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ICSID Arbitration Rules 2022: Settling the Squabble around Rule 23

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ICSID is the biggest institution for the settlement and arbitration of Investment disputes. However, no institution is above criticism. This Article deals with one of the prominent critics of ICSID, i.e. Challenges to Arbitrators. This paper outlines the background of the arbitrator challenge procedure under the previous rules. Additionally, this paper will help understand what is the procedure in other institutions briefly and examine how the thresholds for the dismissal of an arbitrator differ in ICSID. It will discuss the procedure with the example of the Blue Bank case. The article also analyses the demand for change. This Article will explore how the new procedure is going to affect the arbitral proceedings and the arbitrator challenge procedure. Lastly, there will be suggestions as to how the procedure can be better enhanced.

Keywords: *arbitration, rule 23, icsid.*

INTRODUCTION

The International Centre for Settlement of Investment Disputes[1] was established in 1966 to facilitate dispute resolution between international investors and states. It remains the most widely accepted institution for Investment Dispute Resolution and Arbitration. On 21st March

[1] International Centre for Settlement of Investment Disputes 1966

2022,[2] the administrative council approved extensive amendments to the existing arbitration rules and regulations[3]. These rules were amended as per the procedure given under the 1965 convention on the settlement of investment disputes between States and nationals of other states[4]. The ICSID rules have been the backbone of investor-state dispute settlement cases all over the world. In most cases, investor-state disputes[5] arise from bilateral or multilateral investment treaties or other international investment agreements. ICSID has provided a medium for these disputes to be resolved or through arbitration is a set procedure and inadequate guideline for enforcement of awards.

No convention or law in the world lacks some form of faults that come to light as the law is enforced. The same is the case with the arbitration rules. Acknowledging these faults, the third working paper on proposals for the ICSID arbitration rules amendments was released by the secretariat in August 2019. one of the most remarkable suggestions was the amendment of rule 23,[6] which deals with the challenge and legitimacy of arbitrators. ICSID has long been accused of being a pro-investor-biased organisation. This accusation has come from many developing countries, including India. Many have questioned the pool of arbitrators based on "legitimacy concerns tied to ICSID´s pale, male, and stale pool of arbitrators"[7]. As a result, the procedural safeguards of the appeal mechanism called into question the ability of arbitral tribunals to ensure independence and impartiality. In this sense, the proposed changes to the disqualification of Arbitrators are significant.

An arbitrator is the backbone of any arbitrary proceeding. He is equivalent to a judge, and his decision while passing the award determines the parties' rights and liabilities and ensures that

[2] Parra AR & others, 'Some Highlights of the Amended ICSID Arbitration Rules' (*Kluwer Arbitration Blog*, 17 *May* 2022) <http://arbitrationblog.kluwerarbitration.com/2022/05/26/some-highlights-of-the-amended-icsid-arbitration-rules> accessed 31August 2022
[3] *Ibid*
[4] *Ibid*
[5] Vasani BS & Palmer SA, 'Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?' (2014) 30 ICSID Review 194
[6] ICSID Rules of Procedure for Arbitration Proceedings 2006, rule 23
[7] 'Chapter 4: Who Guards the Guardians? the Conflicting Interests of Investment Arbitrators' (*Corporate Europe Observatory*) <https://corporateeurope.org/en/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-investment-arbitrators> accessed 31 August 2022

no injustices are perpetuated. The ICSID has limited room for appeals, which makes the Arbitrator's decision all the more critical. In such a scenario, preconceived prejudices and biases in the desert are at a heavy loss.

RESEARCH QUESTIONS

Through this paper, the researchers will determine the following:

1. What is the Background of the Arbitrator Challenge Procedure?
2. What were Concerns Surrounding Rule 23 prior to the amendment?
3. What are the implications of the New Amendment?

RESEARCH OBJECTIVES

1. To understand what is the Background of the Arbitrator Challenge Procedure
2. To Study the Concerns Surrounding Rule 23 prior to the amendment.
3. To know about the implications of the New Amendment.

SCOPE OF THE STUDY

The recent amendment to the ICSID Rules has vast Implications. The procedure for challenging arbitrators greatly differs under the ICSID Rules. For the sake of brevity, this paper will only deal with the anomalies surrounding Rule 23 of the ICSID Convention for Investment Dispute Resolution. It will cover its application prior to the amendment and its implications now.

METHODOLOGY

The research project titled - ICSID Arbitration Rules 2022: Settling The Squabble Around Rule 23 - is based on the Doctrinal Research methodology, which is qualitative. The researcher will rely primarily on Case laws and past research papers for this assignment.

BACKGROUND OF THE ARBITRATOR CHALLENGE PROCEDURE

Article 57[8] of the ICSID Convention enables parties to challenge the appointment stating that: "*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.*"

This Article empowers the Parties to a dispute to request the dismissal of an Arbitrator if they believe his expertise to be lacking or for any other reason, which is included in Article 14 clause (1).

Article 14(1)[9] of the ICSID Convention further provides: "*Persons designated to serve on the Panels shall be persons of high moral character and recognised competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.*"

To simplify, Article 14 states that an Arbitrator must be a person of:

1) High moral character

2) Known to be competent in the field of law, commerce, industry, or finance

3) Reliable to give impartial and independent judgement

It is especially important that the Arbitrator be experienced in the field of law when a panel is chosen. In "Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela[10]", previously, there had been close to 40 challenges to the appointment of arbitrators under ICSID. In many cases, the Arbitrator gave a voluntary resignation, but in the remaining cases, only one challenge had been upheld in 35 rejected[11]. It was the first instance where the

[8] Convention on the Settlement of Investment Disputes 1966, art 57
[9] Convention on the Settlement of Investment Disputes 1966, art 14
[10] *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela* ICSID Case No ARB 12/20, Award (April 2017); *Víctor Pey Casado & President Allende Foundation v Republic of Chile* ICSID Case No ARB/98/2, Award (May 2008)
[11] Bjorklund AK, 'Are Arbitrators (Judicial) Activists?' (2018) 17 The Law Practice of International Courts and Tribunals 49

appointment of an arbitrator was successfully challenged after a 50-year reign of unsuccessful contestations[12].

Issues of legitimacy regarding the procedure, the Challenge, and the Arbitrator are significantly from an unclear standard that has yet to be set. It is also partially due to the outdated practice that the removal of arbitrators is in the hands of unchallenged arbitrators. Article 57[13] of the Convention has time and again been criticised for setting an unparalleled standard with a threshold so high it is nearly impossible to get a successful challenge. It further establishes that in order for the challenge to be valid, the quality listed under article 14(1)[14] of the Convention must be lacking, opposing to which a challenge will not even be considered. Moreover, in these cases, the party has to furnish evidence to suggest the Arbitrator's bias or his inability to judge independently. the evidence based removal standard sets an unnaturally high threshold and has been again criticised for failing to address potential pro-investor bias[15].

REASONABLE DOUBTS TEST

When compared to other rules of arbitration example, the United Nations Commission on international trade law[16] (UNICITRAL), the burden of proof imposed on the parties in ICSID arbitrations is vastly higher. The UNCITRAL model follows the reasonable doubts test[17]. The disputing parties have the burden of proving the circumstances that give rise to reasonable doubts about the impartiality or independence of the Arbitrator.

The reasonable doubts test is more objective compared to ICSID's two-fold procedure[18]. E.g. the International chamber of commerce arbitration rules in its Article 11 para 2[19] asks the arbitrators

[12] Corporate Europe Observatory (n 7)
[13] Convention on the Settlement of Investment Disputes 1966, art 57
[14] Convention on the Settlement of Investment Disputes 1966, art 14
[15] Prundaru A & others, 'Will Proposed ICSID Arbitration Rule 23 Put an End to Legitimacy Concerns of Arbitrator Dis-Qualifications?' (*Kluwer Arbitration Blog*, 6 October 2019) <http://arbitrationblog.kluwerarbitration.com/2019/10/06/will-proposed-icsid-arbitration-rule-23-put-an-end-to-legitimacy-concerns-of-arbitrator-dis-qualifications> accessed 31 August 2022
[16] UNCITRAL Arbitration Rules 2010
[17] Corporate Europe Observatory (n 7)
[18] *Ibid*
[19] ICC Rules of Arbitration 2021, art 11(2)

to, beforehand, disclose all facts that might cause reasonable doubts as to the impartiality of the Arbitrator

THE BLUE BANK DECISION

On 25 June 2012 Blue Bank Commenced ICSID proceedings against Venezuela alleging that the 1994 agreement between Venezuela and Barbados had been breached. On 8 October 2012, Blue Bank appointed Mr. Jose Maria Alonso as arbitrator. In a statement submitted by Mr. Alonso, he stated that "He was a partner at Baker and Mckenzie Madrid." He asserted that neither he nor Baker & Mckenzie Madrid had any connection to either of the parties involved in the arbitration. He, however, also stated that he was aware of a couple of matters initiated by Baker & Mckenzie New York and Baker & Mckenzie Caracas in 2011 against Venezuela[20].

On 5 November 2012 Venezuela contested the appointment of Mr. Alonso, citing that his position at Baker & Mckenzie puts this credibility in jeopardy. In response to the proposition, the Chairman stated in his decision that the proposal at hand must be decided in accordance with principles laid down in Articles 57 and 58. He disqualified the appointment of Mr. Alonso based on the following reasoning:

1) Mr. Alonso is a Partner at a firm that is representing the investor in a similar arbitration against Venezuela. i.e. *Longreef v Venezuela*[21].
2) Mr. Alonso is a member of the firm's International Arbitration Steering Committee. Therefore it implied that he had some measure of knowledge of the international workings of the firm[22].
3) The issues to be discussed in the long reef case are similar to the Blue Bank case[23].

This Judgement set a new standard for the Disqualification of an Arbitrator. A distant connection to the case could still result in impartiality or be perceived as impartiality.

[20] *Blue Bank International* (n 10)
[21] *Ibid*
[22] *Ibid*
[23] *Ibid*

RULE 23 AND THE CONCERNS SURROUNDING IT

The Contracting States had previously submitted a proposal to the ICSID Secretariat[24]. Essential areas suggested for modification were to firstly clarify the threshold for Challenging an arbitrator under Arbitration Rule 22[25]. Under Rule 23,[26] it was suggested that an external committee for decision-making is appointed to evaluate any changes made henceforth. There was an additional suggestion that the challenge decision is allowed an appeal or validation by the ICSID Chair under Rule 23[27] itself.

AMENDMENT AND CONSEQUENCES

The amended Rule 23[28] states that

"Decision on the Proposal for Disqualification:

(1) The decision on a proposal shall be made by the arbitrators not subject to the proposal or by the Chair in accordance with Article 58 of the Convention.

(2) For the purposes of Article 58 of the Convention: (a) if the arbitrators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General, and they shall be considered equally divided; (b) if a subsequent proposal is filed while the decision on a prior proposal is pending, both proposals shall be decided by the Chair as if they were a proposal to disqualify a majority of the Tribunal.

(3) The arbitrators are not subject to the proposal, and the Chair shall use best efforts to decide on any proposal within 30 days after the later of the expiry of the time limit referred to in Rule 22(1)(e) or the notice in Rule 23(2)(a)."

[24] Prundaru (n 15)
[25] ICSID Rules of Procedure for Arbitration Proceedings 2006, rule 22
[26] ICSID Arbitration Rules (n 6)
[27] *Ibid*
[28] *Ibid*

According to Clause (1)[29], the proposal and decision of any challenge, regardless of whether it is made by the Chair or not, must be in accordance with article 58 of the Convention. s per Clause (2) (a)[30], If the arbitrators are not able to decide on the given proposal for any reason whatsoever, the same must be communicated to the Secretary, and the Tribunal will be considered equally divided. Moreover, according to clause (b), if an additional proposal is filed while the decision for the first proposal is pending, both proposals will be clubbed to mean that the proposal is to dismiss a majority of the Tribunal. Clause (3)[31] states that the Arbitrators and Chair must do their best to decide on any proposal within 30 days before it is presented.

According to the provisions under the ICSID Convention, the challenge regarding neutrality and independence is to be decided by unchallenged members of the Tribunal. Unless the Tribunal is evenly divided[32], in which case the challenge is to be settled by the Chairman of the Administrative Council, i.e. President of the World Bank[33]. This method calls into question the impartiality of the empanelled arbitrators in judging their colleagues. The amended Rule 23 helps the dilemma to some extent. In Rule 23 Clause (1)[34], an additional phrase has been inserted stating that if a tribunal is not able to judge in a challenge "for any reason," it will be deemed to be "equally divided" as per the ICSID Convention, the challenge will as a consequence be decided by the Chairman of the Administrative Council

CONCLUSION

"Nemo Judex In Causa Sua" is one of the most important principles of Natural Justice. It means "No one should be a judge in his own case" because it will inevitably lead to biases. It is paramount that the judge is impartial and that judgement must be given on the basis of evidence recorded as per the case. ICSID remains to be the most widely acknowledged and accepted authority/medium for the resolution of investment disputes all over the world. If a party

[29] *Ibid*
[30] *Ibid*
[31] *Ibid*
[32] Vasani Challenge (n 5)
[33] *Ibid*
[34] ICSID Arbitration Rules (n 6)

believes an Arbitrator to be unfair, it will only lead to further conflict even after the award is passed.

Investment disputes are complicated, but most importantly, they can alter the course of entire economies. Investor-State disputes have incredibly high stakes. If the Arbitrator presiding over any such dispute is incapable of giving a fair judgement or if there is a probability of any bias, it would be a greater risk to let the proceedings continue rather than dismissal. In conclusion, the Amendment of Rule 23 does marginally help with the ceiling set for the challenge procedure, yet there might be more room for improvement.

SUGGESTIONS

- Lack of qualities under Article 14, being a pre-condition for challenge procedure under Article 58, sets an unnecessarily high benchmark for removal. The impartiality of an arbitrator is paramount, and if there are rational doubts about the same, dismissal is the lesser risk.

- ICSID could, like other institutions, adopt the "reasonable doubts test". It has worked relatively over the years and is the norm for many Domestic arbitration procedures as well. The test can be modified to suit the range of arbitration ICSID deals with.

- Lastly, An independent committee must be set up to investigate and hear Challenge proceedings. If unchallenged Arbitrators from the same Tribunal are to judge the fairness of their colleagues might give more room for colluding. Moreover, an essential principle of law is "Justice must not only be done but must also be seen to be done". Allowing colleges to decide on challenge proceedings does not seem to be in conformity with it.