

**ICSID Arbitral Tribunal, ICSID Case No. ARB/17/32, Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia, Decision on the Proposal to Disqualify Prof. Brigitte Stern, international arbitral tribunal, 23 March 2018.**

Member State

 Croatia

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Topic

Independence and impartiality of the arbitrators with a special focus on the lack of impartiality of an arbitrator.

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Deciding Court Original Language

ICSID Arbitral Tribunal

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Deciding Court English translation

Same as above

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Registration N

ICSID Case No. ARB/17/32

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Date Decision

23 March 2018

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National Follow Up Of (when relevant)

Not applicable

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EU legal sources and CJEU jurisprudence

Not directly mentioning EU law but relevant to it in light of Opinion 1/17 and of the ECJ's case law on the independence and impartiality of judicial organs.

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## ECtHR Jurisprudence

Not applicable

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## Subject Matter

The impartiality of the arbitrator appointed by the Respondent State was challenged due to the repeated appointments from the same State that the arbitrator in question had obtained in recent times. This circumstance was seen as susceptible to raising doubts in the mind of a reasonable observer as to the arbitrator's reliability to exercise independent judgement and act impartially.

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## Legal issue(s)

The case is related to the impartiality (or internal aspect of independence), being essentially a case of possible conflict of interest on the part of the arbitrator (thus affecting his equidistance from the disputing parties).

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## Request for expedited/PPU procedures

Not applicable

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## Interim Relief

Not applicable

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## National Law Sources

Not applicable

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## Facts of the case

Two main facts were seen as problematic in the claim. In particular, the arbitrator had been appointed, within the preceding three years, as an arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties. Moreover, at the time of the dispute, the arbitrator was serving as an arbitrator in another arbitration on a related issue involving one of the parties.

On the procedural history, the following points need to be highlighted:

On 25 August 2017, the Claimants submitted a Request for Arbitration to ICSID against the Republic of Croatia.

On 6 September 2017, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

The Tribunal is composed of Professor Gabrielle Kaufmann-Kohler, a national of Switzerland, President, appointed by the agreement of the parties; Professor John Y. Gotanda, a national of the United States of America, appointed by the Claimants; and Professor Brigitte Stern, a national of France, appointed by the Respondent. Professor Stern was appointed by the Respondent following the resignation of Professor Donald McRae, a national of Canada. Ms Anna Holloway, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

On 31 January 2018, the Secretary-General notified the parties that Professor Stern had accepted her appointment and that the Tribunal was deemed to have been reconstituted on that date in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings. Professor Stern provided a declaration with accompanying statement, dated 31 January 2018, which was sent to the parties the same day.

On 16 February 2018, the Claimants proposed the disqualification of Professor Stern, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9. On that date, the Centre informed the parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The parties were also informed that the Proposal would be decided by the other Members of the Tribunal in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

On 19 February 2018, Professors Kaufmann-Kohler and Gotanda established a procedural calendar for the parties' submissions on the Proposal.

In compliance with that procedural calendar, the Respondent submitted their response to the Proposal on 26 February 2018.

Professor Stern furnished her explanations on 8 March 2018, as envisaged by ICSID Arbitration Rule 9(3).

The parties were also permitted, in accordance with the briefing schedule, to file a simultaneous round of comments by 12 March 2018. Only the Claimants elected to do so.

On 19 March 2018, the parties were notified that Professors Kaufmann-Kohler and Gotanda were equally divided and that the Proposal would be decided by the Chairman of the Administrative Council.

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### Reasoning (role of the Charter or other EU, ECHR related legal basis)

The main conclusion reached by the Tribunal is as follows: “In this case, the Claimants have not pointed to any circumstance related to [the arbitrator]’s other appointments by the Respondent that would call into question her impartiality or independence. First, as explained below, the Claimants have not established that a problematic overlap in terms of factual or legal issues of the cases exists at this time. Second, no evidence has been presented to show that a relationship of dependence, financial or otherwise, exists between [the arbitrator] and the Respondent or their counsel. Third, no evidence has been presented which could give rise to the inference that [the arbitrator]’s decisions would be influenced in any way by the fact of such multiple appointments by one party.” [para. 50]

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### Relation of the case to the EU Charter

As mentioned hereinabove, the case relates to the independence and impartiality standards applicable in the EU to judicial organs as resulting from the Charter and the ECJ’s case law.

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### Relation between the EU Charter and ECHR

Not applicable

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### Use of Judicial Interaction technique(s)

The Tribunal makes reference to the existing abundant tribunal case law on the matter.

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### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The Tribunal makes reference to other arbitral tribunals of the same nature and kind.

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Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

Not applicable

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Strategic use of judicial interaction technique (purpose aimed by the national court)

The Tribunal engaged in a systemic interpretation of the norms applicable with a view to preserving an overall coherence of the system.

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Impact on Legislation / Policy

The specific question analysed in the present case has somewhat indirectly been tackled in EU investment agreements. In particular, the rules concerning the randomisation of appointments of the members of the ICS seems to be aimed, among other things, at making sure that there is an adequate turning system and repeated appointments are, therefore, excluded.

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Notes on the national implementation of the preliminary ruling by the referring court

Not applicable

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Impact on national case law from the same Member State or other Member States

Not applicable

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(Link to) full text

<https://www.italaw.com/sites/default/files/case-documents/italaw9724.pdf>

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