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The Interplay Between Nationality and the Independence and Impartiality of the Arbitrator

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ABSTRACT

Independence and impartiality are essential indicators for qualified arbitrators. However, the criteria for assessing these indicators differ among competent authorities when addressing challenges to arbitrators. One contentious aspect is the nationality of the arbitrators. By examining arbitration rules and issued decisions, a distinction was made between commercial arbitration and investment arbitration. The ICSID rules of arbitration explicitly mention common nationality with the parties as a criterion for challenging an arbitrator. The ICSID practice has also influenced investment arbitration outside of ICSID, given the significant role of nationality throughout investment law. Conversely, in commercial arbitration, the role of nationality is less pronounced, to the extent that the international character of arbitration in various legal systems is determined by the differences in the parties' places of business rather than their nationalities. Consequently, the nationality of arbitrators in commercial arbitration cannot solely serve as a basis for challenging an arbitrator without other supporting factors.

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Introduction

In transactions where the parties have different nationalities or places of business, the concerns regarding the independence and impartiality of the dispute resolution body significantly influence the parties' choice of arbitration as the preferred method for resolving disputes. Parties are generally reluctant to have their disputes settled in the courts of the country where the opposing party is based, as they fear potential bias from the adjudicator due to shared nationality with the other party. Thus, in such scenarios, the nationality of the arbitrators becomes increasingly critical to achieving this objective.

This issue is particularly sensitive in investment arbitration, where one of the parties is a state, especially for the investor. Therefore, the role of arbitrators' nationality in both commercial and investment arbitration must be examined as a factor in determining the independence and impartiality of arbitrators and, consequently, the potential for challenging them. This paper aims to clarify the limitations associated with shared nationality between arbitrators and either party, as well as the legal implications that arise from this regarding the composition of the arbitral tribunal and the validity of its award.

The primary question this research seeks to answer is whether the nationality of arbitrators should be considered in their appointment. In other words, can a person's nationality serve as an obstacle or limitation to their selection as an arbitrator? Is there a difference in the perception of arbitrators' nationality in investment arbitration versus commercial arbitration? Finally, what are the implications of shared nationality between the arbitrator and the parties on the arbitral award?

To address these questions, this research employs a descriptive-analytical method. The data collection method is primarily library-based. The first section explores the importance of arbitrators' nationality in relation to their independence and impartiality. The second section focuses on the specific rules related to the nationality of arbitrators in commercial and investment arbitration. Finally, the third section discusses the implications of an arbitrator's nationality as a factor that may compromise the validity of the arbitral award.

1. The Role of Arbitrators' Nationality in Their Independence and Impartiality

In this section, we will examine the role of nationality in determining the independence and impartiality of arbitrators. To begin with, we must define independence and impartiality before delving into the significance of nationality in this context.

1.1. Concept of Independence and Impartiality

The prevailing view is that independence and impartiality represent two distinct concepts, each reflecting a specific obligation that must exist in the relationship between the arbitrator and the parties involved. While these two concepts are two sides of the same coin, they should be defined separately.[1]

Independence refers to the objective relationship of the arbitrator with the parties to the dispute.[2] An independent arbitrator is one who does not have any type of relationship with either party that could lead to direct or indirect benefits from the outcome of the dispute. According to this definition, if the arbitrator has any ongoing relationships with either party, whether as a subordinate or superior, they are no longer considered independent. If an individual is employed permanently, part-time, occasionally, or receives fixed or contingent fees from one of the parties, their independence as an arbitrator is compromised. Similarly, if the arbitrator has any form of employment or contractual relationship with one of the parties, this creates an objective relationship that calls their independence into question.[3]

On the other hand, the lack of impartiality signifies the arbitrator's inclination towards one party's perspective or interests. Impartiality is an internal and personal standard, lacking an objective dimension.[4] Therefore, when discussing impartiality, we deal with a subjective concept, making its assessment and verification challenging.[5] For this reason, many arbitral awards show that the threshold for proving an arbitrator's lack of impartiality is lower than that for establishing a lack of independence. This approach helps prevent the appointment of arbitrators whose impartiality is genuinely compromised. For instance, according to various arbitral awards and some arbitration rules and guidelines from international bar associations regarding independence, impartiality, and challenges to arbitrators, the mere existence of reasonable suspicion and evidence indicating the arbitrator's inclination towards one of the parties or their arguments is sufficient for a successful challenge.[6]

1.2. Nationality of the Arbitrator: A Compromise to Independence or Impartiality?

Nationality establishes an objective relationship between an individual and their state. Therefore, shared nationality between an arbitrator and either party in a dispute does not imply

1 A Redfern, *Law and Practice of International Commercial Arbitration* (Thomson Sweet & Maxwell 2004) 201.

2 L Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators* (2008) 807.

3 M Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (2017) 20.

4 M Kinnear and F Nitschke, *'Disqualification of Arbitrators under the ICSID Convention and Rules' in Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (2015) 50-51.

5 N Rubins and B.C Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration* (2010) 155.

6 C.D Kee, *'Judicial Approaches to Arbitrator Independence and Impartiality in International Commercial Arbitration' in Investment and Commercial Arbitration: Similarities and Divergences* (2009) 184.

a direct relationship between the arbitrator and that party; rather, it signifies a connection to the respective state. As a result, a direct relationship between the arbitrator and that party is excluded.

Although the definition of independence does not limit itself to direct relationships and shared interests, when considering indirect relationships and interests, any doubt regarding the arbitrator's independence must be reasonable and significant. In commercial arbitration, the potential for significant indirect interests between the arbitrator and the disputing party, merely because they share the same nationality, is minimal. For instance, does a ruling favoring one party with shared nationality with another party create any indirect benefits for that party? Does the impact of a commercial case's ruling on a country and its economy generate sufficient benefits for all individuals sharing nationality with the parties involved?

While answers to these questions should be case-specific and context-dependent, a general examination reveals that in the vast majority of cases, the answers are negative. The ruling in a commercial dispute typically does not have enough national or geographical significance to confer benefits on individuals who have no relationship with the parties aside from shared nationality. However, the situation may differ in investment arbitration, which will be discussed further in the next section.

In practice, there is often an overemphasis on the distinction between the two concepts of independence and impartiality,[1] and at times, they are used interchangeably.[2] However, if we delve into the philosophy behind these criteria, we realize that their establishment as prerequisites for an arbitrator's qualification aims to ensure fair adjudication, balanced treatment of the parties, and the reassurance of the parties involved. Consequently, some authors use the term "Neutrality" to refer to both impartiality and independence of the arbitrator.[3]

Neutrality can be described as a concept that encompasses more than mere independence and impartiality. In a broad definition, it can be interpreted as treating both parties equally while maintaining independence from them in thought and action.[4] The common view is that this concept in international arbitration pertains to the absence of dependence and bias concerning geography and nationality.[5] Some theorists have gone further, defining *neutrality* essentially as a lack of dependence from the standpoint of nationality, coining the term "Neutral Nationality" for this concept.[6]

In arbitral practice, there is a growing trend to consider impartiality based on nationality as one of the conditions for a qualified arbitrator.[7] Some even regard it as a fundamental

1 Ibid, 183; C.A Rogers, *Ethics in International Arbitration* (2015) 227

2 W.M Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration* (1989) 29.

3 T Landau, *Composition and Establishment of the Tribunal* (1998) 45-52; P Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration* (1984) 23.

4 Ibid, 26; T Varady, J.J Barceló and A.T.V Mehren, *International Commercial Arbitration: A Transnational Perspective* (2009) 265.

5 R.E Goodman-Everard, *Cultural Diversity in International Arbitration – A Challenge for Decision-Makers and Decision-Making* (1991) 156.

6 Ibid.; D Bishop and L Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* (1998) 400-401; Landau, Op. Cit. (1998) 45-52; Lalive, Op. Cit. (1984) 74.

7 Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* (1998) 404; N.B KC, C.P KC and A Redfern, *Redfern and Hunter on International Arbitration: Student Version* (2023) 202; Landau, Op. Cit. (1998) 45-52; L Lalive, Op. Cit. (1984) 73.

requirement.[1] It is argued that failing to consider this criterion creates an atmosphere of doubt and fear surrounding the arbitration process.[2] While it may be contested that bias cannot be proven merely due to the absence of such a criterion, it is argued that proving bias practically is not necessary; the mere existence of a reasonable possibility of bias suffices to create legitimate concerns.[3] When one of the parties shares nationality with the arbitrator, they may have a greater chance of having their arguments accepted, as they may share cultural and preference similarities that help the party present their positions in a manner more palatable to the arbitrator.[4]

Beyond *neutrality*, impartiality itself may also be compromised due to shared nationality between the arbitrator and one of the parties. This issue, like independence, should be examined on a case-by-case basis. However, it can be generally asserted that most individuals tend to feel a greater commonality with someone who shares their nationality and may seek to support them against foreign parties. In other words, sharing nationality with either party in a dispute can potentially give rise to the suspicion that the arbitrator may favor that party and may not be able to handle the dispute with the other party, who is a foreigner, impartially.

Yet, when we move away from this broad perspective and enter the realm of professional arbitration, we encounter arbitrators whose careers, income, status, and even academic positions depend on their reputation and credibility. These individuals typically prioritize their professional integrity over feelings of commonality and inclination towards a fellow citizen in matters that are fundamentally not national in nature, and they are unlikely to sacrifice their international professional standing for such concerns.

1.3. Parties' Discretion in Selecting Arbitrators

A fundamental element of arbitration is the parties' control over the arbitration process and the formation of the arbitral tribunal from start to finish. Therefore, the parties may agree that an arbitrator who shares nationality with one of them will adjudicate their dispute.[5] However, such an agreement is not always valid everywhere. There may be mandatory rules that prevent the parties, or one of them, from agreeing to arbitration by a person with shared nationality with the other party. Such mandatory rules can be found in the national laws of the parties involved.

For example, the Iranian Law concerning International Commercial Arbitration (LICA, adopted in 1997) states that Iranian individuals cannot consent in advance to arbitration by a person with shared nationality with the other party regarding potential future disputes. Therefore, if arbitration is conducted under the LICA or if the enforcement of the award is requested from Iranian courts, compliance with this provision is mandatory, and any agreement contrary to it lacks legal validity. While finding similar examples of such provisions may

1 Ibid.
2 Ibid., 25.
3 Ibid.; A Azrieli, *Improving Arbitration under the US-Israel Free Trade Agreement: A Framework for a Middle-East Free Trade Zone* (1993) 224-225; N.B KC, C.P KC & Redfern, *Redfern and Hunter on International Arbitration: Student Version* (2023) 204;
4 Landau, Op. Cit. (1998) 45-52; Lalive, Op. Cit. (1984) 73.
5 I Lee, *Practice and Predicament: The Nationality of the International Arbitrator (with Survey Results)* (2007) 612.

be rare and challenging, their existence can limit the parties' discretion in controlling the arbitration process.

If the parties do not have an agreement in this regard—meaning they have not consented to arbitration by a person who may share nationality with one of them, and they have not agreed that arbitration by an arbitrator with shared nationality is permissible—the decision regarding the possibility of such an occurrence will largely depend on the arbitration rules governing the process, which will be addressed further.

2. Nationality of Arbitrators in the Rules of Various Arbitration Bodies

In this section, we examine the role of nationality as a criterion for determining the qualifications of arbitrators or as a basis for challenging them in the arbitration rules of several prominent arbitration bodies. Generally speaking, the criterion of nationality is addressed in many arbitration rules across various organizations.

2.1. London Court of International Arbitration (LCIA)

The arbitration rules of the London Court of International Arbitration address the issue of arbitrators' nationality. According to Article 6 of the LCIA Arbitration Rules, several scenarios are considered:

1. **Parties with Shared Nationality**: In this case, the nationality of the arbitrator is not particularly significant. A sole arbitrator, party-appointed arbitrators, or a presiding arbitrator can have the same nationality as the parties involved in the dispute or may have different nationalities.
2. **Parties with Different Nationalities**: In this scenario, depending on the number of arbitrators and their roles, several sub-scenarios are possible:
    1. **Sole Arbitrator**: In this case, the nationality of the arbitrator must not be the same as that of either party in the dispute.
    2. **Multiple Arbitrators**: Here, the arbitration rules allow for party-appointed arbitrators to have shared nationality with either party. However, the presiding arbitrator cannot share nationality with either party to the dispute.

In the rules of this arbitration body, there is a general exception for all the aforementioned criteria, which is the written agreement and consent of the parties. This means that an arbitrator who shares nationality with one of the parties can be appointed as a sole arbitrator or as a presiding arbitrator if the party with a different nationality gives written consent to proceed with that arbitrator.[1]

2.2. International Chamber of Commerce (ICC) Arbitration

The ICC Arbitration Rules, which govern one of the busiest arbitration organizations in commercial disputes, pay particular attention to the nationality of arbitrators. Two different scenarios concerning the importance of arbitrators' nationality are considered:

1 London Court of International Arbitration, *Arbitration Rules* (2020), art. 6.1.

1. **Arbitration Agreement in a Private Document**: If the arbitration agreement is set out in a private document, either as a separate agreement or as a clause in a contract, then if the arbitrator is a sole arbitrator or serves as a presiding arbitrator in a multi-arbitrator panel, they cannot share nationality with the parties in the dispute. Unlike the LCIA rules, the ICC rules do not mention situations where the parties share nationality, and it can be inferred that even if the parties have shared nationality, the arbitrator's nationality must differ from theirs. However, it is noted that if circumstances warrant and the situation demands, an arbitrator with shared nationality with the parties may still be appointed, provided that neither party objects within the specified timeframe. If either party does object, the appointment of that arbitrator is nullified.

The exception in the LCIA rules is expanded in the ICC rules, in that all requirements regarding the nationality of arbitrators pertain to the situation where the ICC selects a sole arbitrator or presiding arbitrator, and there are no such restrictions regarding party-appointed arbitrators.[1]

2. **Arbitration Agreement Arising from a Treaty**: In this case, since a treaty involves governments, stricter criteria regarding the nationality of arbitrators are imposed. The ICC cannot appoint an arbitrator with shared nationality with either party under any circumstances, and this restriction also applies to party-appointed arbitrators. However, the parties still retain the discretion to agree that an arbitrator with shared nationality may serve as a presiding arbitrator, sole arbitrator, or party-appointed arbitrator despite this limitation.[2]

One notable aspect of the ICC rules is the general obligation for the tribunal to consider the nationality and residence of potential arbitrators in light of the nationality of the parties in the dispute, other arbitrators, and available candidates for selection to the arbitration panel.[3] Thus, the ICC is tasked as the appointing authority to prioritize the nationality and residence of arbitrators when selecting them.

2.3. The Stockholm Chamber of Commerce Arbitration Center

The rules of the Stockholm Chamber of Commerce (SCC) regarding arbitrators' nationality are quite similar to those of the LCIA. According to SCC rules, if the parties to the dispute have different nationalities, the nationality of the sole arbitrator and the presiding arbitrator must differ from that of the parties involved and must not be shared with either party. However, like the rules of other arbitration bodies, there are exceptions to this general rule.

The first exception, as usual, is the agreement and consent of the parties to appoint an arbitrator with shared nationality with one of the parties, although this does not stipulate that the agreement must be in writing. The second exception is unique in that it permits the appointing authority (the SCC) to decide that such an appointment is appropriate without requiring the consent of the parties.[4] In any case, the tribunal has a general obligation to consider the nationality of the parties when selecting arbitrators.[5]

An important point in these rules is that Article 18 emphasizes the necessity of the independence

1 International Chamber of Commerce, *Arbitration Rules* (2021), art. 13 (5).
2 Ibid., art. 13 (6).
3 Ibid., art. 13 (1).
4 SCC, *Arbitration Rules* (2023), art. 17 (8).
5 Ibid., art. 17 (7).

and impartiality of the arbitrator and the specific conditions pertaining to them. This indicates that, from the perspective of the SCC's rule authors, nationality is a separate criterion from independence and impartiality. As a result, shared nationality does not necessarily disqualify an individual from serving as an arbitrator unless it compromises their impartiality or independence.

2.4. Dubai International Arbitration Centre (DIAC)

The rules of the Dubai International Arbitration Centre regarding the criterion of arbitrators' nationality closely resemble those of the Stockholm Chamber of Commerce. According to DIAC rules, if the parties to the dispute have different nationalities, the sole arbitrator or presiding arbitrator must have a nationality different from that of the parties involved. Exceptions to this general principle include the agreement of the parties and the decision of the DIAC Tribunal.[1]

Many other arbitration bodies, such as the World Intellectual Property Organization (WIPO) Arbitration Centre, also address the issue of arbitrators' nationality. In the WIPO Arbitration Rules, specific conditions that necessitate appointing an arbitrator with specialized expertise are mentioned as exceptions to the nationality criterion.[2]

The UNCITRAL Arbitration Rules also state that the appointing authority should consider selecting an arbitrator with a nationality different from that of the parties as advisable and acceptable.[3] In the rules of the Iranian Chamber of Commerce Arbitration Centre, the only exception allowing a sole arbitrator or presiding arbitrator to share nationality with one of the parties in international arbitration is the parties' agreement.[4]

In some arbitration bodies, such as the Permanent Court of Arbitration (PCA),[5] the China International Economic and Trade Arbitration Commission (CIETAC),[6] and the Swiss Rules of International Arbitration (2021), the issue of arbitrators' nationality is not explicitly addressed. However, as stated above, the rules of ICSID, as a specialized investment arbitration center dealing with disputes between foreign investors and host governments, differ in significant ways, which are discussed further.

2.5. International Centre for Settlement of Investment Disputes (ICSID)

In investment arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), nationality becomes significant in three key areas: first, when the state and the Administrative Council of ICSID appoint arbitrators to the list of potential arbitrators; second, when the arbitral tribunal is constituted; and third, when a committee is formed to review a request for annulment of an arbitral award according to ICSID rules.

2.5.1. List of Arbitrators

ICSID maintains a list of arbitrators from which arbitrators for each dispute are selected.[7] Each member state can nominate four arbitrators for inclusion on this list, and these arbitrators

1 Dubai International Arbitration Centre, *Arbitration Rules* (2022), art. 11 (1).
2 World Intellectual Property Organization, *Arbitration Rules* (2021), art. 20 (b).
3 UNCITRAL, *Arbitration Rules* (2021), art. 6 (4).
4 Arbitration Center of Iran Chamber of Commerce, *Arbitration Rules* (2023), art. 14.
5 Permanent Court of Arbitration, *Arbitration Rules* (2012).
6 China International Economic and Trade Arbitration Commission (CIETAC), *Arbitration Rules* (2005); B.O Kostrezewa, 'China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?' (2006) 519-529.
7 ICSID Convention, Art. 12.

may share the nationality of that state or have different nationalities.[1] The President of the ICSID Administrative Council may also nominate ten arbitrators, who must have different nationalities.[2] Additionally, when selecting these individuals, the President is required to consider that the nominees represent the major legal systems of the world and principal forms of economic activity.[3]

It's important to note that arbitrators serving on ICSID tribunals do not have to be chosen from this list unless appointed by the President of the Administrative Council as the appointing authority.[4]

2.5.2. Constituting the Arbitral Tribunal

During the drafting of the ICSID Convention, the nationality of arbitrators was a topic of considerable debate, with some representatives advocating for the complete removal of arbitrators of national origin.[5] Ultimately, a compromise was reached stating that the majority of arbitrators may not share the nationality of either party unless the parties agree to each member of the tribunal individually.[6] This provision was written to prevent a situation where a third arbitrator, appointed as the sole impartial arbitrator, would find themselves in a position akin to that of a sole arbitrator and must balance the interests of party-appointed arbitrators who share nationality with the parties, each of whom would act more as advocates for the parties that appointed them.[7]

Consequently, arbitrators sharing nationality with the parties are permitted to serve on the tribunal only if they constitute a minority of the tribunal, for example, if the tribunal consists of five or more arbitrators, in which case each party may have an arbitrator of shared nationality.[8]

When the parties do not reach an agreement on the constitution and composition of the tribunal, a three-member tribunal is formed based on the following default procedure: each party appoints one arbitrator, and the third arbitrator, who acts as the presiding arbitrator, is determined by mutual agreement of the parties.[9] In this case, each party must nominate two individuals. One of them must not share nationality with either party, and they will be appointed by the party as their arbitrator, while the other will be proposed as the presiding arbitrator.[10]

In other words, the arbitrators appointed according to the default procedure cannot be nationals of either party in the dispute or share nationality with each other; however, the presiding arbitrator, who is appointed by mutual agreement of the parties, may share nationality with either party or other arbitrators.[11]

1 Ibid., Art. 13(1).
2 Ibid., Art. 13(2).
3 Ibid., Art. 14(2).
4 Ibid., Art. 40(1).
5 S.W Schill, L Malintoppi, A Reinisch, C.H Schreuer and A Sinclair (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2022) 498-499.
6 Rule 1(3) of the ICSID Arbitration Rules; ICSID, *Report of the Executive Directors on the Convention, annexed to the ICSID Convention*, para. 36.
7 ICSID, *History of the ICSID Convention* (1968) 983.
8 ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965), para. 36.
9 ICSID Convention, Art. 37(2)(b).
10 ICSID, *Arbitration Rules* (2022), Rule 3(1)(a).
11 C Titi, *Nationality and Representation in the Composition of the International Bench: Lessons from the Practice of International Courts and Tribunals and Policy Options for the Multilateral Investment Court* (2020) 45.

If the parties cannot agree on the arbitrators, the procedure outlined in Article 38 of the ICSID Convention is implemented. According to this, the President of the ICSID Administrative Council appoints the remaining arbitrators at the request of one party and after consulting both parties, taking their views into account as much as possible.[1] The arbitrators appointed by the President under this procedure cannot share the nationality of the state party to the dispute or the nationality of the investor's home country.[2]

2.5.3. Constituting the Annulment Committee

In contrast to the formation of arbitral tribunals in preliminary proceedings, when it comes to annulment under the ICSID Convention, all three members of the annulment committee are appointed by the President of the Administrative Council.[3] In this scenario, specific restrictions apply, such as the prohibition against appointing anyone who served as an arbitrator in the original tribunal that issued the award under review.[4]

Additionally, the President cannot appoint an individual who is a national of the state party to the dispute, has a nationality similar to that of the investor, or shares nationality with any member of the original tribunal that issued the award. Furthermore, the President is barred from appointing someone who was nominated by the state party to the dispute or the investor's home country for inclusion on the ICSID list of arbitrators.[5]

This last restriction (the prohibition on appointing someone nominated by the party to the dispute or the investor's home country, who does not share nationality with them) does not seem to apply to appointments made by the President under Article 38, which pertains to the original arbitral tribunal. However, since in that case the President must consult with the parties to the dispute when appointing arbitrators, it appears unlikely that an individual nominated by the state party to the dispute or the investor's home country would be appointed, even if they hold a different nationality.[6]

3. Invalidating an Arbitral Award Based on Non-Compliance with Arbitrators' Nationality Criteria

In this section, we explore the possibility of annulment or non-recognition of international commercial and investment arbitration awards based on the New York Convention for the Enforcement of Foreign Arbitral Awards (1958) and the ICSID Convention and rules.

3.1. New York Convention

Under the New York Convention, the courts of the contracting states are obligated to enforce arbitral awards made outside the territory of the state of the court in question, thereby classifying them as foreign arbitral awards. However, this obligation to enforce awards has exceptions, and if these exceptions are proven, the court may refuse to recognize and enforce the award. These exceptions are detailed in Article V of the Convention.

1 ICSID Convention, Art. 38; ICSID, *Arbitration Rules* (2022), Rule 4(4).
2 Ibid., Art. 38.
3 Ibid., Art. 52(3).
4 Ibid.
5 Ibid.,
6 Titi, Op. Cit. (2020) 46.

According to subparagraph (d) of Article V, one of the grounds for refusing enforcement of an arbitral award is that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[1] If nationality is one of the criteria for determining a qualified arbitrator as stipulated in the agreed arbitration rules, and this criterion is not adhered to as specified in those rules, the tribunal's composition is not in accordance with the parties' agreement. Consequently, the court requested to enforce the award may refuse enforcement upon the defendant's request.

Additionally, subparagraph (e) of Article V stipulates that the court shall refrain from enforcing an award that has been suspended by a competent authority.[2] Therefore, if non-compliance with the rules regarding the nationality of arbitrators leads to the annulment or suspension of the award by the competent court in the seat of arbitration, requesting enforcement from courts in other countries will also encounter difficulties. This issue is particularly relevant for ICSID awards if the award is annulled according to ICSID rules by the annulment committee, and one party seeks enforcement of the award based on the New York Convention (rather than the ICSID enforcement framework) from a court in another country.

3.2. ICSID

The ICSID Convention provides a mechanism for reviewing requests for annulment of awards issued by the arbitration tribunals of this specialized investment arbitration institution. This mechanism, referred to as the annulment committee or ad hoc committee, is only constituted if at least one of the five conditions outlined in Article 52 of the Convention exists or is claimed. If the claimed condition is proven, the committee may annul the award.

The first of these five conditions is the improper formation of the tribunal.[3] It is evident that if the conditions and rules regarding the nationality of arbitrators are not adhered to during the selection or appointment of the tribunal's arbitrators, the tribunal has not been constituted correctly, which provides grounds for annulling the award. In this case, the award would not be enforceable under the ICSID Convention, the New York Convention, and likely not under the domestic laws of the countries involved.

Conclusion

Arbitrators must meet certain conditions to be recognized as qualified for a dispute. The conditions of independence and impartiality are general requirements that are universally acknowledged and emphasized across all legal systems, whether in ad hoc arbitration rules or institutional arbitration regulations.

In some arbitration rules, nationality is not explicitly mentioned as a separate criterion for determining an arbitrator's qualifications; it only becomes relevant if it can be shown that the arbitrator's independence or impartiality has been compromised. Conversely, in other arbitration rules, nationality is treated as a specific and distinct criterion for determining the qualifications of

1 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art. 5 (d).
2 Ibid, Art. 5 (e).
3 ICSID Convention, Art. 52(1).

independent and impartial arbitrators. These rules often establish clear guidelines to prevent a sole arbitrator or presiding arbitrator from sharing nationality with either party involved in the dispute.

The primary exception to this limitation is typically the agreement of the parties, although in a few cases, the discretion of the administrative authority of the arbitration center or organization is also considered.

In ICSID rules, which serve as the specialized framework for investment arbitration, more complex nationality rules are in place due to the nature of investment disputes and the fact that one of the parties is a state. These rules ensure that, even with the parties' consent, a majority of the arbitrators cannot share nationality with the parties to the dispute, and the appointing authority is also restricted from selecting any arbitrators from those sharing nationality with the parties.

The consequences of failing to comply with the rules regarding arbitrators' nationality, according to the New York Convention, include the non-enforcement of the award, while under the ICSID Convention, it may lead to annulment and non-enforcement of the award.

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