CHICAGO INTERNATIONAL ARBITRATION CENTER

Challenging an Arbitrator

By Margaret Moses

International arbitrators, whether appointed by an arbitral institution or by one of the parties, are expected to be independent and impartial. Arbitration rules, laws and guidelines all require this. For example, the IBA Guidelines on Conflicts of Interest state as the first General Principle, "Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated."[1] An arbitrator who does not meet the standards of impartiality and independence, or otherwise proves unfit, may be challenged by one or both of the parties, and if the challenge is successful will be removed.

Challenges are usually based on conflicts of interest, but may also be based on improper conduct by the arbitrator. In an institutional arbitration, the rules of the institution will provide the grounds and the procedure for a challenge, and the administrative body of the institution will make the decision as to whether the arbitrator will be removed. The Arbitration Rules of the International Center for Dispute Resolution ("ICDR"), for example, provide that "[a] party may challenge an arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality, or independence, or for failing to perform the arbitrator's duties."[2]

A party who wants to challenge an arbitrator must do so promptly, within the time frame set by the rules. Otherwise, it may be deemed to have waived any objection. The ICDR requires a party to send a written notice of the challenge to the Administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party."[3]

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[1] IBA Guidelines on Conflicts of Interest, General Principle 1, available at https://www.ibanet.org/resources
[2] Arbitration Rules of the International Center for Dispute Resolution, Article 14.
[3] *Id.*

If the challenge is unsuccessful, some jurisdictions permit a party to raise the issue before a court. In other jurisdictions, the party must wait until after the final award to have a court review of the non-removal of the arbitrator.

If the arbitration is not being held under the aegis of an arbitral institution, but is *ad hoc*, parties who have adopted the UNCITRAL Arbitration Rules will follow the procedures set forth in those rules. However, if no rules were adopted by the parties, challenge procedures will be governed by local law.

Parties must be very strategic in reaching their decision as to whether to challenge an arbitrator. Although in some cases, a challenged arbitrator will simply withdraw, in many cases parties will have to spend significant effort and resources to try to remove the arbitrator, and on the whole, they are unlikely to be successful. There is a tension that is apparent here, because on the one hand, a party may decide to challenge an arbitrator simply in order to cause delay and to deny the other party its choice. On the other hand, parties should have the right to have confidence in the process by ensuring that their case will be decided by a competent, fair-minded, independent and impartial arbitrator. However, in making the decision about whether to challenge, parties should not neglect to consider that an arbitrator who is unsuccessfully challenged may consciously or unconsciously harbor some negative feelings toward the party that initiated the challenge.

Parties are more likely to be successful if they challenge an arbitrator at the beginning of an arbitration, as soon as the tribunal has been constituted, rather than during the proceedings or even after the award is rendered, when both parties have expended significant time, effort and resources in the arbitration. This means that a party should engage in due diligence as soon as an arbitrator is appointed, to ensure that proper disclosures have been made, and there are no significant conflicts of interest. If the challenge is based on the arbitrator's improper conduct during the proceedings, that conduct should be documented and challenged as early as is reasonably feasible.

Arbitral institutions have not typically provided reasons for the decisions they have reached on whether or not to remove an arbitrator. However, the London Court of International Arbitration ("LCIA") took a different position beginning in 2011, when it first published a digest of twenty-eight reasoned decisions on challenges to

arbitrator.[4] It published 32 more reasoned decisions in 2018.[5] The cases that the LCIA reported were first "sanitized" to remove any information that would permit the parties or arbitrators to be identified. The decisions do not reveal the number of cases where an arbitrator stepped down voluntarily after being challenged. However, among the cases reported both in 2011 and 2018, only 20% of the cases were successful. From the 80% that were rejected, it is apparent that an arbitrator can be far less than perfect and still not be removed as an arbitrator.

The challenges that were successful tended to be based either on the lack of independence of the arbitrator or on evidence of bias by reason of the conduct or relationships between the arbitrator and the party or the party's counsel. For example, an arbitrator was found not to be sufficiently independent because an overseas office of his law firm was representing one of the parties in an unrelated matter. With respect to bias, an arbitrator was removed for having publicly made negative comments about the parent company of one of the parties. Another arbitrator was removed for having given a party advanced notice about the content of an award before it was published.

Of the 80% of challenges that failed, many had been based on procedural grounds, such as complaints about the way the arbitrator was managing the proceedings, or the failure of a chair to consult with co-arbitrators before making a ruling. Procedural challenges tended to be rejected because the conduct of the arbitration was considered within the discretion of the arbitrator, and challenges on these grounds were often viewed as vexatious and intended to delay. With respect to potential bias, neither a favorable demeanor of an arbitrator toward the side that appointed him, nor even some ex parte conversations were considered be sufficient to cause removal.

The LCIA decisions are useful for learning what may and what may not result in a successful arbitrator challenge. They can help counsel decide whether or not to challenge an arbitrator, and can help arbitrators decide whether or not they should accept an appointment, what kinds of information they should disclose, and what the expectations are for their conduct as an arbitrator.

[4] 27 Journal of International Arbitration, No. 3, 2011.
[5] LCIA Releases Challenge Decisions Online (Feb. 2018), available at https://www.lcia.org/News/lcia-releases-challenge-decisions-online.aspx

Challenges to arbitrators in investor-state arbitrations under ICSID have been even less successful than in international commercial arbitration. The ICSID success rate of challenges is approximately 5%. This is in large part because the decision to disqualify an arbitrator is usually made by the other two arbitrators. If two of three arbitrators are challenged, or if the two unchallenged arbitrators do not agree, then the Chairman of the ICSID Administrative Council makes the decision.

The arbitrator community in investor-state arbitration is quite small, and it is understandable that two arbitrators on a tribunal might be reluctant to find that a third arbitrator should be disqualified under the ICSID Convention standard, which is that he or she demonstrated "a manifest lack of the qualities required to serve as an ICSID arbitrator."[6] Those qualities are that the arbitrators are "persons of high moral character and recognized competence, who may be relied upon to exercise independent judgment."[7] In such a closed community, a finding that a fellow arbitrator lacked high moral character and recognized competence would be not be easily made. However, a few cases where challenges were successful have interpreted the ICSID Convention as not requiring proof of actually dependence or bias, but rather the appearance of dependence or bias.[8]

In any event, an attempt to disqualify an arbitrator in either commercial arbitration or investor-state arbitration is, for the most part, unlikely to succeed, and probably not worth undertaking unless there is evidence of truly egregious conflict of interest or bias.

[6] ICSID Convention, Article 57.
[7] ICSID Convention, Article 14.
[8] *See, e.g.,* Blue Bank International & Trust (Barbados) LTD v. Bolivarian Republic of Venezuela, ICSID Case No. ARB 12/20, Decision on the parties' Proposals to disqualify Venezuela's appointee, Dr. Torres Bernárdez; Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case no. ARB/13/13, Decision on the proposal for Disqualification of Mr. Bruno Boesch (20 March 2014).

Additional sources:

- Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (2012)
- Baiju S. Vasani and Shaun A. Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn*? ICSID Review (Winter, 2015).
- *Challenges to Arbitrators Under the ICSID Convention and Rules* (2020), available at https://www.lexology.com/library/detail.aspx?g=deb5a5ac-acb6-490b-bbbd-5e6c9d5f0204
- *Arbitrator challenges: a practical guide* (2020), available at https://globalarbitrationnews.com/arbitrator-challenges-a-practical-guide/.