



THE SELECTION AND REMOVAL OF ARBITRATORS IN INVESTOR-STATE DISPUTE SETTLEMENT

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INTRODUCTION

International investment arbitration is and will continue to be a unique dispute resolution mechanism deeply embedded in public international law and using processes that are mutatis mutandis similar to those used in international commercial arbitration. The very uniqueness of international investment arbitration is in that it deals with conflicts between a sovereign state and a foreign private investor.¹ This feature is important, as it distinguishes foreign investment arbitration as a hybrid dispute resolution system that applies both substantive and procedural law., which can include issues of State responsibility, treaty law and explores the regulatory powers of the State; and also in terms of procedural law. Notably, most international investment disputes arise under bilateral investment treaties (BIT) are administered mainly from the public international law and are concluded between two sovereign States and which empower nationals of those States with the unique ability to initiate arbitration

against a foreign (host) State.² The investment arbitration itself is in fact between an investor and a State, through investor is necessarily not party to the BIT.³ Less often, investment, arbitration cases also arise from contact or from domestic legislation.⁴

As a dispute resolution mechanism, international investment arbitration strives for creating a neutral forum between host state and foreign investor to arbitrate dispute and provide a dependable and neutral conflict settlement mechanism outside of either party's national level courts.⁵ Indeed, one of the system's unusual characteristics is that the case's parties must choose who will settle their conflict.⁶ “Who selects international arbitrators and how they are selected are key elements of the system. Similarly, who is selected is also particularly relevant and has recently been the focus of much scrutiny that goes to the core of the investor-State dispute settlement (ISDS) system: how can we ensure that selected arbitrators are and remain independent and impartial? Are arbitrators sufficiently diverse? Is the system of party-appointment appropriate for the kinds of disputes that investment arbitration resolves?”⁷

The disputes in international arbitration investments is mainly decide by the tribunal

¹ Christoph Schreuer, *The Development of International Law by ICSID Tribunals*, 31(3) F. I. L. J. 734, 728-739 (2016)

² Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HAR. INT'L L. J. 531, 524-535 (2002).

³ Jan Paulsson, *Arbitration without Privity*, 10(2) F. I. L. J. 243, 232-257 (1995)

⁴ James Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) ARB. J. 359, 351-374 (2008)

⁵ William Michael Reisman, *International arbitration and Sovereignty*, 18(3) ARB. INT'L 232, 231-239 (2002)

⁶ Chiara Giorgetti, *WHO DECIDES WHO DECIDES IN INTERNATIONAL INVESTMENT ARBITRATION?*, 35 U. Pa. J. Int'l L 450, 433- 485 (2014)

⁷ United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute Settlement (ISDS)*, UNCITRAL (Sept. 5, 2018), <https://undocs.org/en/A/CN.9/WG.III/WP.149>



made of three members, where each party has a right to appoint one member and presiding member or arbitrator is appointed by arbitrators, neutral appointing arbitrator, or by consensus between the parties. This feature is unique and one of the main characteristics of international investment arbitration which is critical in making decisions for the parties.⁸ The arbitrator is chosen after the lawyer has conducted extensive research and consulted with their client. It is essential duty of the parties to nominate those who have expertise in the subject matter and can work towards a better decision. Arbitrator are adjudicator of the dispute between the parties that has been referred to the arbitration, and they are ultimately empowered to render a final and binding award on parties.

The emphasis of this paper is on who chooses arbitrators under the most commonly applied applicable laws. It then goes through the criteria for selecting and appointing arbitrators, including the appropriate and desirable qualities. The final section of this paper looks at the relevant provision for removing an arbitrator who has lost or lacks the qualifications to sit in arbitral proceedings.

SELECTION OF ARBITRATORS

The appointment method is generally given under arbitration clause of an investment agreement or given as per the international treaty or national law. The most favorable

method of selecting an arbitrator is three-arbitration panel under which one arbitrator is selected from each party respectively and the presiding arbitrator is selected by either through neutral appointing authority or through both arbitrator.

ELIGIBILITY CRITERIA FOR SELECTION

The selection is affected by the arbitrator background which are extensively reviewed from education, nationality, professional experience and expertise on subject matter. The experience includes their earlier decision, writings and any position held. The party and their counsel have to search extensively which cost resources and time for selection of arbitrator.⁹ The applicability of law, nationality of parties, location, cause of action arose and many other issues are to be taken into consideration.¹⁰

The selection is affected by the claimant as well as respondent position in the case. The claimant have the beginner advantage in selection of the arbitrator for the request of arbitration and can use time as major resource for appointment of best arbitrator by serious research on the subject matter but the selection has a disadvantage as it is done without any knowledge of other party counsel or other tribunal member.¹¹ The respondent situation is complex as it has time constraint and have to select within that time frame. The respondent may involve governmental agencies which select

⁸ Constantine Partasides, *The Selection, Appointment and Challenge of Arbitrators*, 5 VINDOBONA J. 217, 205-234 (2001)

⁹ Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17 MEALEY'S INT'L ARB. REP. 26, 25-28 (2002)

¹⁰ R. Doak Bishop and Lucy Reed, *Practical Guidelines for Interviewing, Selecting and*

Challenging Party-Appointed Arbitrators in International Commercial Arbitration, 14 ARB. INT'L 403, 395-429 (1998)

¹¹ C. Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, supra note 6, at 480



arbitrator for international investment which broaden the dispute of State which is not given under the bilateral trade and further include the consideration in the matters of public interest.¹²

The arbitrator must possess necessary requirement with certain threshold qualities:

- **Nationality:** It is one of most important identifier for choosing an arbitrator for parties as the same national arbitrators may have inclined position towards the party sharing the national bond as comparison to other arbitrator.¹³
- **Independence and Impartiality:** An independent arbitrators is one which is not dependent on either of parties for any kind, financially, personally or in any manner which can affect the arbitration. Impartiality simply refers as arbitrators are not biased or against one of the parties. These are the essential requirements for the international investment arbitrators.
- **Legal Expertise:** The arbitrators must have some sort of expertise in the subject matter of the case. The arbitrator which does not have any sort of expertise in the subject matter must not be appointed for the matter as it will affect the decision and its future reference.
- **Other Requirements:** Most of the international court and Tribunals have mentioned the requirement for high moral character for arbitrator. Parties are required for not appointing the advocate as their arbitrator due to the complex nature of International investment disputes and required deep understanding on the rules and procedures. There is need for diverse

knowledge of various international agreement or treaties rules and procedure for arbitrator. There are various additional requirement can be found in various treaties or specified in the contract which can also include the terms and expertise required from the arbitrators such as “public international law, international trade or international investment agreements.”

The international investment arbitration often include two or more legal system, languages and complex litigation which make party to keep in mind several desirable qualities while making appointments. The desirable qualities are not fixed and change as per the nature of the dispute which make it flexible. The legal background is consider when appointing it as a lawyer as arbitrator may have come from elite school making them familiar with the various legal system around the globe and also save major time as it does not need to look into great deal and save time and resources as arbitrator is already familiar with the applicable rules and procedure.

Parties desire to select the arbitrator which have already participated in the complex arbitrations and is one of the important characteristics for the presiding arbitrator in the dispute to ensure the smooth arbitration proceeding. This allows the better scrutinizing of record of the arbitrator for their views and decision. The experienced arbitrator balanced the fact of the arbitrators which are prone to be challenged as they have

¹² George H. Aldrich, The Selection of Arbitrators, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 130 (David Caron and John Crook eds., Brill, 2000)

¹³ Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides, REDFERN AND HUNTER ON ARBITRATION 263 (Oxford University Press, 2009)



served in many similar conflicts which is possible for issue conflicts.¹⁴

METHODS FOR SELECTION

In majority of cases, these two methods are used globally for selection of arbitrators for international investment arbitration:

- **Party Appointment:** It is applied in majority of cases where each party appoint one arbitrator which further help parties to strengthen their case as they have a say to the person selected by them and is considered as one of the important features of the international investment arbitration.⁶ “The selection of the party-appointed arbitrator may be the most critical decision in an international arbitral proceeding.”¹⁵ The “dispute resolution clause” provides for the method in which the arbitration is resolved as well as the procedure that can be adopted for the proceedings.¹⁶
- **Third-party Appointments:** In this case, a neutral authority plays a part in the selection process to appoint the arbitrators when the parties do not agree or one party defaults on the selection of presiding arbitrator and then there comes an impartial appointing authority which appoints an presiding arbitrator and parties have binding effect on it. “The Chairman also appoints the three members of ad hoc annulment committees, which are a separate, party-led process that allows for restricted award review. The Chairman of ad hoc annulment committees is therefore limited to nominating only members from the Panel of Arbitrators, and cannot appoint

those elected to the Panel of Arbitrators from any of the two States.”¹⁷

If a dispute is assigned to three arbitrators under the ICC Rules, the third and presiding arbitrator is appointed by the Court, unless the parties have decided on a different method. If the parties within a fixed timeframe does not reach an agreement, the Court will nominate a third arbitrator. When a party fails to name an arbitrator, the Court appoints one.

REMOVAL OF ARBITRATOR

There may be circumstances that cause one or more arbitrators to be challenged by one of the parties. The job of an arbitrator is delicate, complex, and dangerous. There is no doubt that an appeal, whether successful or not, changes the nature of arbitration as well as relationship between parties. Challenges are often time consuming and expensive. In foreign investment arbitrations, arbitrator challenges were once uncommon. They have, however, become much more popular in recent years, despite the fact that they are often ineffective.¹⁸ On the one hand, repeat appointments and the possibility of intimate, technical, and other cases or disputes can give parties potential reasons to presume an arbitrator’s biasness.¹⁹ Tactual or unmeritorious obstacles, on other hand are used by parties to gain tactical advantage and to mitigate disadvantages.

GROUND AND CHALLENGES FOR REMOVAL

¹⁴ Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5

¹⁵ Wendy Miles, International Arbitrator Appointment, 57 DISP. RESOL. J. 39, 36-41 (2002)

¹⁶ Partasides, The Selection, Appointment and Challenge of Arbitrators, supra note 8, at 217

¹⁷ Eloïse M. Obadia, Remarks at 105th ASIL Annual Meeting, 105 ASIL ANN. MTG. PROC. 75, 74-77 (2011)

¹⁸ CHALLENGES AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 515-27 (Karel Deale ed., Kluwer Law International, 2012)

¹⁹ Wendy, supra note 18, at 40



The lack of qualities required by an arbitrator is one of the most basic grounds on which arbitrator is challenged and which revolve around one of the essential qualities on arbitrator under “lack of independence and impartiality”. When contemplating a challenge, the proper applicable criteria vary, and the applicable rules should be carefully examined. There are various international treaties and under which different rules have given for the grounds on which arbitrator is challenged.

The protocols for challenges under the ICSID are very special. A party or parties may recommend the disqualification on grounds for an arbitrator "on account of any fact suggesting a manifest lack of the qualities" as per Article 57 of the ICSID Convention. The word "manifest" has been specifically applied in ICSID practice means “obvious” or “evident” and "extremely probable, not just likely."²⁰

Under ICSID, challenge applications must be lodged with the Secretary General "as soon as possible" and before the closing of the case proceedings. After that, the Secretary General sends the request to the tribunal members and notifies the other side. The file is also sent to the Chairman of the Administrative Council, involving the issue of number of arbitrators against it is filed. The questioned arbitrator is then given the opportunity to explain himself or herself to

the Tribunal or Chairman. The suggestion is discussed and voted on by the remaining number of arbitrators in the Tribunal. The Chairman can only decides on appeal if there is draw by the remaining members or such disqualification suggestion will affect the majority of members of the tribunal. He makes every attempt to finalize his decision within thirty days from the date of receiving the proposal. The proceedings have been halted pending the outcome of the appeal. The high threshold for challenging an arbitrator under ICSID, as well as the facts that the decision have attracted criticism which are made by the remaining member of tribunal²¹ due to this only few appeals have been upheld.²²

In UNCITRAL Rules there are different threshold for challenging on the similar grounds, "if conditions occur" that raise "justifiable questions" about their impartiality or independence. The number.²³ The criterion in this case differs significantly as mentioned above "manifest" lack a fixed standard and it is commonly construed as requiring that a fair and knowledgeable third party have justifiable questions about the challenged arbitrator's impartiality.²⁴ A party which is intending to the challenge the arbitrator on the mentioned grounds must challenge after giving the prior notice of fifteen days of being informed of the arbitrator's appointment or obtaining the knowledge which gave rise to such

²⁰ ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30

²¹ Noah Rubins & Bernhard Lauterburg, Independence, Impartiality and Duty of Disclosure in Investment Arbitration, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 163 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing, 2009).

²² Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentina, ICSID Case No. ARB/03/19

²³ Vito G. Gallo v. Canada

²⁴ ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, UNCITRAL, PCA Case No. 2010-9



circumstances, according to UNCITRAL Rules. The notice of appeal, as well as the reasons for it, must be sent directly to the challenged arbitrator or arbitrators. If the parties have not decided on the challenge within fifteen days of the date of the notice or the arbitrator against which it is issued has not been withdrawn, the party which have issued notice may pursue its challenge by requesting a judgement from the appointing authority within thirty days of the date of the challenge notice.

A party can decide to question an arbitrator under the SCC Rules if there are circumstances which "give rise to justifiable doubts as to the arbitrator's impartiality or independence" or "if the arbitrator does not meet the parties' agreed-upon qualifications". Any protocol which is challenged must be sent in writing within fifteen days to the Secretariat from the date of party being aware of the circumstances.

"The Secretariat then notifies the parties and arbitrators of the challenge and provides them with an opportunity to comment on it. The arbitrator must withdraw if the other party agrees to the appeal. In all other cases, the SCC Arbitration Institute's Board of Directors takes the final decision on the challenge."²⁵

It may be appropriate to fill the vacant position in the Tribunal in such circumstances. Vacancies may occur for a variety of reasons, including the outcome of a successful appeal, death or resignation of an arbitrator. The new appointment is made in similar manner as the previous or first appointment is made. As per ICSID rules, once the tribunal is formed and started its

hearing proceedings, the composition of the tribunal cannot be easily changed unless an arbitrator dies, becomes incapacitated, or resigns, resulting in a vacancy on the tribunal. Such vacancies are filled in compliance with the rules governing arbitrator's nomination. Similarly, as per the UNCITRAL Rules, the arbitrator which is substituted within the course of trial must be selected or replaced through the same method as the original arbitrator's appointment of preference. As per ICC Rules, however, give the power to Court for determine the method the original method or any different method to be used in selection of replacement.

CONCLUSION AND SUGGESTION RECOMMENDATIONS

The selection, procedure and removal of the arbitrators in the investor state dispute settlement is one of the major concerns for the parties. The parties have hard time to select the appropriate arbitrator which have diverse knowledge, deep understanding and does not conflict the interest of parties.

- The selection of the arbitrators by the parties have to take various matters into consideration, such as their interest and evaluate so that it does not hinder in the future due to interest conflicts may appear. The parties have to evaluate every arbitrator strength and mutual interest with parties to have no worries about any potential conflicts with regard to the matter of interest issues.
- In the three-member arbitral tribunal, where the presiding member arbitrator is selected by the arbitrator of both parties. The arbitrator for choosing a presiding arbitrator can consult the party's member. In the complex arbitration it is essential that there must be

²⁵ Id.



panel to give efficient and effective solution or award to the issues. Thus, it is recommended that the parties must have fundamental right to choose or elect their arbitrators directly or indirectly.

- There are no international model guidelines for the formulation of the selection of arbitrators through parties or through a neutral party or such similar matters which can further enhance the transparency of the arbitral practice.

CONCLUSION

The parties involved in international arbitration have shown that the gradually increasing interviewing of the prospective arbitrator is one part of the selection process. There are no rules or regulation which is directly regulating the uniform practice of arbitration laws. It can be seen in a manner, that arbitration laws are giving freedom to the parties by giving them right and power to decide the manner of appointment as well as the procedure of the arbitrators. The default provision is also given in case where parties are failed to appoint arbitrators. The model international standard for selection of arbitrator is yet not found and it can be consider as one of important reason to use arbitration. Parties have to be cautious in selection of arbitration as well in case of replacement of arbitrator as it can affect the future of hearing or proceedings.

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