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Potential Amendments to ICSID Rules and Regulations

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**PROPOSAL FOR AMENDMENTS TO ICSID RULES AND
REGULATIONS**

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ABOUT THE REQUEST FORMULATED BY ICSID

In October 2016, the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID or the Centre) had begun working on further updating and modernizing the ICSID Rules and Regulations by asking Member States for preliminary suggestions of topics or themes for „Possible Rule Amendments for ICSID Arbitration”.

In January 2017, the Secretariat of the Center formulated a request by inviting others interested in the ICSID process to provide suggestions regarding „*Potential Amendments to ICSID Rules*”. The ICSID Secretariat wishes to explore how to simplify the dispute settlement procedure to make it increasingly cost and time effective, while continuing to ensure due process and equal treatment of the parties, among other things. One of the guiding principles will be to maintain the balance between the interests of investors and States to ensure continued integrity of the process.

ABOUT THE AUTHOR



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Suggestions for Rule Amendments on ICSID Arbitral Rules and Regulations

Submitted by

Center in International Arbitration Research

University of Bucharest

1. The Center in International Arbitration Research of the Bucharest University (CIAR-UB or the Center) is a unique institution located in the heart of Bucharest. The Center comprises high-level academics and professionals with national and international law practice experience and young researchers devoted to researching the field of international arbitration.

CIAR-UB seeks to provide a framework for critical and constructive debate about the functions, content and working of law in the international arbitration community. The Center also has a proactive role within the International Arbitration Research Area, undertaking high quality research activities, in close contact with the industry and various institutions. More specific, the Center aims to favor the research in international arbitration and other related disciplines, and to combine theoretical and practical research with experimental innovative applications aiming at solving complex law issues.

2. Recent decisions have reinforced an increasingly widespread belief in the arbitration world that there exists only a remote chance of success when challenging arbitrators in ICSID proceedings.

Indeed, while there have been over 40 challenges lodged against sitting ICSID arbitrators, the replacement of an arbitrator proved to be problematic, in the absence of a voluntary resignation. Practitioners and commentators point two potential flaws of the system.

2.1. First, the substantive threshold under ICSID, which requires a “*manifest*” lack of required qualities, is unusually high compared to other rules or national arbitration laws.

This threshold to evaluate the grounds for a challenge has been criticized as too strict and difficult to meet¹.

Lower thresholds allow for a challenge to arbitrators in circumstances that give rise to “*justifiable doubts*” as to the impartiality or independence of an arbitrator². For instance, UNCITRAL Arbitration Rules require only the presence of “justifiable doubts” as to an arbitrator’s independence and impartiality.

There is no easy solution to this. The fact that this requirement is established in the ICSID Convention makes altering it a daunting task – one that would entail agreement by all member States.

Article 57 and Article 58 of the ICSID Convention provide that a party may propose the disqualification of an arbitrator “*on account of any fact indicating a manifest lack of the qualities*” of impartiality or independence³.

2.2. Secondly, the decision on a challenge is taken by the unchallenged members of the arbitral tribunal.

The more common procedure of requesting a third party to take a decision is adopted only when a sole arbitrator or a majority of the arbitral tribunal is challenged⁴. In that case, challenges to ICSID arbitrators are decided by the Chairman of the ICSID Administrative Tribunal, who is also the President of the World Bank.

¹ Critics highlighted that despite the substantial increase of cases before ICSID and the more recent increase in challenges to arbitrators, successful challenges remain rare. Because numerous challenges are tactical and spurious, however, this criticism remains difficult to assess. See Constantine Partasides, Head of Arbitration at Freshfields London, The Art of Selecting the Right Arbitrator, Lecture at London School of Economics (Nov.2011),<http://www.lse.ac.uk/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1252>.

² Please See e.g., UNCITRAL Arbitration Rules, art. 12(1) (2010).

³ See, ICSID Convention, *supra* note 3, arts. 57, 14. Article 57 provides: “A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.” Article 14 (1) provides: “(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”

⁴ ICSID Convention, *supra* note 3, art. 58. See generally Chiara Giorgetti, *Challenges of International Investment Arbitrators – How it Works, and Does it Work?*, 7 World Arb & Med. Rev. 303 (2013).

The method by which challenges are decided may increase the confidence in the ICISD arbitration process.

Moreover, if ICSID implements this proposal with special attention to challenges predicated upon repeat appointments, it is possible that more challenges will be upheld, thereby widening the pool of arbitrators and increasing the diversity of arbitrators who hear international investment disputes.

Various arbitral institutions (e.g. London Court of International Arbitration(LCIA), the Stockholm Chamber of Commerce (SCC), Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce (ICC) or Romanian Court of International Commercial Arbitration), vest authority for deciding arbitrator challenges in the institution, not in the other members of the tribunal.

Given that ICSID already decides certain arbitrator challenges, it therefore has the infrastructure and the know-how to agree on all challenges.

At a recent conference⁵, Professor Susan D. Franck⁶ stated that arbitral institutions have the primary role in increasing gender diversity among arbitrators by regulating this approaches and as well the practitioners have an important role, due to the fact that parties appoint approximately 75 percent of all arbitral tribunal members. Successful challenges to regularly appointed arbitrators may incentivize parties to appoint different arbitrators or select individuals to serve for the first time on an ICSID tribunal, thereby increasing diversity.

⁵ “*Contemporary issues & Emerging Trends in International Arbitration*”, organized by the University of Pennsylvania, March 27, 2017, <https://pennlaw.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=6be57675-ae8d-4917-af9a-33d12532bace>.

⁶ Professor Frank is an expert in the fields on international economic law, dispute settlement, and the empirical analysis of international law. Her faculty profile can be viewed here: <https://www.wcl.american.edu/faculty/franck/>.

Establishment of the Tribunal – Suggested changes to ICSID Arbitration Rule 1

Rule 1 General Obligations

1. [...]
2. [...]
3. **The majority of the arbitrators shall not be discriminated on the bias of race, color, gender identity or age and they shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by consent of the parties whether in a contract, treaty, statute or other instrument. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the consent of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.**
4. **No person, woman or man, who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the same parties to a dispute may be appointed as a member of the Tribunal.**

Suggested changes to ICSID Arbitration Rule 2

Rule 2

Method of Constituting the Tribunal in the Absence of Previous Agreement

or

Appointment and the Number of Arbitrators

1. [...]

- a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole arbitrator, or of a specified uneven number of arbitrators and indicate the method proposed for their appointment. The parties shall not make any discrimination based on race, color, gender identity or age of the proposed arbitrator(s).

Note for Rule 1 & Rule 2:

Promoting gender equality and arbitrator diversity should be a core objective in the ICSID's Arbitration binding Rules: equality is a fundamental value of the human race. The Arbitration Rules and the ICSID Secretariat shall aim to promote equality in all its standards and rules. As the Universal Declaration of Human Rights proclaims:

„Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”

Suggested changes to ICSID Arbitration Rule 9

Rule 9 - Disqualification of Arbitrators

- (1) Any nominated arbitrator may be disqualified by any party if facts and circumstances cast justifiable doubts as to the arbitrator's impartiality or independence. If the arbitrator has serious doubts as to his or her understanding to be independent and impartial, he or she must decline the appointment.
- (2) The nominated arbitrator may be disqualified only for reasons of which parties become aware after the appointment or confirmation has been made.
- (3) A Party that intends to disqualify an arbitrator shall render a written notice of disqualification to the Secretariat in accordance with the requirements of Rule 9.4. within 30 days after the receipt of the notice of appointment or confirmation of the arbitrator who is being disqualified or within 30 days after the facts and circumstances stated in Rules 9.1. and 9.2. are acknowledged by that Party.
- (4) The written notice of disqualification shall specify the facts and circumstances on which the disqualification is based. The date of receipt of the written notice of disqualification is deemed to have been submitted on the day it was received by the Secretary-General. Such communication or notice may be made by registered post, email, courier, delivery against receipt, or by any other means of high tech that provides a record of the sending thereof. The party requesting the disqualification of an arbitrator shall provide all supplied written communications in a number of copies for each party, plus one for the arbitrator who is being disqualified, as well for all members of the Tribunal or for any appointed arbitrator if the Tribunal has not yet been constituted, and shall notify the Secretary-General on the accomplishment of these formalitie.
- (5) After receiving the written notice of disqualification under Rule 9.4., the Secretary-General may order an interruption of the arbitral proceedings until the disqualification request is concluded. If necessary, the Secretary-General may request the other Party or Parties, the arbitrator concerned or any other

members of the arbitral tribunal to give comments in writing within 20 days from the date they were informed about the disqualification.

- (6) When an arbitrator is to be disqualified by a Party and the other Party or Parties may agree to the disqualification, the Administrative Council shall remove the arbitrator after the Party or the Parties, the arbitrator concerned and any other members of the arbitral tribunal have had an opportunity to comment in writing within the period of time given by the Rule 9.5. The arbitrator may also have the opportunity to withdraw from the office voluntarily.
- (7) Where an arbitrator is removed or voluntarily withdraws from the office in accordance with the Rule 9.6., a substitute arbitrator shall be appointed in accordance with the Rule 2.



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