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STATUS OF ARBITRATOR IN PUBLIC INTERNATIONAL LAW

IVAN CISÁR

Masaryk University, Faculty of Law, Czech Republic

Abstract in original language
Arbitration is an important mean of dispute settlement in the public international law. And an arbitrator as an individual holds important function in the arbitration. This contribution tries to outline what the status of the arbitrator is under the public international law, who he is and the legal safeguards for his work are.

Key words in original language
Arbitrator; status of arbitrator; privileges and immunities; permanent arbitration tribunal, *ad hoc* arbitration.

Introduction

Arbitration is a mean of dispute settlement know to the mankind for thousands of years.[1] It was frequently used by the states to solve their disputes before the era of the international courts and still it hold important place in the range of available dispute settlement tools. Moreover, the arbitration is also widely used by the businessmen in solving their commercial disputes in the international commercial arbitration.

This contribution is limited to the arbitration as a dispute settlement mean in the public international law. So, I will not deal with the international commercial arbitration. Also, the observances about the arbitrators are limited to the arbitrators holding their function in tribunals solving the disputes among the states and states and other entities (like inter-governmental organizations and to some extend also foreign investors).

In its first part, I will describe who can be an arbitrator. Second part describes what his necessary qualities must be. The third part will deal with the question of the privileges entrusted to the arbitrators to fulfil their role in the arbitration.

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[1] SOHN, L.B. *International arbitration in historical perspective.* In SOONS, A. (ed.). *International arbitration: past and prospects : a symposium to commemorate the centenary of the birth of Professor J. H. W. Verzijl (1888-1987).* Dordrecht : Martinus Nijhoff Publishers, 1990. 221 s. ISBN 0792307062. p. 9-10.

1 WHO CAN BE AN ARBITRATOR?

Arbitration is distinguished from the other judicial mean of dispute settlement by the fact, that parties have much more influence on the organization of the whole proceedings and also on the persons who will decide their dispute.[2] Parties are in general free to choose the persons who will sit in the tribunal.

The two groups of potential arbitrators can be distinguished. The first group in composed of the persons who hold also another function in the public sphere - they hold some official position. The second group is composed of the private individuals, whether nationals of the states that are involved in the dispute, or the nations of the third states.

The most common arbitrator in the past was a sovereign or head of state of the third uninvolved state[3]. Also other official persons[4], like an ambassadors or ecclesiastical persons[5], could have been asked to act as arbitrators. This

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[2] BUTLER, NICHOLAS. *Arbitration and Conciliation Treaties.* In *Max Planck Encyclopaedia of Public International Law* [online]. Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press [cit. 2010-03-19]. p. 4. Available at: <http://www.mpepil.com>.

[3] Examples can be find in STUYT, A. *Survey of international arbitrations : 1794-1970*. Leyden : A.W. Sijthoff, 1972. 572 s. ISBN 9028602429.

E.g.: Case Nr.4a: H.M. The Empress of Russia, p.7; Case Nr. 24: Alexander I, Emperor of Russia, p. 27; Case Nr. 27: William I, King of Netherlands, p. 30; Case Nr. 32 Victoria, Queen of Great Britain, p. 35; Case Nr. 38: Frederic-William, King of Prussia, p. 41; Case Nr. 41: Nicholas, Emperor of Russia, p. 44; Case Nr. 44: William III. King of Netherlands, p. 47; Case Nr. 45: Louis Napoleon, President of the French Republic, p. 48; Case Nr. 54: Isabella II, Queen of Spain,, p. 57; Case Nr. 59, 69 and 70: Leopold I, King of Belgium, p. 62, p. 72, p. 73; Case Nr. 77: J.J. Perez, President of the Republic of Chile, p. 79; Case Nr. 85: U.S.Grant, President of the USA, p. 88; Case Nr. 95: William, German Emperor, King of Prussia, p. 99; Case Nr. 159: Swiss Federal Council, p. 164; and many others.

[4] Examples can be find in STUYT, A. *Survey of international arbitrations : 1794-1970*. Leyden : A.W. Sijthoff, 1972. 572 s. ISBN 9028602429.

E.g.: Case Nr. 87: Robert Wiliam Keate, Lieutenant Governor of Natal, p. 90; Case Nr. 88: S. D'Ehrenhoff, Resident Minister of the King of Sweden and Norway, p. 91; Case Nr. 89: Edward Thorto, British Minister at Washington, p. 92; Case Nr. 156: Baron Lambermont, Belgian Minister of State, p. 161.; and others.

Also the Secretary-General of the United Nation in arbitration between France and New Zealand – Rainbow Warrior; example from MERRILLS, J. *International dispute settlement*. 4th ed. Cambridge : Cambridge University Press, 2005. 387 s. ISBN 0521617820. p. 94.

[5] Examples can be find in STUYT, A. *Survey of international arbitrations : 1794-1970*. Leyden : A.W. Sijthoff, 1972. 572 s. ISBN 9028602429.

practice was customary to the 19th century.[6] The reminiscences of this practice were still visible in the 20th century.[7] Nowadays, parties are choosing the judges of the International Court of Justice instead.[8]

The most common arbitrator chosen in these days is the private person. Parties can choose either their national or nation of the third state.

The condition of nationality is sometimes so important that it finds it way also into the treaties constituting the tribunals. The 1907 Hague Convention for Pacific Settlement of International Disputes allows each party to dispute to appoint two arbitrators of whom only one can be a national of this party.[9] Similar provision is also in the 1949 Revised General Act for the Pacific Settlement of International Disputes. Under the provision of the General Act, the parties to the dispute are allowed to pick one their national to be a member of the tribunal. The three other members must be nationals of the third states and even they can not be resident at the territory of the party to the dispute or be in its service.[10]

E.g: Case Nr. 141: His Holiness Leo XIII, p. 146; Case Nr. 189: His Holines Pope Leo XIII, succedded by Benedict XV, p. 195; Case Nr. 281: His Holiness Pius X, p. 288; and others.

6 *Memorandum on Arbitra Procedure, prepared by the Secretaria*t *A/CN.4/35* [online]. United Nations, International Law Commission, 21 November 1950 [cit. 2010-11-20]. Available at < http://untreaty.un.org/ilc/documentation/english/a_cn4_35.pdf>. p. 161.

7 STUYT, A. *Survey of international arbitrations : 1794-1970.* Leyden : A.W. Sijthoff, 1972. 572 s. ISBN 9028602429. Case Nr. 435, p. 456; Case Nr. 432, p.453. MERRILLS, J. *International dispute settlement.* 4th ed. Cambridge : Cambridge University Press, 2005. 387 s. ISBN 0521617820. p.93.

8 Example: Arbitration regarding the Iron Rhine Railway between The Kingdom of Belgium and The Kingdom of the Nertherlands from *Reports if International Arbitral Awards, Volume XXVII* [online]. United Nations, Office of Legal Affairs. Released February 2008 [cit. 2010-11-20]. Available at <http://untreaty.un.org/cod/riaa/vol_XXVII.htm>. ISBN: 9789210330985.

9 Art. 45 *1907 Hague Convention for Pacific Settlement of International Disputes*. Available at < http://www.pca-cpa.org/upload/files/1907ENG.pdf>.
*Memorandum on Arbitra Procedure, prepared by the Secretaria*t *A/CN.4/35* [online]. United Nations, International Law Commission, 21 November 1950 [cit. 2010-11-20]. Available at < http://untreaty.un.org/ilc/documentation/english/a_cn4_35.pdf>. p. 163.

10 Art. 22 *1949 Revised General Act for the Pacific Settlement of International Disputes*. UNTS 912. *Memorandum on Arbitra Procedure, prepared by the Secretaria*t *A/CN.4/35* [online]. United Nations, International Law Commission, 21 November 1950 [cit. 2010-11-20]. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_35.pdf>. p. 164.

In general, it is recognized that when the parties to the dispute are nominating part of the arbitral tribunal, the chair of the tribunal should be neutral.[11] Also the possibility of the tribunal in full composed of the neutral members is possible.[12] The requirement for the nationality of the third uninvolved state is required for the chairman of the tribunal established under the ICSID Convention.[13]

The question of nationality of the members of the tribunal often leads to the complaints that the nationals to the parties in dispute will vote in favour of their states irrespective of the arguments presented by the state. Also it is argued that the presence of the national member adds to the expense and size of the tribunal and makes it more difficult for the tribunal to reach the decision.[14] On the other hand, national members are still recognized as a necessary part of the tribunals and they have found their way also into the composition of the international courts.[15] The complaint that they vote solely for their states is not supposed by the experience – they are rarely alone to support their own state and there were cases when they vote against it. Moreover, they are viewed as an important source of information of the special features of the national law of the involved states.[16]

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[11] *Memorandum on Arbitra Procedure, prepared by the Secretaria*t *A/CN.4/35* [online]. United Nations, International Law Commission, 21 November 1950 [cit. 2010-11-20]. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_35.pdf>. p. 161.

[12] *Memorandum on Arbitra Procedure, prepared by the Secretaria*t *A/CN.4/35* [online]. United Nations, International Law Commission, 21 November 1950 [cit. 2010-11-20]. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_35.pdf>. p. 161.

[13] Art. 38. *ICSID Convention, regulations and Rules* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, apríl 2006 [cit. 14 November 2009]. Available at: <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

[14] *Memorandum on Arbitra Procedure, prepared by the Secretaria*t *A/CN.4/35* [online]. United Nations, International Law Commission, 21 November 1950 [cit. 2010-11-20]. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_35.pdf>. p. 164.

[15] Art. 31 *Statute of the International Court of Justice*. Available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>. Art. 17 *Statute of the International Tribunal of the Law of the Sea*. Available at <http://www.itlos.org/documents_publications/documents/statute_en.pdf>.

[16] *Memorandum on Arbitra Procedure, prepared by the Secretaria*t *A/CN.4/35* [online]. United Nations, International Law Commission, 21 November 1950 [cit. 2010-11-20]. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_35.pdf>. p. 164.

2 REQUIREMENTS ON THE ARBITRATOR

Nearly every private person could be an arbitrator. It is up to the parties to the dispute to choose the arbitrator from this pool of possible candidates.

The extent of this pool can be limited by the requirements prescribed on the arbitrators by the law. These could be the requirement of nationality and also the requirement of some knowledge or skills. And the most widely used and also the most widely presumed condition - the independence of the possible arbitrator.

The condition of the nationality of the arbitrator is not used much widely. The few examples are mentioned in the previous section. Mostly, there is no prescription on the nationality of the arbitrator nominated by the parties to the dispute.[17]

Other requirements for the arbitrators are connected with their knowledge and experiences. In general, it can be described as a requirement for the persons skilled in the law.[18] But this requirement can be drafted also in other way, like person *"recognized for their competence in international law"*[19] or *"arbiters of recognized competence in questions of international law and of the highest integrity"*[20].

These requirements are also the prerequisites for the most important requirement on the arbitrator - the independence of an arbitrator.

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[17] E.g. Art. III(1) *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration)* 19 January 1981 [online] [cit. 2010-05-29]. Available at: <http://www.iusct.org/claims-settlement.pdf>. Art. 2 *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November* 2009 [online]. [cit. 2010-05-18] Availabe at: <http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitra%C5%BEni_sporazum_-_podpisan_EN.pdf >.

[18] *Memorandum on Arbitra Procedure, prepared by the Secretaria*t *A/CN.4/35* [online]. United Nations, International Law Commission, 21 November 1950 [cit. 2010-11-20]. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_35.pdf>. p. 161.

[19] Art. 2(1) *Arbitration Agreement between the Governments of the Republic of Slovenia and the Government of the Republic of Croatia 4 November* 2009 [online]. [cit. 2010-05-18] Availabe at: <http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitra%C5%BEni_sporazum_-_podpisan_EN.pdf >.

[20] Art. XL(1) *American Treaty on Pacific Settlement (Pact of Bogota)* [online]. Available at < http://www.oas.org/juridico/english/treaties/a-42.html>.

The necessity of arbitrator independence is recognized from the beginning also in the works of ILC: *"Judges should be capable and disinterested persons;".*[21]

The necessity for the independence of the arbitrator also finds its way into the treaty law. The example is the Article 5 of 1992 Convention on Conciliation and Arbitration within the CSCE[22].

3 PROCEDURAL SAFEGUARDS OF INDEPENDENCE

As was said in the previous part, the independence of the arbitrator is necessity for the well-function of the arbitration tribunal and the outcome of the dispute settlement. But how is this independence safeguarded? How are the states guaranteeing the tribunal that they would not interfere with their work?

The independence of the arbitrator is protected by the principle of immutability of the tribunal. Another safeguard to his independence are the privileges and immunities that are granted to him

3.1 PRINCIPLE OF IMMUTABILITY

The general principle governing the composition of the tribunal through the dispute is that it is unchangeable. From the moment when the tribunal is set up to the moment when the award is rendered, the tribunal should be the same. This principle was recognized in the workings of the International Law Commission on the Draft of Convention on Arbitral Procedure.[23]

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[21] *Memorandum on Arbitra Procedure, prepared by the Secretaria*t *A/CN.4/35* [online]. United Nations, International Law Commission, 21 November 1950 [cit. 2010-11-20]. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_35.pdf>. p. 161.

[22] *1992 Convention on Conciliation and Arbitration within the CSCE* [online]. Available at < http://www.osce.org/documents/mcs/1992/12/4156_en.pdf>.

”*Article 5 Independence of the Members of the Court and of the Registrar*
The conciliators, the arbitrators and the Registrar shall perform their functions in full independence. Before taking up their duties, they shall make a declaration that they will exercise their powers impartially and conscientiously.”

[23] *Commentary on the Draft Convention on Arbitra Procedure Adopted by the International Law Commission at its Fifth Session, prepared by the Secretariat A/CN.4/92* [online]. United Nations, International Law Commission, 1955 [cit. 2010-11-20]. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_92.pdf>.

The aim of this principle is to ensure that the agreed arbitration proceedings is not „subject to the frustration by a subsequent obstructive attitude of one of the parties or by failure to provide for foreseeable contingencies".[24]

3.2 IMMUNITIES AND PRIVILEGES

There are different immunities and privileges in place for the different categories of possible arbitrators. As was already stated in the second section of this contribution, there are at leas two different groups of possible arbitrators - the persons holding officials functions and the private persons.

The person holding official is protected by the status of the function he is holding. Also the immunities that are in place to ensure the exercise of his official duties will be there to ensure the exercise of the duties stemmed from the arbitration. So if the parties to the dispute chose the head of the third state, he would be protected by the immunities of the head of the state. If the parties chose the representative of the inter-governmental organization (like the secretary general of the UN), he would be protected by the immunities of the representative of that inter-governmental organization. If the parties to the dispute chose the judge of the ICJ or any other international court, he would be protected by the immunities of the judge.

The different situation is when the chosen arbitrator is only a private person. He does not have any other official status that would protect his independence under the international law. Only the status of the arbitrator could do this.

But are there any privileges and immunities connected with the status of arbitrator? There is possibility that there are some expressly granted to the arbitrators in general, but I have not found any document mentioning the privileges and immunities for the arbitrators universally.

"Article 5

1. Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered."

"Article 7

1. Once the proceedings before the tribunal have begun, an arbitrator may withdraw only with the consent of the tribunal. The resulting vacancy shall be filled by the method laid down for the original appointment."

[24] *Commentary on the Draft Convention on Arbitra Procedure Adopted by the International Law Commission at its Fifth Session, prepared by the Secretariat A/CN.4/92* [online]. United Nations, International Law Commission, 1955 [cit. 2010-11-20]. Available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_92.pdf>. p. 26.

The privileges and immunities are granted only by particular states for the particular arbitration tribunals or arbitrators. Also in this situation, the express grant of the privileges and immunities is common for the permanent arbitration tribunals, but not so much for the *ad hoc* tribunals.

The example of the privileges and immunities granted by the group of states for the arbitration tribunal they established to be able for any future disputes is Article 6 of the 1992 Convention on Conciliation and Arbitration within the CSCE[25].

It is interesting that OSCE Convention is using the better established legal concept of immunities and privileges of the judges of the International Court of Justice and grants the same privileges and immunities as are granted to the ICJ judges. The OSCE Convention is referring to the Article 19 of the Status of the International Court of Justice, which also refers to the well-established concept of diplomatic privileges and immunities[26].

Other example of expressly granted immunities and privileges is the Iran – United States Claims Tribunal. But this time, the privileges and immunities are not granted by the states involved in the dispute, but by the host state of the Tribunal – the Netherlands. There is no mention about the status of the arbitrators in the agreement setting this Tribunal up.

The extent of the expressly granted privileges and immunities is much more elaborate than the wording in the case of the OSCE Court of Conciliation and Arbitration. They were granted by the agreement concluded between the Iran – United States Claims Tribunal and the Kingdom of Netherlands. The content of the agreement is recorded in the letters exchanged between the

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[25] *1992 Convention on Conciliation and Arbitration within the CSCE* [online]. Available at <http://www.osce.org/documents/mcs/1992/12/4156_en.pdf>.

"Article 6 Privileges and Immunities
The conciliators, the arbitrators, the Registrar and the agents and counsel of the parties to a dispute shall enjoy, while performing their functions in the territory of the States parties to this Convention, the privileges and immunities accorded to persons connected with the International Court of Justice."

[26] *Statute of the International Court of Justice*. Available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

"Article 19
The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."

Dutch Ministry of Foreign Affairs and the President of the Iran – United States Claims Tribunal.[27]

The general grant of the immunities end privileges is in the Article 7[28].

As a result of the fact that the privileges and immunities are granted only by the host state, they are limited by its territory and by the time spend by the arbitrators on its territory. What is interesting the time extend is also adjusted to the time when the arbitrator is actually holding its function[29].

Another interesting aspect of the privileges and immunities for the arbitrators at the Iran – United States Claims Tribunal is the distinguishing between the nationals of the Netherlands and permanent residents in the Netherlands on the one hand and the nationals of the other states on the second hand. The protection and the privileges of the Netherlands nationals

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[27] *Exchange of Letters between the Government of the Kingdom of the Netherlands and the President of the Iran-United States Claims Tribunal concerning the granting of privileges and immunities to the Tribunal 24 September 1990* [online]. Available at <http://wetten.overheid.nl/BWBV0002529/geldigheidsdatum_21-11-2010>.

[28] *Exchange of Letters between the Government of the Kingdom of the Netherlands and the President of the Iran-United States Claims Tribunal concerning the granting of privileges and immunities to the Tribunal 24 September 1990* [online]. Available at <http://wetten.overheid.nl/BWBV0002529/geldigheidsdatum_21-11-2010>.

"Article 7

The members of the Tribunal shall be inviolable. They shall not be liable to any form of arrest or detention. The Netherlands authorities shall treat them with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity."

[29] *Exchange of Letters between the Government of the Kingdom of the Netherlands and the President of the Iran-United States Claims Tribunal concerning the granting of privileges and immunities to the Tribunal 24 September 1990* [online]. Available at <http://wetten.overheid.nl/BWBV0002529/geldigheidsdatum_21-11-2010>.

"Article 15

1. Every person entitled to privileged and immunities shall enjoy them from the moment he enters Netherlands territory for the purpose of performing his functions with the Tribunal or, if he is already in its territory, from the moment when his appointment is notified to the Netherlands Ministry of Foreign Affairs.

2. When function of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves Netherlands territory, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However in respect of acts performed by such person in the exercise of his function, immunity shall continue to subsist. "

and the permanent residents there are limited when compared to the immunities and privileges of the other arbitrators.[30]

CONCLUSION

The members of the international community often use arbitration to solve their disputes instead of using the international tribunal. Nowadays, it is not so common to ask the head of the third state to act in the role of an arbitrator. Instead, the private persons who are deemed to be persons of recognized competence in international law are chosen to act as arbitrators.

Another requirement on the arbitrator is his independence and that he is not personally interested in the outcome of the dispute and will not favour any of the disputants.

But the requirement for the independence is in conflict with the possibility of the parties to appoint their nationals. This risk is checked by the fact, that both parties have the same opportunity and the nationals of the one party would not be able to dominate the tribunal.

Moreover, the independence of the arbitrators is secured by the different sets of privileges and immunities granted to them. In the history, when the sovereigns were asked to act as arbitrators, their independence was secured by their own status as a sovereign of the third power. But nowadays, when the arbitrators are private persons, the privileges and immunities are tailored specially for the function of arbitrator.

However, there are differences between the permanent arbitration tribunals and the tribunals *ad hoc.* The situation of the arbitrators in the permanent tribunals is secured better. There was more time to think about this question. But also here are the differences. In case of OSCE Court of Conciliation and Arbitration, the privileges and immunities are granted by the every party to the 1992 Convention on Conciliation and Arbitration within the CSCE. But

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[30] *Exchange of Letters between the Government of the Kingdom of the Netherlands and the President of the Iran-United States Claims Tribunal concerning the granting of privileges and immunities to the Tribunal 24 September 1990* [online]. Available at <http://wetten.overheid.nl/BWBV0002529/geldigheidsdatum_21-11-2010>.

"Article 12

1. Except insofar as additional privileges and immunities may be granted by the Netherlands Government, a member of the Tribunal or a staff-member of the Tribunal who is a Netherlands national or permanently resident in the Netherlands shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his function.

2. In other respects the Kingdom of the Netherlands shall exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the Tribunal."

in case of Iran – United States Claims Tribunal, there are no privileges and immunities granted by the parties in the disputes, but only by the host state of the tribunal.

In case of arbitration tribunals *ad hoc*, there is no general answer to this question. The works of the ILS on arbitral procedure did not deal with this topic and I did not find any examples of the state practice in the arbitration agreements.

There is no formal legal protection, except of the principle of immutability, of the independence of the arbitrators in *ad hoc* tribunals from the interference of the parties in dispute and also from the interference of the third states. The protection of the arbitrator at permanent tribunals is a little bit better but still it is divergent.

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Contact – email

cisar.ivan@gmail.com