

SYMPOSIUM: A FOCUS ON ETHICS IN INTERNATIONAL COURTS AND TRIBUNALS

ETHICAL DIMENSIONS OF ARBITRATOR RESIGNATIONS

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This essay considers the ethical implications of arbitrator resignations.¹ The resignation of an arbitrator “can severely disrupt an arbitration, particularly if it occurs at a late stage of the proceedings”² and can cause “delays and significantly increased expense”³ resulting from replacement efforts, possible suspension of proceedings, and even the repetition of hearings. Given its potential impact on the parties and the arbitrator’s own liability and reputation, “resigning from office is a serious decision, and should never be taken lightly.”⁴ Ethical issues connected with resignation have traditionally been given less prominence than discussion of conflicts and challenges, but should not be overlooked in any new endeavors aimed at developing a code of conduct for international arbitration.

To minimize the likelihood of resignation and its detrimental effects on proceedings, arbitrators should take care at the outset to be complete and frank about their availability, their conflicts, and any other situation that could cause them to withdraw.⁵ Nevertheless, no matter how thorough or forthcoming an arbitrator or institution is at the beginning of a case, circumstances beyond an arbitrator’s control can still arise later in the case that justify resignation. These might include (1) unfounded challenges, (2) health and other personal matters, (3) new professional opportunities, and (4) the emergence of new conflicts. The first part of this essay surveys these common scenarios.

Some rare but extreme circumstances give rise not only to a right to resign, but may even impose a duty to do so, such as when the legality or security of the proceedings is compromised.⁶ Also rare, but sadly not unknown, are

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¹ This essay builds on Judith Levine, *Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes*, in CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS (Chiara Giorgetti ed., 2016). A longer version appears in *The Law and Practice of International Courts and Tribunals* (2019).

² YVES DERAIS & ERIC A. SCHWARTZ, *A GUIDE TO THE ICC RULES OF ARBITRATION* 185 (2005).

³ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1955 (2d ed. 2014); Levine, *supra* note 1, at 282.

⁴ Decision on Challenge in ICC Case No. 23288/AYZ, 5, 7; in *ICC Rejects Challenge Based on Arbitrator’s Age*, GLOBAL ARB. REV. (Oct. 15, 2018) [hereinafter ICC Decision].

⁵ More extensive disclosure on representations and availability has been suggested in Int’l Ctr. for Settlement of Inv. Disp., *Proposals for Amendment of the ICSID Rules - Working Paper #2*, paras. 158–63 (2019) [hereinafter ICSID Working Paper].

⁶ Am. Arb. Ass’n, *Code of Ethics for Arbitrators in Commercial Disputes* (Mar. 1, 2004) [hereinafter AAA Code]; JAMS, *Arbitrators Ethics Guidelines*, VII.A. In *Dal Tile v. Inter ceramic*, all arbitrators resigned after respondent obtained court orders threatening criminal sanctions against the arbitrators if the case continued. *“Calvo” Injunction Triggers NAFTA Threat*, GLOBAL ARB. REV. (Mar. 27, 2018). In one PCA case, “outrageous” threats and accusations by claimant led the arbitrators to resign and the PCA to discontinue the chair selection.

resignations that seem orchestrated in collusion with a party for tactical reasons. The second part of the essay canvasses measures to discourage such ethically dubious conduct.

Ethical Questions in Common Resignation Scenarios

While there is no universal code of arbitrator ethics, it appears generally accepted that arbitrators are under a positive obligation to perform the function for which they are appointed. Expression of this duty can be found in the *International Bar Association's Rules of Ethics*, which provide that “[a]rbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes”⁷ and more recently in codes of conduct in EU free trade agreements.⁸ Gary Born observes that “[w]hether or not express provisions dealing with the subject exist, an arbitrator’s acceptance of his or her appointment entails an implied undertaking to complete that mandate.”⁹ The corollary of this positive obligation to complete the mandate is the negative obligation “not to resign during the course of the arbitration without good cause.”¹⁰ Indeed, the first “canon” of the *American Arbitration Association's Code of Ethics* provides, “Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue.”¹¹

Unfortunately, even with the most thorough disclosure at the outset of a case, situations still arise during proceedings that make arbitrators consider resignation. What follows are four common resignation scenarios.

1. Resignations in the Face of an Unfounded Challenge

A number of arbitrator resignations occur following a challenge raised by a party.¹² Most arbitral rules authorize an arbitrator to resign without implying acceptance of the validity of the challenge.¹³

In *Pey Casado v. Chile*, an arbitrator believed a challenge to be unfounded but considered resignation was “the proper approach to allow these proceedings to continue without the distraction posed by [his] involvement.”¹⁴ In a challenge submitted to the Permanent Court of Arbitration (PCA) Secretary-General, the arbitrator resigned. Despite believing the challenge unfounded, he thought the “very tone and groundless allegations created a situation of such hostility” that he could not serve effectively but regretted that a party could “poison the atmosphere through its own conduct” to “obtain the outcome it seeks.”¹⁵

Commentary is divided on whether arbitrators have a duty to the parties *not* to resign if they consider a challenge unfounded or brought for dilatory purposes. Yves Derains and Eric Schwartz note that whatever the actual merits of the challenge, it would be best ultimately for the arbitrator to be replaced, “in order to permit the arbitration to proceed in a better climate of confidence and trust and to minimize the likelihood of recourse against the arbitral

⁷ Int’l Bar Ass’n, *Rules of Ethics for International Arbitrators*, Rule 1 (1987) [hereinafter IBA Rules of Ethics].

⁸ See, e.g., “Code of Conduct for Arbitrators and Mediators”, in *EU-Singapore Free Trade Agreement*, Oct. 19, 2018, Annex 14-B, para. 6.

⁹ BORN, *supra* note 3, at 2008.

¹⁰ *Id.*

¹¹ *AAA Code*, *supra* note 6, Canon I(H).

¹² See *Levine*, *supra* note 1, at 282 n.118.

¹³ See, e.g., *UN Comm’n on Int’l Trade Law Arbitration Rules*, art. 13(3) (2010).

¹⁴ Professor Philippe Sands QC Letter to ICSID Secretariat, Jan 10, 2014, relating to *Victor Pey Casado & Anor v. Chile*, ICSID Case No. ARB/98/2.

¹⁵ See also *SolEs Badajoz GmbH v. Spain*, ICSID Case No. ARB/15/38; Alison Ross, *Alexandrov and Joubin-Bret Resign from ECT Case Against Spain*, GLOBAL ARB. REV. (Oct. 25, 2017).

award.”¹⁶ Conversely, Alan Redfern and Martin Hunter posit that when a challenge is unfounded, “the arbitrator should not resign”; although letting the challenge procedure run its course “may create delay,” such an approach “helps to discourage unmeritorious disruptive tactics.”¹⁷

2. Resignations for Personal Reasons

Resignation might genuinely be inevitable for personal reasons, through no one’s fault. Nonetheless, it can lead to extensive delays. For example, in *Vanessa Ventures v. Venezuela*, the presiding arbitrator resigned due to bad health five months before a scheduled hearing, with the replacement processes leading to cancellation of the hearing.¹⁸

There is arguably a duty to disclose serious health issues. In a 2018 International Chamber of Commerce (ICC) case, an arbitrator retracted his initial resignation in the face of a challenge based on his age.¹⁹ The ICC court ruled that “age cannot in and of itself be a discriminating circumstance” although “precarious health conditions” might be.²⁰

Some personal reasons that have led to resignation concern family connections.²¹ Perceptions about impartiality might be influenced by a family member’s professional activities,²² or, in politically sensitive disputes, even a spouse’s nationality.²³ In two such examples, at least some disclosure had in fact been made to the relevant appointing body, but the disclosure was not conveyed to the parties prior to the appointment. The time lost for replacement may have been saved with more efficient communication, or by reaching out earlier for institutional support.

3. Resignations and New Positions

Another common scenario for midproceeding resignations is when the arbitrator takes on new professional endeavors that may conflict with arbitrating a particular case. For example, three International Centre for Settlement of Investment Disputes (ICSID) cases were put on hold in 2018 due to professional moves of tribunal members, including new roles as Hong Kong’s Justice Secretary, Costa Rica’s Foreign Trade Minister, and President of the International Court of Justice.²⁴ In high stakes disputes, where accomplished individuals from a mix of private sector and public service backgrounds tend to be selected, these kinds of promotions and

¹⁶ DERAINS & SCHWARTZ, *supra* note 2, at 195.

¹⁷ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION para. 4.138 (2009). See also Marc Lalonde, *Chapter 46: Quo Vadis Disqualification?*, in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 641, 645 (Meg Kinnear et al. eds., 2015).

¹⁸ *Vanessa Ventures Ltd. v. Venez.*, ICSID Case No. ARB(AF)/04/6, Award, paras. 20, 30 (Jan. 16, 2013).

¹⁹ See *ICC Decision*, *supra* note 4, at 7.

²⁰ *Id.*

²¹ Ill-health of a family member prevented one arbitrator from traveling so he resigned in *I v. Turkmenistan*. See *Levine*, *supra* note 1, at 284.

²² See Cosmo Sanderson, *Malintoppi Resigns After Challenge over Husband’s Counsel Work*, GLOBAL ARB. REV. (Feb. 6, 2019). In 2009, an arbitrator whose daughter worked for the firm representing one of the parties declined to resign. He was removed by the PCA Secretary-General.

²³ See Pia Lee-Brago, *UN Arbitral Panel Member with Pinay Wife Resigns*, THE PHILIPPINE STAR (June 7, 2013); *South China Sea*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, paras. 30-31 (Oct. 29, 2015).

²⁴ *Gabriel Resources Ltd. v. Rom.*, ICSID Case No. ARB/15/31; *Valores Mundiales, S.L. & Anor. v. Venez.*, ICSID Case No. ARB/13/11; *Edenred S.A. v. Hung.*, ICSID Case No. ARB/13/21; see also *National Grid v. Arg.* (UNCITRAL) (resignation four years into proceedings upon appointment as Executive Director to the World Bank) and *Yukos v. Russ.* (PCA Cases No. AA226-228, resignation upon appointment as senior White House official).

opportunities are somewhat inevitable. Disruption caused by the resignations can be minimized by prompt disclosure, prompt replacement, and smooth running of the proceedings in the interim.

Other types of professional moves mid-arbitration, however, may be frowned upon, if the new role is directly connected to one of the parties to the case. More than four years into proceedings in *Holiday Inns v. Morocco*, an arbitrator revealed he had become a director of one of the claimant companies.²⁵ He submitted his resignation subject purportedly to the condition that the claimants appoint his successor. The coarbitrators decided that the condition was improper and withheld consent to the resignation, meaning ICSID filled the vacancy. The then-Secretary General of ICSID described the arbitrator's conduct as an "egregious impropriety."²⁶

Resignations also result when arbitrators assume new positions as counsel. In an interstate case, one arbitrator resigned six months into the proceedings when he was retained as counsel in an unrelated case against the respondent. Another resigned after taking a position at a firm acting adversely to one of the parties. In a recent PCA case, an arbitrator resigned upon joining a firm that has a policy against its partners acting as arbitrator in investor-state disputes, due to possible issue conflicts in clients' cases. This policy is part of a growing recognition of the challenges posed by "double-hatting," or serving both as counsel and arbitrator in disputes where similar issues might arise.

4. Resignations Due to New Conflicts

Failure to perform an adequate conflict search has led arbitrators to resign after discovering a conflict with a party. In other cases, conflicts may relate to an *issue* in dispute.²⁷ In an investor-state case at the PCA, the presiding arbitrator from a large firm disclosed that one of his partners had taken on counsel work in a separate bilateral investment treaty (BIT) case with similar issues. He outlined steps he had taken to erect an ethical wall and avoid compensation from the other case, but ultimately resigned in the face of continued objections, and to preserve integrity and efficiency.²⁸

There has been a spate of similar resignations in the wake of the judgment in *Slovak Republic v. Achmea*, in which the Court of Justice of the European Union ruled that the arbitration clause contained in the Netherlands-Slovakia BIT was incompatible with EU law.²⁹ The judgment threw a cloud of uncertainty over dozens of pending arbitrations brought under intra-EU BITs, leading a number of arbitrators to resign because their firms represented clients in other cases where the effect of the *Achmea* judgment may come into play.³⁰ The level of disruption caused by these resignations is different in each case depending on the phase in proceedings—in some it has arisen at a crucial time in deliberations, in others during a period of suspension. In one case the *Achmea* effect was enhanced

²⁵ *Holiday Inns S.A. v. Morocco*, ICSID Case No. ARB/72/1.

²⁶ [Convention on the Settlement of Disputes Between States and Nationals of Other States](#), art. 56(3), Mar. 18, 1965 [hereinafter ICSID Convention]. See *Conduct by a Party-Appointed Arbitrator During the Arbitral Proceedings*, in PREVENTING DELAY AND DISRUPTION OF ARBITRATION / EFFECTIVE PROCEEDINGS IN CONSTRUCTION CASES 286 (ICCA Congress Series, Albert Jan van den Berg ed., 1991).

²⁷ See Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, in 61 DISP. RES. J. 60 (Feb.-Apr. 2006); [Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration](#), THE ICCA REPORTS, No. 3 (Mar. 17, 2016).

²⁸ *Id.*; Sarah J. Grimmer, *Three Scenarios That Raise Due Process Issues*, in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 162, ICCA Congress Series (2017).

²⁹ Case C-284/16, *Slovk. v. Achmea BV* (Ct. of Justice of the European Union, Mar. 6, 2018).

³⁰ Alison Ross, [Three Crowns Partners Resign from Panels Considering Achmea](#), GLOBAL ARB. REV. (Aug. 9, 2018); [Another Resignation from Panel Weighing Achmea](#), GLOBAL ARB. REV. (Sep. 5, 2018) (both citing ICSID cases). Resignations have also occurred in several PCA-administered intra-EU BIT cases.

when the substitute arbitrator himself was challenged on *Achmea*-related grounds, leading to yet a further five months of delay.

Some Consequences of Ethically Dubious Resignations

The above questions have all arisen in scenarios where, for the most part, there was no reason to doubt the good faith of the participants. Ethically dubious resignations, unfortunately, are not unknown.

The act of resigning at an extremely disruptive point, such as shortly before decision, is thankfully rare.³¹ Even some purportedly health-related resignations are suspect given their context and timing. For example, in one UNCITRAL investment case, a party requested postponement of an imminent hearing after settlement negotiations broke down. The tribunal refused the request; the next day, the arbitrator appointed by the requesting party resigned for “health reasons.”

A number of mechanisms advance the systemic interest in discouraging improper resignations. For example, ICSID has proposed new rules clarifying that “an arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal *and providing reasons for the resignation*,”³² which increases accountability. Similarly, some procedural rules require that the resigning arbitrator seek the consent of the institution or coarbitrators.³³

Improper resignation may bring serious consequences to the resigning arbitrator. Most obviously, improper resignation may have consequences for his or her fees.³⁴ In addition, liability issues may arise. As Born notes, “a wrongful resignation will expose the arbitrator to a loss of immunity, damages claims and other sanctions.”³⁵ Another “market discipline” is that an improper resignation will likely have an impact on reputation and future appointments.³⁶

Other strategies create adverse consequences for a collusive party. Under certain regimes, a party can be deprived of the right to appoint the replacement arbitrator if there are reasons to believe the party orchestrated a tactical resignation.³⁷ More controversially, in rare instances the remaining arbitrators may continue the arbitration without a replacement, a consequence that modern arbitral rules are increasingly making available in “exceptional circumstances.”³⁸

Conclusion

Even legitimate resignations can be disruptive. They also give rise to ethical questions which could be addressed in any new common code of conduct for arbitrators.

³¹ See *Levine*, *supra* note 1, at 287-88; Timothy G. Nelson, *Boycotts and Walkouts in International Arbitration*, TRANS'L DISP. MGMT. 16 (2017).

³² *ICSID Working Paper*, *supra* note 5, paras. 187-89 (emphasis added), Rule 24.

³³ *Int'l Chamber of Commerce Rules of Arbitration*, art. 15(1) (2017); *ICSID Convention*, *supra* note 26, art. 56(3).

³⁴ *IBA Rules of Ethics*, *supra* note 7, Introductory Note; see also English *Arbitration Act 1996*, c. 25 s. 25 (Eng).

³⁵ *Born*, *supra* note 3, at 2008-09.

³⁶ Simon Greenberg et al., *Secretariat's Guide to ICC Arbitration* (2012), para. 3-600. For express acknowledgement that an ethical breach may lead to nonconfirmation in subsequent appointments, see Milan Chamber of Arbitration, *Code of Ethics of Arbitrators* art. 13.

³⁷ See *Int'l Ctr. for Settlement of Inv. Disp. Arbitration Rules* art. 11(2); *UN Comm'n on Int'l Trade Law Arbitration Rules* art. 14(2) (2010); *Permanent Ct. of Arb. Arbitration Rules* art. 14(2) (2012). This was invoked in *Holiday Inns v. Morocco*. See also *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, para. 39 (May 22, 2007).

³⁸ See *Permanent Ct. of Arb. Arbitration Rules* art. 12(4) (2012); *Int'l Chamber of Commerce Rules of Arbitration*, art. 15(5) (2017). This occurred in *Himpurna California Energy Ltd. v. Indon.*, Final Award of Oct. 16, 1999, para. 5, XXV YEARBOOK COMM. ARB. 186 (2000).

First, there is an ethical obligation only to accept appointments that the arbitrator believes he or she is capable of fulfilling to completion and without conflict. As a preventative measure, the arbitrator should be frank, prompt, and thorough in disclosing any matters that may conflict with that duty.

Second, there is an ethical commitment to complete an arbitration. If circumstances unavoidably change mid-proceedings, any resignation should be tendered with reasons and in consultation with the parties, coarbitrators, and the institution. The response should be a swift replacement and consideration of appropriate measures to safeguard the fairness, efficiency, and integrity of proceedings.

Third, an arbitrator should not resign in bad faith. Careful choice of applicable procedural and legal regimes may ensure there are consequences for such a resignation, including depriving a party of the right to reappoint, or allowing the arbitration to proceed without a substitute. Arbitrators who resign without justification may face consequences for fee entitlement, liability, and, not least, their reputations.