Is it acceptable for them to act as both counsel and arbitrators in different cases? Generally, how should we approach the counsel/arbitrator relationship? Do we need stricter and more common ethics rules to guide arbitrators' behavior?

As a community, we value academic freedom and encourage the free exchange of views, so how should we approach the issue of conflicts and the issue of prior stated positions? Should they become reasons for challenges? If so, how can we continue to encourage public discourse while at the same time protecting the parties' legitimate concerns?

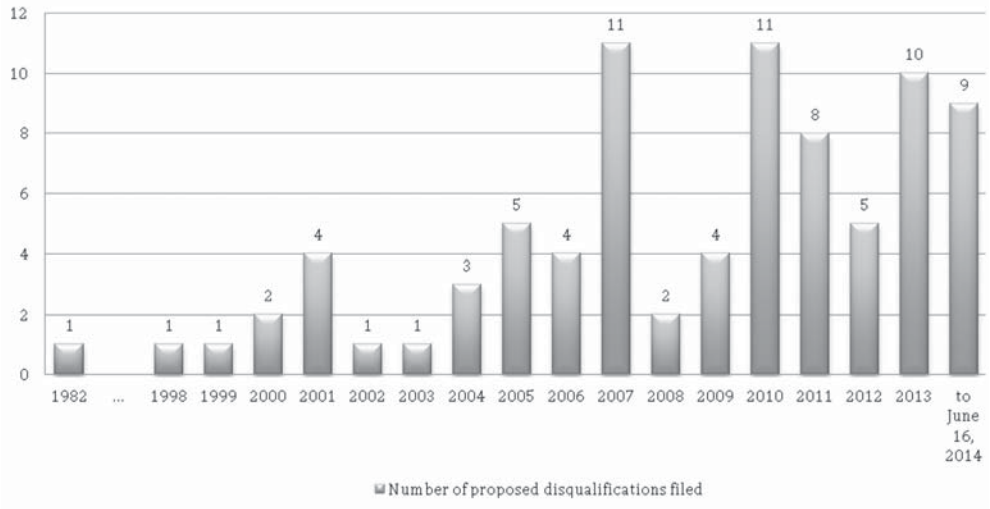
Challenge of Arbitrators at ICSID—An Overview

By Meg Kinnear[*]

In its almost 50 years of operation, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) has received 83 applications for the disqualification of arbitrators in 57 of the over 470 cases registered by the Centre.

Number of Applications Filed

The first challenge was filed in *Amco v. Indonesia* in 1982,[1] and it was not until 16 years later that the next one was filed.[2] In recent years the number of challenge applications filed has increased. Indeed, between 2010 and May 2014, forty-four arbitrator challenges were initiated at ICSID. The increased number of challenges is not limited to ICSID and has been seen generally in both investment and commercial arbitration. About 68% percent of the challenges at ICSID have been made to a single member of the tribunal, but we have been increasingly receiving challenges to the majority of the tribunal or to the full tribunal. There have also been cases in which more than one challenge was initiated—sometimes with respect to the same arbitrator.[3]



[*] Secretary-General, International Centre for Settlement of Investment Disputes (ICSID).

[1] Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1.

[2] Víctor Pey Casado v. Republic of Chile, ICSID Case No. ARB/98/2.

[3] Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5; Koch Minerals Sàrl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/1.

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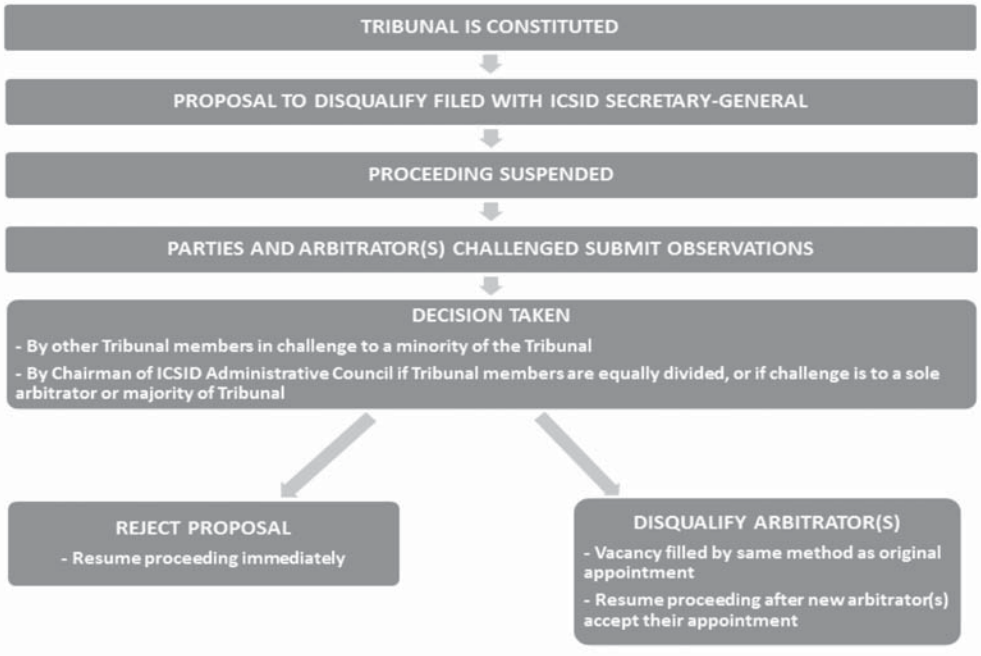

Challenge Procedure

The procedure for the disqualification of an arbitrator in an ICSID proceeding is straightforward and is outlined in ICSID Arbitration Rule 9.

ICSID will only address a disqualification proposal after the tribunal is constituted. Under ICSID Arbitration Rule 9(1), the disqualification proposal must be submitted promptly and, in any event, before the proceeding is declared closed. A proposal for disqualification that is not filed ''promptly'' will be rejected.[4] As soon as the tribunal is constituted and ICSID receives the proposal to disqualify, the proceedings are suspended and remain so until the challenge is decided or the resulting vacancy on the tribunal is filled.[5]

The party proposing the disqualification must file the proposal with the Secretary-General.[6] The Secretary-General immediately transmits the proposal to the tribunal. If the challenge is to be decided by the Chairman of the ICSID Administrative Council, it is also transmitted to him or her.[7] While the Rules do not require a copy of the proposal to be sent to the other party to the dispute,[8] in practice it is also transmitted to the other party with a schedule for the filing of observations by both sides and explanations by the challenged arbitrator. The provision of explanations by an arbitrator is optional, but should be provided ''without delay''[9] if submitted.

[4] Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5; Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26; Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12; CDC Group plc v. Republic of Seychelles, ICSID Case No. ARB/02/14; CEMEX Caracas Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15.

[5] ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) 9(6) and 10(2).

[6] Arbitration Rule 9(1). Aside from a requirement in Rule 9(1) that reasons for the proposal must be included, there is no prescribed format.

[7] Arbitration Rule 9(2)(a).

[8] Arbitration Rule 9(2)(b).

[9] Arbitration Rule 9(3).

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Under Article 58 of the ICSID Convention and under ICSID Arbitration Rule 9(4), the challenge is considered by the non-challenged arbitrators in the absence of the challenged arbitrator. This is based on practice in various international courts and tribunals, including the International Court of Justice. However, if the challenge is to a sole arbitrator or to the majority of the tribunal, or if the non-challenged arbitrators are equally divided on how to determine the challenge, it is decided by the Chairman of the ICSID Administrative Council. Recently, the number of challenges decided by the Chairman has increased—either because the non-challenged arbitrators are equally divided, or because the challenge is to the majority or all of the tribunal. Indeed, all but five of the 20 proposed disqualifications on challenges issued between 2012 and mid-May 2014 were decided by the ICSID Chairman.

The ICSID Arbitration Rules do not impose a time limit for the co-arbitrators to decide a challenge, except to state that it must be done ''promptly.''[10] When the ICSID Chairman is seized of a challenge, he is expected to use his best efforts to decide the challenge within thirty days of receiving the file.[11] ICSID is very conscious of the need to ensure that challenges are resolved expeditiously, as the proceeding remains suspended until the challenge is resolved. Presently, the entire challenge process at ICSID is resolved within three months or less. This includes the briefing period and, where applicable, the time the proposal is before the non-challenged arbitrator prior to review by the ICSID Chairman.

Bases for Challenge

There are three main grounds for the challenge of arbitrators in ICSID proceedings, namely nationality, capacity, and independence.

The effect of Article 39 of the ICSID Convention is that an arbitrator cannot be a national of the same state as either disputing party without the consent of both parties. To date, there has not been a successful proposal for the disqualification of an arbitrator at ICSID on nationality grounds. However, a few arbitrators have stepped down when they realized that their nationality put them at risk of a challenge on this basis.

On capacity, Article 56 of the ICSID Convention and ICSID Arbitration Rule 8(1) state that if an arbitrator becomes incapacitated or unable to perform the duties of office, the usual procedure in respect of the disqualification of arbitrators in ICSID Arbitration Rule 9 shall apply. Again, this basis for challenge has rarely been invoked, and no arbitrator has been disqualified on this basis to date.

The most usual ground relied upon in proposals for disqualification of arbitrators at ICSID is an alleged absence of impartiality or independence.

Standard for Challenges Based on Lack of Impartiality or Independence

The legal standard at ICSID for challenges based on alleged lack of impartiality or independence is set out in Article 57 of the ICSID Convention. It provides that a party may propose the disqualification of an arbitrator, ''on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14'' of the ICSID Convention.[12]

[10] Arbitration Rule 9(4).

[11] *Id.*

[12] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965 (entered into force Oct. 14, 1966) (ICSID Convention). Article 58 further provides that the arbitrator shall be replaced if the proposal is ''well-founded.''

In such instances, the challenging party will allege that the arbitrator cannot be relied upon to exercise independent judgment in the circumstances of the case. Independence in the ICSID Convention includes ''impartiality of judgment,'' as provided by the equally authentic Spanish version of the ICSID Convention. Independence has been interpreted as an ''absence of external control,'' and impartiality is an ''absence of bias or predisposition.'' The requirement for both independence and impartiality is designed to protect parties ''against arbitrators being influenced by factors other than those related to the merits of the case.''[13] The ICSID Convention does not require proof of actual dependence or actual bias; rather, it is sufficient to establish the appearance of dependence or bias.[14] The appearance of bias must be established ''on the basis of a reasonable evaluation of the evidence by a third party.''[15]

Recent Examples of Challenges Based on Lack of Impartiality or Independence

Proposals for disqualification of arbitrators at ICSID typically allege partiality of the challenged arbitrator or his/her inability to exercise independent judgment, based on various factual circumstances. Examples of the circumstances alleged include a prior professional relationship between the arbitrator and the other party or its counsel;[16] involvement of the arbitrator or his/her firm in another case involving either of the disputing parties (either as counsel or arbitrator);[17] procedural decisions made by the arbitrator which the challenging party interprets as proof of bias;[18] or perceived predisposition of an arbitrator to the cause of investors or states, as the case may be.[19]

More recently, two other grounds for disqualification have been raised: allegations of issue conflict, which suggest that the arbitrator has previously taken a position on the legal issues before the tribunal as evidenced in a speech, publication, or award;[20] and allegations of bias or lack of independence arising from multiple appointments of the arbitrator by the same counsel or a pattern of claimant/respondent appointments.[21]

These raise difficult questions which are currently under consideration by the Joint ASIL-ICCA task force on challenges in international arbitration. These questions are especially difficult given the fact-specific nature of determining whether an appointment creates a reasonable apprehension of partiality.

[13] Blue Bank Int'l v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20; *Urbaser S.A.*; *Burlington Resources, Inc.*; ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30; Universal Compression Int'l Holdings, S.L.U. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/9.

[14] *Urbaser S.A.,* Decision on Claimants' Proposal to Disqualify an Arbitrator, para. 43 (Aug. 12, 2010).

[15] *Blue Bank Int'l,* Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, paras. 59–61 (Nov. 12, 2013); Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ICSID Case No. ARB/13/13, paras. 54–57 (Mar. 20, 2014).

[16] *E.g., Amco Asia Corp.*; Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3; EDF Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/03/23; Suez v. Argentine Republic, ICSID Case No. ARB/03/17; Suez v. Argentine Republic, ICSID Case No. ARB/03/19.

[17] Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19.

[18] Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5; Koch Minerals Sàrl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/1.

[19] Repsol, S.A. v. Argentine Republic, ICSID Case No. ARB/12/38.

[20] *E.g., Urbaser*; *Universal*; Tethyan Copper Co. v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1.

[21] *E.g.,* Opic Karimun Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/14; Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5; *Blue Bank Int'l.*

Outcomes

To date, 58 of the 84 challenges have been decided. In four instances, the challenged arbitrators were disqualified. In a further 21 instances, the arbitrator resigned. Three proposals were withdrawn before a decision was issued, and two are pending. As a result, while there have been very few disqualifications under the ICSID rules, the composition of the Tribunal after a challenge has changed in 30% (25 out of 84) of the cases.

Fig. Outcome of Proposals for Arbitrator Disqualification

Conclusion

The trend of increased challenges to arbitrator appointments will likely continue in the near future, as the fact situations and grounds for challenge pose increasingly complex questions for institutions and the profession at large. Over time, decisions on challenges and broader initiatives within the profession should assist in reducing the number of challenge applications filed in arbitration.

Remarks by Luke A. Sobota*

Professor Giorgetti has asked me to offer some comments on the issue of multiple appointments of an arbitrator by the same party or law firm, which is an issue that affects the integrity of international arbitration.

Status Quo

Although party autonomy in arbitration is fundamental, the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) state that multiple appointments of the same arbitrator may give rise to ''justifiable doubts as to the arbitrator's impartiality or independence.''[1] This reflects the perception that through repeated selection, an arbitrator may develop feelings of loyalty to, or may be influenced by the hope of reappointment by, the appointing party. Even without the appearance of partiality, repeated appointments may provide the appointing party and its counsel an undue tactical advantage given their greater familiarity with the arbitrator's predilections, prior rulings, and general decision-making process. Although such negative perceptions of the practice are not universal—some may view repeat appointments as a positive reflection upon the arbitrator's expertise or fairness—they are neither anomalous nor unreasonable. Thus, balancing one party's

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[1] IBA Guidelines, Part I, Section 2(b) (2014).

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