

CHALLENGING THE ARBITRATOR

Björn Gehle, Special Counsel
Clayton Utz, Sydney

KEY POINT

Parties in an international arbitration should adopt due diligence when nominating the arbitrator to ensure the arbitrator is independent and impartial.

INTRODUCTION

One of the most fundamental principles in international arbitration is that the arbitrator must be impartial and independent. This principle is embedded in most arbitration laws and rules, though different interpretations exist as to the exact meaning of those requirements. A question which often arises in this context is what can a party do when the impartiality or independence of an arbitrator is called into question.

The problem can be illustrated by using an example from a recent arbitration where the arbitrator (who was nominated by the respondent) disclosed that he was presently acting as co-counsel with the respondent's lawyers in an unrelated dispute.

The claimant also discovered that the arbitrator had previously acted together with the respondent's lawyers on two other occasions, a fact that was not disclosed by the arbitrator. The claimant was successful in challenging the arbitrator on the basis of his relationship with the respondent's lawyers and the arbitrator was removed from the tribunal and replaced.

GROUND UPON WHICH AN ARBITRATOR CAN BE CHALLENGED

The possibility to challenge an arbitrator if certain requirements are met exists to protect the parties and the integrity of the arbitral process. Most leading arbitration rules contain provisions on what grounds arbitrators can be challenged as well as the procedure to be followed for such challenge

(for example Article 14 of the Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules).

Arbitrators are commonly required to disclose prior to their appointment or confirmation any potential conflicts they may have. Naturally, there are different views as to what constitutes proper disclosure and what circumstances give rise to doubts as to the arbitrators' impartiality and independence.

Some common aspects an arbitrator may need to consider are, for example, the arbitrator's past or existing relationship:

- with one or more of the parties;
- with the parties' lawyers; and
- with a potential witness.

However, a lack of impartiality or independence may arise from circumstances which, at the first, may appear far more remote than those mentioned above, for example:

- the arbitrator's law firm representing (or having represented) one of the parties;
- a family member of the arbitrator having a financial interest in the outcome of the dispute (for example as shareholder of one of the parties).

The existence and disclosure of the circumstances do not automatically disqualify the arbitrator as not being impartial or independent. Instead the particular circumstances in each case need to be considered carefully in order to determine whether they suffice to disqualify the person from being the arbitrator in that dispute.

CHALLENGE PROCEDURE

If a party forms the view that an arbitrator is lacking the required standard of impartiality and independence that party

should instigate the challenge immediately. The procedure for challenging an arbitrator varies depending on the arbitration law and rules application to the arbitration.

In institutional arbitration the arbitration rules often require the challenging party to submit in writing to the institution the grounds upon which the challenge is made. The challenged arbitrator, any other members of the tribunal, and the other parties will be informed and are given the opportunity to comment. Some institutions, such as ACICA, will only determine the challenge if the other parties do not accept the challenge or the arbitrator refuses to resign, which other institution, such as the International Chamber of Commerce, will always make a determination in respect of the challenge.

For challenges made in ad hoc arbitrations, ie. where the arbitration is not administered by an institution, the procedure may be more complex. In those circumstances, if the arbitrator is not willing to resign the party challenging the arbitrator may need to seek assistance from the court which has supervisory jurisdiction over the arbitrator. This will usually be the court at the place (or seat) of the arbitration.

REMOVAL ON OTHER GROUNDS

It is not uncommon that parties wish to remove the arbitrator for reasons which are unrelated to the arbitrator's impartiality or independence, for example, where the arbitrator fails to progress the arbitration, or otherwise does not perform as necessary.

However, the scope for a challenge on the grounds is somewhat more limited and largely depends upon the

arbitration rules agreed between the parties.

Article 15.2 of the ACICA Rules, for example, allows a party to replace an arbitrator where he or she 'fails to act' or it becomes impossible for the arbitrator to perform his or her functions. This may, for example, be the case if the arbitrator only has very limited availability because he or she took on too many arbitrations at the same time. In such circumstances, the procedure for the challenge of an arbitrator applies accordingly.

ISSUES TO CONSIDER

The independent and impartiality of an arbitrator are essential requirements in international arbitration for obvious reasons. Unsurprisingly awards may prove difficult to enforce where the independent or impartiality of the arbitrator who rendered the award was compromised.

Therefore, in order to uphold the integrity of arbitral awards as well as to prevent unnecessary delays and costs, parties in an international arbitration should adopt due diligence when nominating the arbitrator(s). It is a common misconception that a party appointed arbitrator is the extended arm of the parties on the tribunal. Instead, that arbitrator is subject to the same standard of impartiality and independent as any other arbitrator.

It is always useful to direct the arbitrator's attention to the IBA Guidelines on Arbitrator Independence which offer some guidance on what may give rise to a conflict of interest and which circumstances ought to be disclosed by the arbitrator.

Further, after the arbitrator has disclosed all relevant information, the parties should carefully consider whether there are any doubts as to the arbitrator's

impartiality and independence. If so, it may be necessary to instigate the challenge of that arbitrator. It is important to note that most arbitration laws and rules apply time limits within which a challenge has to be made, usually commencing from the point in time when the party becomes aware or could not have been unaware of the circumstances giving rise to the challenge.

Finally, parties should also agree to have their dispute resolved through institutional arbitration and select rules containing effective challenge procedures. This usually avoids having to go to the courts to replace the arbitrator.

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