics in international arbitration that "[i]nternational arbitration dwells in an ethical no-man's land."[4] Parties, counsel and arbitrators participating in international arbitrations often come from different legal cultures. Arbitration frequently takes place in a jurisdiction that is not home to lead counsel for the parties nor to one or more arbitrators. As Doak Bishop and Margrete Stevens, among others, have noted, this gives rise to the "double deontology" problem: "the situation in which a lawyer may be subject to more than one code of ethics."[5] For example, a lawyer may be subject to ethical rules in the lawyer's home jurisdiction, the place of arbitration, or rules that the tribunal sees fit to apply.

In addition to the double deontology problem, lawyers acting in international arbitrations must contend with the possibility that more than one adjudicative body may judge the lawyer's conduct. This can be particularly tricky when the relationships or interaction between counsel and arbitrators are called into question. Can the arbitrators sit in judgment when the allegations involve their

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[4] Catherine Rogers, *Fit & Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Int'l. Law (2001-2002) p. 342.
[5] Doak Bishop, *Ethics in International Arbitration*, in A.J. van den Berg, ed., *Arbitration Advocacy in Changing Times*, ICCA Congress Series no. 15 (Kluwer 2011) p. 384.

own conduct or relationships? Should the courts intervene? What is the role of an arbitral institution? And what ethical standards should apply?

This paper examines the specific question of who has the authority to decide challenges to arbitrators and motions to disqualify counsel in arbitral proceedings. This question can be particularly thorny when the conduct of -- or relationship between -- arbitrators and counsel are in question. A 2011 case out of the United States District Court for the Southern District of New York, *Northwestern v. Insco*,[6] is particularly instructive because it involved allegations of serious misconduct by counsel and two of the arbitrators. The allegations were presented first to the arbitrators and then to the court. The arbitrators and the court had to grapple with their own authority to act and with the ethical standards they should apply. Thus, this case is useful to an examination of the US approach to policing the conduct of arbitrators and counsel and to a comparison of the US approach to that of the broader arbitration community. Accordingly, this paper analyzes these issues through the lens of the court's decision in *Northwestern.*

Part I sets forth the background facts of *Northwestern*. Part II addresses available processes for challenging an arbitrator or having opposing counsel disqualified. It notes that the US approach to challenging arbitrators diverges from the modern approach because US courts have no authority to remove an arbitrator

[6] *Northwestern,* 2011 U.S. Dist. LEXIS 113626, at *15-16.

while the proceedings are pending. In addition, a majority of courts in the US have held that only the court -- and not the tribunal -- has the power to disqualify counsel. This approach is out of step with modern practice in other jurisdictions. It also leads to the possibility that a court faced with clear misconduct by counsel and an arbitrator can disqualify the lawyer but has no power to prevent the arbitrator from proceeding with the arbitration and issuing an award. In contrast, most arbitral institutions have the power to remove an arbitrator but not to disqualify counsel. Thus, where counsel and an arbitrator have engaged in misconduct, the institution can remove the arbitrator but cannot disqualify the lawyer.

Part III puts forward the following arguments. First, the US should come into line with modern practice in other jurisdictions and allow courts to consider challenges to arbitrators while the arbitration is pending. Second, the majority rule in the US holding that arbitrators have no power to disqualify counsel is not appropriate in the context of an international arbitration. A party should, however, still have recourse to the courts if the tribunal declines to act.

I. BACKGROUND FACTS

Assume the following facts. During the course of an arbitration, the arbitrator appointed by the Respondent provides Respondent's counsel with documents reflecting internal communications among the members of the tribunal.

According to Respondent, the documents show that: (1) the arbitrator appointed by Claimant has failed to disclose relevant aspects of her professional relationship with Claimant's counsel; (2) the arbitrator in question has developed considerable animosity toward Respondent and its counsel; and (3) these circumstances have tainted the arbitration.

According to Claimant: (1) the documents show internal communications among the tribunal members concerning the merits of the case; (2) the arbitrator appointed by Respondent should not have disclosed them; and (3) Respondent's counsel should not have received, reviewed or used the documents.

Next, assume that Respondent uses these documents to seek the resignation of all three members of the tribunal, while Claimant asks the tribunal to disqualify Respondent's counsel. How should the arbitrators respond? Alternatively, assume that the parties apply to the court seeking the same relief. How should the Court respond?

These are the facts of *Northwestern v. Insco*.[7] It also should be noted that *Northwestern* involved a domestic arbitration seated in New York; the arbitration was conducted under the AIDA Reinsurance and Insurance Society ("ARIAS") Rules, which allow substantial contact between party-appointed arbitrators and the parties; the parties had agreed that, while the arbitrators should remain

[7] *Northwestern*, 2011 U.S. Dist. LEXIS 113626, at *15-16.

independent, some communication between the parties and the arbitrators they had appointed was permitted; and it was an ad hoc arbitration, so no arbitral institution was involved.

II. REMOVAL OF ARBITRATORS AND DISQUALIFCIATION OF COUNSEL

A. Removal of Arbitrators

A challenge to an arbitrator arising during the course of the proceedings highlights the tension between the parties' desire for a prompt and efficient resolution of their dispute and their right to have their dispute heard by a fair and impartial tribunal. The US approach leaves it to the arbitrators themselves, or to the arbitral institutions, to resolve such challenges. US courts consistently have held that they have no jurisdiction to hear a challenge to an arbitrator. Instead, if the arbitrator will not resign (or is not removed by an institution), the party must wait until an award is issued and then attack the award. This contrasts with the approach under other modern arbitration laws which provide for the court to intervene and, if necessary, remove an arbitrator who will not resign and who is not removed by an institution.

(i) The arbitrator's right to resign

The *Northwestern* Respondent's first step was to request that all three arbitrators resign. The arbitrator appointed by Respondent promptly resigned,

while the arbitrator appointed by Claimant and the Chair of the tribunal elected to proceed with the case. This reflects the simple fact that arbitrators confronted by questions concerning their ability to proceed must decide whether to stay or go.

The US Federal Arbitration Act (the "FAA") implicitly recognizes an arbitrator's right to resign because it addresses the court's ability to intervene to fill a vacancy on the tribunal if necessary.[8] The major arbitration rules also recognize this reality. The United Nations Commission on International Trade Law ("UNCITRAL") 2010 Arbitration Rules (the "UNCITRAL Rules") state that a challenged arbitrator may "withdraw from his or her office" and that such withdrawal does not "imply acceptance of the validity of the grounds for the challenge."[9] The London Court of International Arbitration (the "LCIA") and the American Arbitration Association's International Centre for Dispute Resolution (the "ICDR") have similar rules allowing an arbitrator to withdraw without conceding the merits of the challenge,[10] while the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules") expressly contemplate an arbitrator's resignation.[11]

An arbitrator might choose to resign for a variety of reasons. The resigning arbitrator in *Northwestern* stated that the process had been tainted by his co-

[8] 9 U.S.C. §5 (2010).
[9] UNCITRAL Rules, Article 13.1.
[10] *See, e.g.* LCIA Rules, Article 10.1; ICDR Rules, Article 10.1.
[11] ICC Rules, Article 15.1.

arbitrator's misconduct and expressed concern over the enforceability of the award once issued.[12] Concern over the enforceability of the award, of course, would be a legitimate reason for an arbitrator to resign,[13] although it is difficult to see how this arbitrator's resignation could cure problems caused by the alleged misconduct of one of the other arbitrators.

It is not apparent from the record why the two remaining arbitrators declined to resign or if they even gave reasons. It could be argued, however, that arbitrators have a duty to continue with the case where there are no legitimate grounds for a challenge, especially if it appears that the challenging party is simply trying to delay or obstruct the process. For example, Canon VII of the ARIAS Code of Conduct (which applied in *Northwestern* because the parties agreed to arbitration pursuant to the ARIAS Rules) requires the arbitrators to "exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings, and written awards."[14] Comment 2 to Canon VII states that "[a]rbitrators should make all reasonable efforts to prevent delaying tactics . . . or

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[12] *Northwestern*, 2011 U.S. Dist. LEXIS 113626, at *6.
[13] Henri C. Alvarez, *Evidentiary Privileges in International Arbitration*, in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 2006 Montreal Volume 13 (Kluwer Law International 2007), p. 682 ("The tribunal's mandate does . . . include the duty to render an award that is likely to be enforced.").
[14] ARIAS (US) Code of Conduct, Canon VII.

other abuse or disruption of the arbitration process."[15] Similarly, the UNCITRAL Rules require the tribunal to "conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."[16] The LCIA Rules impose a general duty on the tribunal that includes a duty to "avoid[] unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute."[17] The ICC Rules and the ICDR Rules also require the tribunal to proceed expeditiously and appropriately.[18] Indeed, in a recent International Centre for Settlement of Investment Disputes ("ICSID") case, the tribunal concluded that its President had an obligation to continue if possible in the face of a perceived conflict under a "principle of the immutability of properly constituted tribunals" reflected in the ICSID Convention and the ICSID Rules. [19] The tribunal further expressed its concern that a party could interfere with the proceedings by inducing an arbitrator to resign without cause.[20]

Thus, while arbitrators have an obligation to consider whether to resign in the face of a challenge, they also should consider that they may have an obligation

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[15] Id., Canon VII, Comment 2.
[16] UNCITRAL Rules, Article 17.l.
[17] LCIA Rules, Article 14.1(ii).
[18] ICC Rules, Article 20.1; ICDR Rules, Article 16.2.
[19] *Hvratska Elektroprivreda, d.d. v. The Republic of Slovenia*, (ICSID Case No. ARB/05/24), Tribunal's Ruing of 6 May 2008 Regarding the Participation of Counsel in Further Stages of the Proceedings, para. 27.
[20] *Id.*

to proceed in the face of an unfounded challenge in order to preserve the integrity of the proceedings. Either way, it is clear that the arbitrators have an obligation in the first instance to decide whether to continue when confronted with a challenge.

(ii) The role of the institutions

Major institutions have embraced the notion that the right to an impartial tribunal either does not conflict with or is more important than the need for prompt and efficient resolution of the dispute. An LCIA publication has described the ability to challenge and remove arbitrators as one of the "fundamentals" of the arbitral process.[21] Article 12 of the UNCITRAL Rules expressly permits a challenge to an arbitrator at the outset of the case or during the course of the proceedings.[22] Article 13 provides that a party must lodge a challenge within 15 days of being notified of the appointment of the arbitrator or within 15 days of learning of the grounds for the challenge.[23] The arbitrator will be removed if the parties agree to the challenge or if the arbitrator elects to withdraw.[24] If the parties do not agree, or the arbitrator refuses to withdraw, the challenge will be decided by

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[21] http://www.lcia.org/Dispute_Resolution_Services/The_Case_for_Administered_Arbitration_.aspx ("The incorporation of a set of established rules will reliably take care of the fundamentals, including . . . determining challenges to arbitrators.").
[22] UNCITRAL Rules, Article 12.1.
[23] *Id.*, Article 13.1.
[24] *Id.*, Article 13.3.

the appointing authority selected by the parties[25] or designated pursuant to the rules.[26] The Rules of the ICC,[27] the ICDR,[28] and the LCIA[29] all provide similar procedures for challenging arbitrators.

US courts apparently have no objection to the enforcement of arbitral rules permitting such challenges. While there are few reported cases on this point, the United States Court of Appeals for the Eighth Circuit has declined to review the substance of a challenge to an arbitrator that had been denied by the American Arbitration Association (the "AAA") under its rules.[30] The United States District Court for the Southern District of New York has gone further and held that, in the context of a motion to vacate an award for arbitrator bias, the court should defer to an institution's prior application of its own rules.[31] This accords with modern practice in other jurisdictions.[32]

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[25] *Id.*, Article 13.4.
[26] *See, generally, id.* Article 6.
[27] ICC Rules, Article 11.
[28] ICDR Rules, Articles 8-9.
[29] LCIA Rules, Article 10.
[30] *Crawford Grp., Inc. v. Holekamp*, 543 F.3d 971 (8th Cir. 2008).
[31] *Reeves Bros. v. Capital-Mercury Shirt Co.*, 962 F.Supp. 408 (S.D.N.Y. 1997).
[32] *See, e.g.* Model Law, Article 13.1 (referencing "a challenge under any procedure agreed upon by the parties"); 1996 English Arbitration Act, §24(2) (referencing the parties ability to "vest[] an arbitral or other institution or person . . . with power to remove an arbitrator"); Swiss Law on Private International Law (referencing the parties' ability to provide for a challenge procedure by agreement).

Northwestern involved an ad hoc arbitration, so no institution was available to hear a challenge. Thus, Respondent's only potential recourse was to the court.

(iii) The court's inability to act

The *Northwestern* Respondent accordingly announced its intention to ask the US District Court for the Southern District of New York to remove the two remaining arbitrators. Respondent elected not to proceed with this challenge "after being told by the Court that it could not entertain an attack upon the qualifications of the arbitrators until after the conclusion of the arbitration,"[33] which was consistent with settled US law.

Specifically, US courts consistently have held that they have no authority to entertain motions to disqualify arbitrators.[34] Rather, a party objecting to an arbitrator's conduct is expected to complete the arbitration and then raise the arbitrator's misconduct as grounds to challenge, or resist recognition and enforcement of, the award. Thus, for example, in *Aviall,* a 1997 decision of the US Court of Appeals for the Second Circuit, a party sought the removal of an arbitrator

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[33] *Northwestern*, 2011 U.S. Dist. LEXIS 113626, at *7.

[34] See, e.g. *Aviall Inc. v. Ryder Sys., Inc.* 110 F.3d 892 (2d Cir. 1997) (The FAA does not grant courts the authority to remove an arbitrator); *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (same); *Cox v. Piper*, 848 F. 2d 842 (8th Cir. 1988) (same); *Marc Rich & Co. v. Transmarine Seaways Corp.*, 443 F. Supp. 386 (SDNY 1995) (same); *Certain Underwriters at Lloyd's v Argonaut Ins. Co.*, Ltd. 264 F. Supp.2d 926 (N.D. Cal. 2003) (applying the rule in an international arbitration).

by the court based on "evident partiality."[35] The Court held that the challenge could not be heard, because "[a]lthough the [Federal Arbitration Act] provides that a court can vacate an award 'where there was evident partiality or corruption in the arbitrators' . . . it does not provide for pre-award removal of an arbitrator."[36] Similarly, in the 2002 case of *Gulf Guaranty*, the United States Court of Appeals for the Fifth Circuit rejected a challenge based on the arbitrator's alleged failure to meet the qualifications specified in the arbitration agreement on the grounds that this was "not the type of challenge that the district court was authorized to adjudicate pursuant to the [Federal Arbitration Act] prior to the issuance of an arbitral award."[37] The Fifth Circuit explained the rationale for this rule of non-interference as follows:

> A prime objective of arbitration law is to permit a just and expeditious result with a minimum of judicial interference and any other such rule could spawn endless applications to the courts and indefinite delay and that otherwise there would be no assurance that the party seeking removal would be satisfied with the removed arbitrator's successor and would not bring yet another proceeding to disqualify him or her.[38]

Thus, the US courts take a different approach from that of the institutions: arbitrator challenges represent too great a threat to the prompt and efficient

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[35] Aviall, 110 F.3d at 895.
[36] *Id.*.
[37] *Gulf Guaranty*, 304 F.3d at 492.
[38] *Id.*, 304 F.3d at 492.

resolution of the dispute. Moreover, the US view is that the court will have an opportunity to right any wrongs at the enforcement stage.

(iv) Courts' ability to act in other jurisdictions

The refusal of the US courts to consider motions to remove arbitrators is out of step with the modern approach adopted in other countries' international arbitration laws. For example, Article 13 of the Model Law provides an irrevocable right to challenge an arbitrator in court.[39] Article 180 of the Swiss Law on Private International Law sets out grounds for challenging an arbitrator and states that, if the parties have made no provision for a challenge procedure, a court at the seat of arbitration shall decide the challenge.[40] Similarly, Section 24(1) of the English Arbitration Act permits a party to the arbitration to "apply to the court to remove an arbitrator" if certain conditions are met.[41]

This approach would appear to elevate considerations of fairness over considerations of speed and efficiency. The Model Law and the English Arbitration Act recognize the problems this might cause and address them by

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[39] Model Law, Article 13.
[40] Systematische Sammluugdes Bundesrechts SR 291 (hereinafter, "Swiss Law on Private International Law"), Article 180.
[41] Arbitration Act, 1996, c.23 §24(1) (Eng.) (hereinafter, the "English Arbitration Act" or the "Arbitration Act 1996").

providing that the tribunal may continue with the case -- and even issue an award -- while the challenge is pending.[42]

So the US is in harmony with the approach under other modern arbitration regimes with respect to the fact that arbitrators must consider challenges in the first instance and that the parties may provide by their agreement or by adopting arbitral rules for a process for removing an arbitrator during the proceedings. The US is out of step with the modern approach followed in other countries in that it does not permit a court to remove an arbitrator mid-stream. This difference in approach can be significant given the deference US courts show to arbitral awards, because a court that might have sympathy to a challenge early in a case might be more reluctant to disturb a final award after the fact.

Moreover, the US courts' refusal to interfere can lead to perverse consequences when the grounds for the challenge relate to conduct involving an arbitrator and counsel. This is because the majority rule in the US is that the courts have exclusive jurisdiction to consider motions to disqualify counsel. Thus where a court finds that an arbitrator and a lawyer have acted improperly, the court could find that it has the power to remove the lawyer but not the arbitrator.

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[42] Model Law, Article 13.3; Arbitration Act 1996, §24(3).

B. Disqualification of Counsel

It is generally recognized that parties have the right to assistance from, and representation by, persons of their choosing.[43] The UNCITRAL Rules,[44] the ICDR Rules,[45] and the LCIA Rules[46] all explicitly recognize that right. This right can, however, come into conflict with the parties' right to fairness in the proceedings, which raises the question: who has the authority to disqualify a party's lawyer from an arbitration?

(i) The tribunal's refusal to act

The *Northwestern* Claimant sought disqualification of Respondent's counsel on grounds that he had improperly acquired the tribunal's communications. Claimant first approached the arbitral tribunal, which refused to consider the motion. The tribunal (1) indicated that it was not interested in hearing such a

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[43] *Northwestern*, 2011 U.S. Dist. LEXIS 113626, at *17, n.66; (Disqualification of counsel is discouraged because it "separates the client from the counsel of his choice."); Hvratska Tribunal's Ruing of 6 May 2008 Regarding the Participation of Counsel in Further Stages of the Proceedings, para. 23 ("[W]e readily accept that as a general rule parties may seek such representation as the see fit -- and that this is a fundamental principle.").
[44] UNCITRAL Rules, Article 5.
[45] ICDR Rules, Article 12.
[46] LCIA Rules, Article 18.1.

motion,[47] and (2) suggested that if Claimant wanted to seek such relief, it should do so in court.[48]

Courts and tribunals presented with this issue generally have asked one or both of the following questions: (1) are motions to disqualify counsel arbitrable at all, and (2) does the motion fall within the scope of the arbitration agreement? In *Northwestern*, while the tribunal did not give this as a reason, it was following settled law in New York holding that attorney disqualification is non-arbitrable.

The New York rule traces back to a short opinion of a New York state intermediate appellate court, *Biderman v. Avmar*.[49] In *Biderman*, a party sought a stay of arbitration so that it could file a motion to disqualify counsel with the court because (1) the lawyers might be witnesses in the case, and (2) those lawyers had access to confidential information arising from a prior representation of the opposite party. The court held that "matters of attorney discipline are beyond the jurisdiction of arbitrators."[50] This is because they involve "interpretation and application of the Code of Professional Responsibility and Disciplinary Rules, as well as the potential deprivation of counsel of the client's choosing."[51] Matters of

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[47] *Northwestern*, 2011 U.S. Dist. LEXIS 113626, at *21-22.
[48] *Id.*, at *22.
[49] *Biderman Indus. Licensing, Inc. v. Avmar N.V.*, 173 A.D.2d 401 (N.Y. App. 1st Dept. 1991).
[50] *Id.*, 173 A.D.2d at 402.
[51] *Id.*

attorney discipline "cannot be left to the determination of arbitrators selected by the parties themselves for their expertise in the particular industries engaged in."[52] Thus, when presented with this issue, the *Northwestern* court held that "[i]t is now settled that possible attorney disqualification is not capable of settlement by arbitration."[53]

The *Biderman* rule has been followed by courts in New Mexico,[54] Florida,[55] and Pennsylvania.[56] and it was expressly extended to international arbitrations seated in New York in *R3 Aero v. Marshall of Cambridge*.[57] The *R3 Aero* court held that a motion to disqualify counsel had to be brought in state court rather than federal court because (1) it did not involve a "commercial" dispute, and (2) it was not capable of settlement by arbitration. Thus, the New York Convention did not apply and there was no federal question jurisdiction.

The minority view in the US is that arbitrators do -- or can -- have jurisdiction to decide motions to disqualify counsel. For example, in the 2010 case

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[52] *Id.*
[53] *Northwestern*, 2011 U.S. Dist. LEXIS 113626 at *15-16.
[54] *United States ex rel. Baker v. Comty. HealthSystems, Inc.* No. CV 05279, 2011 US Dist LEXIS 153427 (D. NM, December 15, 2011).
[55] *Morgan Stanley DW, Inc. v. Kelley & Warren, P.A.*, No. 02-80225-CIV, 2002 US Dist. LEXIS 28107 (S.D. Fla., May 9, 2002).
[56] *Coushore v. Bucanan Ingersoll P.C.*, 3 Pa. D. &C.4th 142 (1996).
[57] 927 F. Supp. 121 (S.D.N.Y. 1996).

SOC-SMG v. Zimmerman,[58] a party sought disqualification of opposing counsel in the Delaware Chancery Court on grounds of discovery abuse.[59] The court looked to the language of the parties' arbitration agreement, which incorporated institutional rules permitting the arbitrators to determine discovery-related issues and found that the motion to disqualify counsel fell within the scope of this authority. [60] Next, the court cited a number of examples of securities industry (or "FNRA") arbitrations in which arbitrators had decided motions to disqualify counsel, demonstrating that in practice parties are willing to submit such disputes to the arbitrators.[61] Finally, the Court noted that the rationale underlying the *Biderman* rule was that arbitrators often are selected because they have industry expertise and may, therefore, lack familiarity with rules governing attorney conduct.[62] Here, however, the arbitrators were all retired US Magistrate Judges, who dealt with discovery issues on a daily basis during their judicial careers.[63] Thus, there was no reason to believe that the arbitrators lacked the relevant experience to address a disqualification motion based on alleged discovery abuse.[64]

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[58] *SOC-SMG v. Zimmerman*, No. 5375-VCS, 2010 Del. Ch. LEXIS 195 (June 15 2010).
[59] *Id.*, 2010 Del. Ch. LEXIS at *9.
[60] *Id.*
[61] *Id.* at n. 3.
[62] *Id.*, 2010 Del. Ch. LEXIS at *7 n. 12.
[63] *Id.*
[64] *Id.*

Arbitral tribunals also have grappled with their authority to disqualify counsel. In an ICC arbitration seated in Canada, the tribunal was asked to disqualify a lawyer on the grounds that he had previously represented the other party in a related matter.[65] The tribunal concluded that it could not disqualify counsel for three reasons: the lawyer was not a party to the arbitration agreement; the parties had the right to choose their own counsel for the arbitration proceeding; and in any event, even if the arbitration agreement applied, the motion as presented was non-arbitrable because there was a criminal element to the complaint against the lawyer.[66]

In contrast, another decision that has received significant attention was the 2008 order from an ICSID Tribunal excluding counsel from participating in the final hearing.[67] There, the Claimant sought an order "recommend[ing] to the Respondent that it refrain from using the services of" an English barrister belonging to the same Chambers as the President of the arbitral tribunal. This case was somewhat unusual in that the lawyer who was challenged had not participated in the case when the arbitral tribunal was constituted. Rather, he was added to Respondent's legal team shortly prior to the final hearing.

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[65] Partial Award in ICC Case No. 8879, paraphrased in Grigera Naon, Choice-of-Law Problems in International Commercial Arbitration, 289 Recueil des Cours 9, 157-158 (2001).
[66] *Id.*
[67] *Hvratska*, Tribunal's Ruling of May 6, 2008.

In these circumstances, the parties could have joined issue over the question whether the President of the tribunal should resign. It seems likely this would have been the issue if the challenged counsel had appeared in the case prior to the constitution of the tribunal. Instead, both parties agreed that the President should remain and that the only question was whether counsel should go. The tribunal ultimately concluded that it had inherent authority -- arising under both the ICSID Convention and its inherent powers to ensure that the proceedings were conducted properly -- to decide the issue and it disqualified the lawyer in question.

Arbitral tribunals may, understandably, be wary of motions to disqualify counsel. If the only issue were whether the parties had granted this authority to the tribunal, the tribunal might feel comfortable resolving the motion. Because some courts have held that motions to disqualify counsel are non-arbitrable, however, it is easy to see why arbitral tribunals tread carefully in this area.

(ii) Institutions' inability to act

In contrast with the approach to arbitrator challenges, the major arbitral rules do not provide for an institution's ability to disqualify counsel. The UNCITRAL Rules, for example, provide that "[e]ach party may be represented or assisted by persons chosen by it,"[68] but do not provide any mechanism for institutional review of that person's suitability. The ICC Rules provide that, at hearings, "[t]he parties

[68] UNCITRAL Rules, Article 5.

may appear in person or through duly authorized representatives. In addition, they may be assisted by advisors."[69] There is no mechanism for the ICC Court to remove a party's lawyer from the case. The ICDR Rules state that "[a]ny party may be represented in the arbitration"[70] and do not provide for the institution to remove a representative. Similarly, the LCIA Rules state that "[a]ny party may be represented by legal practitioners or any other representatives,"[71] but again provide no mechanism for the institution to remove a parties' counsel.

The inability, or the perceived inability, of the tribunal or the institution to remove a lawyer from case can have unfortunate consequences. The ICC Court recently addressed a situation very similar to that presented in *Hvratska*. It involved a challenge "against a barrister serving on an ICC tribunal in an arbitration in an EU civil law jurisdiction who, without warning, was faced with other members of his chambers appearing as counsel to one of the parties at the start of a hearing."[72] Whether the other party elected not to ask the tribunal to excuse the lawyer, or the tribunal declined to do so, this resulted in a challenge to the arbitrator before the ICC Court. The ICC Court sustained the challenge and

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[69] ICC Rules, Article 26(4).
[70] ICDR Rules, Article 12.
[71] LCIA Rules, Article 18.1.
[72] *Bar Counsel to Address Barristers' Conflicts*, Global Arbitration Review, March 12, 2012.

removed the arbitrator from the case[73] even though he had done nothing to cause or exacerbate the problem.

The ICC Court clearly faced a dilemma because the arbitrator was asked to pay the price for something counsel had done. The President of the ICC Court was recently quoted to the effect that if this situation arises in the future, the tribunal might follow the *Hvratska* approach and tell the lawyer: "We're staying, you're going."[74] This suggests, at minimum, a view among some on the ICC Court that the tribunal has the power to disqualify counsel in appropriate circumstances.

(iii) The court's jurisdiction to act

The Respondent in *Northwestern* argued that the court should not act because disqualification of counsel is a matter for the tribunal, not the court, in the first instance. The court rejected this argument and held that "[i]t is now settled that possible attorney disqualification is not capable of settlement by arbitration."[75] Thus, the court found that it had the authority to act. The court then disqualified respondent's lawyer for violations of the New York Code of Professional Conduct and the rules governing the arbitration, which the court found by reference to the ARIAS Canon of Ethics for arbitrators and, because the parties had cited them, the AAA Rules. This plainly indicates that, in the court's view, the arbitrator was

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[73] *Id.*
[74] *Id.*
[75] *Northwestern*, 2011 U.S. Dist. LEXIS 113626 at *15-16.

guilty of misconduct. Ironically, however, if the arbitrator had not already resigned, the court would have had the power to remove the lawyer but not the arbitrator. This is the reverse of the situation that recently confronted the ICC Court, in that the ICC Court had the power to remove the arbitrator, but not the lawyer.

III. RECOMMENDATIONS

A. US Courts Should Entertain Challenges to Arbitrators

The majority rule in the US can lead to perverse results: a court confronted with misconduct involving both an arbitrator and a lawyer could find that it has the power to disqualify the lawyer but that it must permit the arbitrator to proceed and issue an award. Modern arbitration laws in other countries, as reflected in the UNCITRAL Model Law and elsewhere, permit courts to consider challenges to arbitrators during the course of the proceedings.

The concern expressed by US courts is that parties could use arbitrator challenges tactically to delay or disrupt the arbitration, and the solution is to provide for opportunities to attack the arbitrators' conduct after the award is issued. This argument may have some force in the context of relatively small disputes. It will provide small comfort to parties to larger disputes, however, where the burden of starting over again could be prohibitive. Consider, for example, that in a recent ICSID case the parties quantified their costs *for the jurisdiction phase only* at more than $24 million for the Claimant and more than $35 million for the Respondent, for a total of more than $60 million.[76] Had that case proceeded through a merits phase and an annulment phase, the costs would have been far greater. This is an

[76] *Libananco Holdings Co. Ltd. v. Republic of Turkey*, (ICSID Case No. ARB/06/8), Award dated 2 September 2011.

extreme example, but it illustrates the fundamental problem: in a large case, addressing arbitrator misconduct early in the proceedings rather than at the end presents slight problems and may have significant advantages.

US law allows for parties to provide for challenges to arbitrators in their agreements, for example, by allowing arbitral institutions (or the appointing authority to hear challenges). So the solution for parties seating an arbitration in the US is to use an institution or to incorporate rules such as the UNCITRAL Rules that allow for arbitrator challenges.

It would be better, however, if the US were to follow the Model Law approach and permit courts to intervene if there is no institution or appointing authority or if the institution or appointing authority got it wrong. The problem of parties using unfounded challenges to thwart the arbitration process is adequately managed by the provisions permitting the tribunal to resign in the face of a challenge or to continue and issue an award while the court proceedings are pending.

B. Arbitral Tribunals Should Have the Power to Disqualify Counsel

The fact that there is a divide amongst the US courts is telling. New York courts, following *Biderman*, have found that attorney disqualification is non-arbitrable. The Delaware Court of Chancery, in *SOC-SMG*, has found that parties

can agree to let arbitrators decide the issue and that if they do, the court has no authority to act. This suggests that, as a practical matter, arbitrators sitting in New York (or other *Biderman* jurisdictions) should decline to entertain motions to disqualify counsel while arbitrators sitting in Delaware (or other *SOC-SMG* jurisdictions) should be prepared to rule on such motions.

The primary rationale of the *Biderman* rule is that motions to disqualify counsel involve application of local rules of professional conduct that courts are more suited than arbitrators to decide. The *Biderman* court believed that courts, rather than industry-expert arbitrators, are better suited to resolve issues involving lawyer ethics. Consistent with this approach, a US District Court in Pennsylvania held that motions to disqualify arbitrators are governed by the rules of professional conduct in the jurisdiction where the arbitrators are sitting.[77] And a US District Court in New York has found that *Biderman* applies with equal force to international arbitrations.[78]

This analysis is, however, oversimplified. First, in the "system of international arbitration, . .. experienced arbitrators . . . routinely consider[] matters involving different legal systems."[79] There is no reason to think that an

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[77] *Coushore*, 3 Pa. D. &C.4th 142 (1996).
[78] *R3 Aero*, 927 F. Supp. 121 (S.D.N.Y. 1996).
[79] LCIA Court Decisions on Challenges to Arbitrators, Reference No. 3470, 14 August 2003.

international arbitral tribunal would be unqualified to decide a motion to disqualify counsel.

Second, in practice, US courts do not simply apply local rules of professional conduct. The *Northwestern* court, for example, looked not only to the ARIAS Canons of Ethics but also to the AAA Rules.[80] The *SOC-SMG* court held that attorney disqualification was subject to the agreement of the parties. This suggests that, under both the majority rule and the minority rule, US courts will give effect to the parties' agreement concerning the substantive rules to apply.

Moreover, the arbitration institutions and international arbitration tribunals have shown increasing willingness to apply international standards rather than the standards applicable in local jurisdictions. For example, in a 1997 challenge to an English barrister appointed as arbitrator by counsel who was a member of his chambers, the LCIA Court easily dismissed the challenge with the statement that "Claimant and its Counsel were considered to be familiar with the organization of barristers Chambers in England."[81] Ten years later, the LCIA Court undertook a nuanced review of the "traditions and cultural norms" in London with respect to barrister's conflicts and concluded that, while the practices in question might be acceptable in English litigation "it did not follow that a fair-minded and informed

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[80] *Northwestern*, 2011 U.S. Dist. LEXIS 113626, at __.
[81] LCIA Court Decisions on Challenges to Arbitrators Reference No. UN97/XII, 5 June 1997.

observer (through whose eyes, the circumstances of the case were to be examined) would be as fully attuned with local traditions and culture as a member of the community, or wholly uncritical of it."[82] Thus, the LCIA Court upheld a challenge to an arbitrator whose conduct may have been appropriate in England but which, it concluded, was not appropriate in the context of an international arbitration.

Another example is the approach taken in *Methanex v. United States,* where the arbitral tribunal determined that it had the authority to exclude illegally obtained evidence under Article 15(1) of the UNCITRAL Rules and pursuant to a general duty of the parties to arbitrate in good faith.[83] Moreover, the US rules governing attorney ethics expressly allow for the application of rules other than those of the place of arbitration. Specifically, the American Bar Association's (the "ABA") Model Rule 8.5 provides for the application of "the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise."[84] This suggests that, at least with respect to an arbitration seated outside the US, the arbitral tribunal may determine the applicable rules. In that case, it makes even more sense for the tribunal to be given authority to police the behavior of the lawyers appearing before it, including by deciding motions to disqualify counsel.

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[82] *Id.*, Reference No. 81160, 28 August 2009.
[83] *Methanex Corp. v. United States of America,* Final Award of the Tribunal on Jurisdiction and Merits, ¶54.
[84] ABA Model Rules of Professional Conduct, Rule 8.5(b)(1).

A second rationale for the *Biderman* rule is that the parties often have a role in appointing the arbitrators. Thus, it may be awkward for the arbitrators to sit in judgment on the conduct of the lawyers. It could similarly be awkward in cases where the arbitrators' own conduct, or the arbitrator's relationship with counsel, is at issue. There is some force to the argument that this is simply part of an arbitrator's job and that the arbitrator has an obligation to decide these issues regardless of any personal discomfort. These concerns, however, might cause some arbitrators to hesitate or to decline to decide the issue. In such cases there is a practical solution. First, where the tribunal declines to disqualify the lawyer -- either by denying the motion or by refusing to consider it -- recourse should be available in the courts. Second, where the arbitrator's own conduct or relationships are at issue, a party could always challenge the arbitrator first. If the challenge to the arbitrator is successful, the reconstituted tribunal could then address the conduct of counsel.

As noted above, given the existing precedents it is likely that tribunals sitting in New York (and other *Biderman* jurisdictions) will conclude that they lack the authority to disqualify counsel while tribunals sitting in Delaware (or other *SOC-SMG* jurisdictions) may conclude that they have this power. But what is the US position concerning arbitrations taking place overseas? Assume, for example, that an international tribunal sitting in another country issues a verbal order

disqualifying a member of Respondent's legal team with the understanding that it will set out its reasons in the final award. Next, assume that the tribunal issues an award in Claimant's favor that includes the reasons for its order disqualifying counsel. Further assume that Claimant applies to the United States District Court for the Southern District of New York for recognition and enforcement of the award. What would happen? And would it make a difference if the arbitrators issued a procedural ruling disqualifying counsel and made no mention of it in the award?

Respondent might argue that recognition and enforcement should be refused pursuant to Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") for four reasons. First, "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."[85] Second, "[t]he . . . arbitral procedure was not in accordance with the agreement of the parties."[86] Third, "[t]he . . . arbitral procedure was not in accordance with the law of the country where the arbitration took place."[87] Fourth, "[t]he subject matter of the dispute is not capable

[85] New York Convention, Article V(1)(b).
[86] *Id.*, Article V(1)(d).
[87] *Id.*

of settlement by arbitration"[88] under US law.[89] The first two arguments raise issues concerning the scope of the tribunal's authority under the parties' agreement while the third and fourth raise the question of arbitrability. And, of course, similar arguments could be raised in the context of an action outside the US to enforce an award issued by a tribunal seated in the US.

It does not appear that US courts have confronted this issue yet. Until they do, or unless a consensus view develops in the US courts to abandon the *Biderman* rule, the international arbitration community will have to be aware of these potential grounds to challenge an award following a tribunal's disqualification of counsel.

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[88] *Northwestern*, 2011 U.S. Dist. LEXIS 113626, *15-16

[89] New York Convention., Article V(2)(a).

CONCLUSION

The overarching question presented at the 2012 ATLAS Conference is how the US fits in with the modern system of international arbitration. On issues relating to challenges to arbitrators and disqualification of lawyers, it is fair to conclude that the US is in some respects a trendsetter, in others an outlier, and in still others, one in a crowd.