Kluwer Arbitration Blog

Will proposed ICSID Arbitration Rule 23 put an end to Legitimacy Concerns of Arbitrator Dis-qualifications?

Ana Prundaru · Sunday, October 6th, 2019

The ICSID Rules Amendment Project

Marking the latest step in its procedural rules overhaul, the International Centre for Settlement of Investment Disputes ("ICSID") Secretariat released the third Working Paper on Proposals for the ICSID Arbitration Rules Amendments in late August 2019 ("WP3").

It is safe to say that the revisions of the ICSID Rules arrive at a critical moment. Practitioners, academics and public interest groups have voiced legitimacy concerns tied to ICSID´s pale, male, and stale pool of arbitrators and its failure to address purported pro-investor bias. As a result, the procedural safeguards of the challenge mechanism have elicited distrust over their ability to safeguard the independence and impartiality of the tribunal. Against this backdrop, the proposed amendments regarding arbitrator disqualifications are of great interest.

Background on the Arbitrator Challenge Procedure

Legitimacy issues pertaining to the arbitrator challenge procedure largely transpire from an unclear standard of removal and the practice of leaving disqualification decisions in the hands of the unchallenged arbitrators.

The wording of Art. 57, ICSID Convention has been criticised for encouraging a removal standard that is unparalleled in its soaring threshold for a successful challenge. Establishing that a 'manifest lack' of qualities listed under Art. 14, Par. 1, ICSID Convention is a necessary pre-condition for a challenge to be upheld, the provision is often interpreted literally. In such cases, the challenging party has to furnish evidence that suggests high probability that the challenged arbitrator is manifestly biased or manifestly unable to judge independently. Given the difficulty to meet this strict evidence-based removal standard, this removal standard has been criticised for failing to address potential pro-investor bias.

What is more, compared to other arbitration rules under which investor-State disputes are decided, the burden of proof imposed upon challenging parties at ICSID is

considerably higher. For example, the Arbitration Rules of the United Nations Commissions on International Trade Law ("UNCITRAL") prescribe that challenges are decided based on a reasonable doubts test. In other words, the challenging party has to present circumstances that imply reasonable doubts as to the impartiality or independence of an arbitrator.

Next to the incredibly high threshold to unseat an arbitrator, the decision-making structure has garnered disapproval as to its ability to protect procedural fairness. Art. 58, ICSID Convention provides that in a three-member panel, disqualification proposals are decided by the two unchallenged arbitrators. Considering the relatively small pool of investor-State arbitrators and the frequency of repeat appointments, the optics of relying on arbitrators for a neutral ruling on their colleague's challenge proposal is problematic. This sentiment rings even more true, given that against the prospect of facing a challenge in a future dispute, unchallenged co-arbitrators may feel incentivised to hike up the threshold.

What do Contracting States want?

Contracting States, stakeholders and the publics have submitted reform proposals regarding arbitrator challenges to the UNCITRAL secretariat, in preparation of UNCITRAL Working Group III meetings.

Chief among the proposed avenues to strengthen the perceived and actual independence and impartiality of the tribunal were first, clarifying the removal threshold under WP3 proposed Arbitration Rule ("AR") 22 and second, introducing the option for disputing parties to submit challenges to an external decision-maker under proposed AR 23. In a similar vein, some contracting States proposed to subject the challenge decision to judicial review or validation by the Chair under proposed AR 23.

Stagnation or Progress?

Although the above mentioned proposals appear considerably helpful in enhancing trust in the legal correctness of arbitrator challenge outcomes and despite vocal support in particular for the latter two by legal scholars, the Secretariat rejected their inclusion in working papers. The Secretariat did not dispute that forwarding challenges to an external decision-maker was conductive to strengthening procedural fairness, by developing a coherent removal standard and removing the peculiar reliance on un-challenged arbitrators to decide challenges. However, as all three proposals necessitate the amendment of Articles 57 and 58, ICSID Convention, respectively, they fall outside the scope of the amendment project.

Despite this setback, in light of the identified need by the UNCITRAL Working Group III to correct the lack or apparent lack of independence and impartiality of arbitrators, it appears pivotal to consider the reform progresses made so far.

Much of the progress focuses on establishing brevity and enhanced clarity in the

current AR 9, which under the working papers has been divided into two provisions. Under WP1, AR 29, published in August 2018, outlined the prescribed procedure in Art. 57, ICSID Convention and focused on the basis of a challenge proposal. AR 30 on the other hand, regulated the decision-making, in line with Art. 58, ICSID Convention.

Although less to do with robust procedural safeguards and more linked to clarifying applicable procedural rules, WP1 replaced the term “promptly”, regarding the time to file a challenge proposal and the time to respond to a proposal, with specific time periods under proposed AR 29, Par. 2 (a) and (c). The initial imbalance of these time periods was corrected under WP2, which emerged in March 2019 and required an equal amount of time for the proposal lodging and its response.

Drawing extensive criticism, WP1 also debuted the removal of automatic suspension under AR 29, Par. 3. However, due to disagreements over its gravity, WP2 re-introduced automatic suspension and it remains part of the challenge rules under WP3. While eliminating the suspension of procedures during arbitrator challenge deliberations would have likely deterred tactical challenges and thereby contributed to more efficiency, the main concern was that the challenged arbitrator would continue to influence decision-making.

Of much relevance is the option for co-arbitrators to forward challenge proposals to the Chair for any reason, which was introduced under AR 30, WP1. This proposal has remained unchanged during the two working papers that followed. Based on this reading of Art. 58, ICSID Convention, proposed AR 23, WP3, attempts to reconcile contracting states’ distrust in a decision-making mechanism that heavily relies on the self-policing ability of its arbitrators, with limitations imposed by the scope of the rule amendment project.

Conclusion

As the next multilateral reform deliberations of the UNCITRAL Working Group III in mid-October are drawing near, contracting states must make the best of the negotiation platform to forge avenues that appropriately reconcile the tension between party-appointment right hazards and the guarantees of procedural fairness. In that sense, AR 23, WP3 has potential to serve as a stepping stone for future initiatives toward more robust procedural safeguards of the challenge mechanism.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator

Offers 6,200+ data-driven arbitrator, expert witness and counsel profiles and the ability to explore relationships of 13,500+ arbitration practitioners and experts for potential conflicts of interest.

Learn how **Kluwer Arbitration Practice Plus** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*

This entry was posted on Sunday, October 6th, 2019 at 9:00 am and is filed under Arbitrator Challenges, ICSID Convention, Independence and Impartiality, Investor-State arbitration, UNCITRAL, Working Group III
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.