Challenge and Replacement of Arbitrators balancing fairness with Arbitral integrity

التحدي وإستبدال المحكمين بتحقيق التوازن بين العدالة مع نزاهة التحكيم

by

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ABSTRACT

Arbitrators are appointed once there is a dispute to be settled, when the parties to the dispute had agreed in writing to have their disputes settled out of court by an arbitral tribunal. They are handpicked by the parties to the dispute, or if the parties agree otherwise a competent court will do the appointing of arbitrators. Since arbitrators are human beings just like the parties they will solve their dispute, there might be some relationships which are not allowed by the rules of arbitration. Those relationships might be contradicting with the core principles of arbitration such as independence and impartiality. Independence and impartiality are some of the requirements of an arbitrator besides educational qualifications. Before being appointed an arbitrator is informed of the intention of the party that want to appoint him or her for arbitration so that enough time is given to the arbitrator to investigate all potential conflicts that can lead to an arbitral challenge. Realising that there are no potential conflicts of interests the arbitrator is then free to accept appointment, but if there are real potential conflicts they have to be disclosed at the beginning of the process or better still reject the appointment if the conflicts are of great importance to the arbitration. Relationships with financial benefits, family relations, just to mention a few of some of the non-waivable relationships which according to arbitration rules parties are not allowed to waive their rights. Automatically given such relationships, the arbitrator will be removed from the arbitral tribunal; the removal of a once appointed arbitrator simply means that a vacant in the tribunal has been created. There are different national arbitration laws in different countries so as such some of the vacancy has to be filled before the process can continue while others say it depends with the number of the remaining arbitrators. Those who consider the number of remaining arbitrator also consider the stage at which the process was when the challenge was raised, if it was at an advanced stage they will simply allow the remaining arbitrators to issue an award. It’s only difficult when the challenged arbitrator was a sole arbitrator to the case which means they will be forced to replace such an arbitrator. Challenged arbitrators are replaced following the same procedure which was used to appoint the removed one. Though its allowed to challenge and replace arbitrators, procedures besides time limit are supposed to be followed, at the same time balancing fairness and arbitral integrity.

نبذة مختصرة

يتم تعيين المحكمين عندما يكون هناك خلاف يتوجب تسويته ، و يتم الاتفاق بين أطراف النزاع كتابة بأن يتم تسوية النزاع القائم بينهما خارج أسوار المحاكم بواسطة محكمين من قبل هيئة التحكيم. يتم إختيارهم من قبل أطراف النزاع، أو إذا اتفق الطرفان على خلاف ذلك فأن هناك محكمة مختصة سوف تقوم بتعيين المحكمين . وحيث أن المحكمين بشر مثلهم كأطراف النزاع الذين سوف يتم حل نزاعهما، لذا قد تكون هناك بعض الأشياء التي لا يسمح بها وفقا لقواعد التحكيم. تلك الأشياء قد تكون متناقضة مع المبادئ الأساسية للتحكيم مثل الاستقلالية والحياد. الاستقلالية والنزاهة هي بعض من متطلبات المحكم إلى جانب المؤهلات العلمية. قبل تعيينه وإبلاغ المحكم بنية الجهة التي تريد أن تعيينه كمحكم له أو لها للتحكيم بحيث تعطى وقتا كافيا للمحكم للتحقيق في جميع الصراعات المحتملة التي يمكن أن تؤدي إلى تحدي يواجه التحكيم. ويعد إدراك أنه لا يوجد أي تضارب محتمل في المصالح ومن ثم له حرية قبول التعيين، ولكن إذا كان هناك تضارب محتمل يجب أن يتم الكشف عنها في بداية عملية أو أفضل من ذلك رفض التعيين إذا كان الصراعات ذات أهمية كبيرة للتحكيم. العلاقات مع الفوائد المالية، العلاقات الأسرية، على سبيل المثال لا الحصر بعض العلاقات غير قابلة للإلغاء والتي وفقا لقواعد التحكيم لا يسمح للأطراف بالتنازل عن حقوقهم. وجود هذه العلاقات تلقائيا، سيتم إزالة المحكم من هيئة التحكيم. إزالة محكم تم تعيينه مرة واحدة يعني ببساطة أن مكانه شاغر في هيئة التحكيم التي تم تكوينها. هناك اختلاف قوانين التحكيم الوطنية في بلدان مختلفة وذلك مثل بعض الوظائف الشاغرة لديها المراد شغلها قبل أن تستمر العملية في حين يقول آخرون أنه يعتمد على عدد من المحكمين الباقين. أولئك الذين يعتبرون عدد المحكميين المتبقيين تنظر أيضا في المرحلة التي كانت العملية عندما تم رفع التحدي، إذا كان في مرحلة متقدمة سوف يسمح ببساطة للمحكمين الباقين إلى إصدار حكم. من الصعب عندما كان المحكم محكم واحد فقط في القضية وهو ما يعني أنها ستضطر ليحل محل هذا المحكم. يتم استبدال المحكمين بالطعن باتباع نفس الإجراء الذي تم استخدامه للتعيين أو إزالة أحدهم. على الرغم من السماح لتحدي واستبدال المحكمين، ومن المفترض أن يتبع، في نفس الوقت تحقيق التوازن بين الإنصاف والنزاهة التحكيم الإجراءات إلى جانب المهلة.

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TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

For each and every profession there are ethical standards which are supposed to be adhered to and followed, so as to make it easy to determine whether there is a violation of the laws or not. In the legal profession there is acceptable and unacceptable behaviour for arbitrators. Those rules are there so that arbitral integrity can be safeguarded and bias can be avoided. To avoid bias arbitrators are supposed to be neutral, independent and impartial at all times. The issue of being neutral, independent and impartial is there to make sure that there is no relation between the arbitrator and any of the disputing parties, any established relationship will be challenged as long as it potentially has something to do with the outcome of the arbitration. Only an arbitrator with no predisposition or conflict of interest in the outcome will be accepted as such.

Arbitrators are to be appointed and there are procedures which will be followed and if there are specific requirements, they have to be meet during the selection process according to the agreement of the parties. The same procedures which is done at first appointment will be repeated when there is a replacement arbitrator, so as to maintain fairness to the arbitration process as well as the outcome.

An independent and impartial arbitrator has to be free from improper connections and also free from prejudgements. Independence and impartiality are the main causes of arbitral challenges once there exist facts that raise reasonable doubts about the arbitrator's independence and impartiality. Whenever there is an element of a problematic relationship which has been established and proved, then that relationship has to be challenged, be it from financial dealings, friendships, family or even shared nationality sometimes is challenged if it's an International arbitration. Once a challenge is accepted and looked into, the challenged arbitrator can withdraw, or be removed, if the arbitrator withdraws or is removed, he/she will be replaced.

The issue of prejudgement will be looked at to an extent of what an arbitrator is known about and his/her beliefs for example when an arbitrator has openly spoken about the issue in question and seem to be against it, be it he/she has written an article in which he has shown a firm position on the issues in dispute. Some commentators are of the view that already there is an element of what to expect from such an arbitrator, as such they say there will be no balance of fairness in such a trial.

On the other hand, some scholars have argued that we cannot judge one by his general opinion on a certain issue and that makes the issue of prejudgement controversial.

Every relationship has to be analysed, some say a simple chart with the arbitrator will not have any effect but I think if the simple chart can grow to become a regular thing, can end up being a deeper relationship. Which means those simple relationships can also result in arbitrator disqualification, because an arbitrator should not be involved with a lawyer representing one side. Besides the fact that the other party can be on a fact finding mission so as to establish independence and impartiality of an arbitrator, the parties are allowed to investigate on the arbitrators and on the other hand the arbitrators have a duty to disclose.

For an arbitrator to serve as such both parties have to consent to that effect, and such consent can only be obtained after a full disclosure of any current and previous relationship which he had or presently have with the other party involved. The duty to disclose is an essential and integral party for independence and impartiality in every dispute. When disclosing, the arbitrator also has a duty to look at what could be potential conflicts in future, such as indirect relationships which an arbitrator can easily overlook. Regarding the duty of disclosure by an arbitrator and other rules of arbitration there are established guidelines in different arbitration rules and instruments such as the International Bar Association Rules on Conflict of Interests in International Arbitration.

The issue of disclosure is more of the first step against secrecy and the establishment of how honest one can be when dealing with a dispute. If disclosure was done deliberately and bias is established, then it's possible that disqualification follows and a vacancy is created again which has to be filled. Besides challenging an arbitrator, the fully informed parties can decide to waive their rights. The International Bar Association Guidelines on Conflicts of interest in International Arbitration [IBA Guidelines] contain a list of rights which can be waived and those that cannot be waived. Which means there are some instances which the parties cannot waive their rights even if they want to do so, they won't be allowed by the law to do so. The other reason for disclosure is fairness, which has to be seen to be done during the arbitral process, disclosure should therefore be an ongoing process till the end of the proceedings, which means the arbitrator is under a duty to disclose anytime during the course of the proceedings.

According to the Islamic Sharia, there is a difference between an arbitrator and a judge and as a result the Sharia laws also subscribe or I can say they believe and accept the same principle and idea that the arbitrator may be challenged, before issuance of the arbitral award. In Islamic Sharia Laws they also have the grounds for challenge, by virtue of the UAE New Draft Arbitration Law, an arbitrator can be challenged if circumstances exist that give rise to serious doubt as to his impartiality and independence.

1.1 SELECTION AND APPOINTMENT OF ARBITRATORS

For arbitration process to be valid there have to be an arbitration agreement, the consent of the parties to settle the dispute outside national courts. Once it has been established that both parties agreed to the arbitration, and then the tribunal will be established to that effect. Since there is no permanent standing body, of arbitrators the tribunal will have to be established. Both parties have a duty to nominate an arbitrator, they can do so according to their agreement. Arbitrators can be appointed by the arbitral institution, by a national court or through a list system. The main reason why most parties agree to arbitration is that the parties have a chance to nominate who to judge their case.

The fact that arbitrators are handpicked by the parties does not mean that they are of less importance. There are also a number of requirements for one to be an arbitrator. For example, "In Saudi Arabia, arbitrators are required to have a knowledge of Islamic Law [the Shari'ah]"[1] Besides this requirement, there is also the issue of qualifications, experience which can also be considered when choosing an arbitrator regardless of the Nationality of the arbitrator. "No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties."[2] Usually a neutral nationality will be an ideal candidate as it produces curious results. The issue of neutrality helps build confidence in the outcome because the neutral arbitrator will not be biased to any of the two parties involved. "In making the appointment, the appointing authority shall have agreed to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."[3]

The same issue of neutrality also applies to the sole arbitrator or chairman of an arbitral tribunal. According to the ICC Rules, "The sole arbitrator or the chairman of an arbitral shall be of a nationality other than those of the parties."[4] The rule of neutrality has to be observed but from my own understanding of the law there is always an exception to the general rule. "Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed nominee all agree in writing otherwise."[5]

[1] Redfern and Hunter on International Arbitration 5th Edition ,2009 p259
[2] www.zlea.org internet source accessed September 2015
[3] www.alukooyebode.com internet source accessed September 2015
[4] ICC Rules, Art 9.5
[5] www.keatingchambers.co.uk internet source accessed September 2015

Experience in arbitration makes it easy for one to either accept or reject appointment at the beginning of the appointment because one will be aware if there is a possibility of future challenge and possibility replacement, if the challenge is successful. .

STANDARDS REQUIRED OF ARBITRATORS

1.2 INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

Generally, the word "independence" in arbitration law relates to the external connections or relations between the arbitrator and a party involved in the dispute, while "impartiality" is more concerned about the subjective state of mind of the arbitrator.[6]Independence and impartiality are the basic and fundamental requirements of arbitrators. Being impartial and independent is both obvious and imperative to arbitrators. "Arbitrators, after all, take the place of judges and the act of adjudicating necessarily requires a neutral third party decision maker. Moreover, the opposite of impartiality is bias or partiality which is a form of misconduct that is unexpected and unacceptable among such decision makers. But the nature of impartiality is not nearly as simple as these maxims would suggest, particularly when it intertwines with notions of party preference and party autonomy."[7]

Independent and impartial are regarded as the minimum requirement of arbitrators, for example the Swiss Rules of International Arbitration [Swiss Rules] state that "All arbitrators conducting arbitration under these rules shall be and remain at all times impartial and independent of the parties."[8]What it simply means is that the arbitrator has to be independent and impartial throughout the process and need be even after the award to the dispute has been awarded. Besides the Swiss Rules which l have mentioned, so many countries have adopted the same principles of independence and impartiality of arbitrators, the wording might differ but the meaning remains the same. For example the Chinese International Economic and Trade Arbitration Commission Rules [CIETAC Rules] states[9] that arbitrators shall "not represent either party and shall remain independent of the parties and treat them equally."[10] Besides these national established

[6] Chiara Cuovannuci Orlandi Ethics for International Arbitrators, 67 UMKC L Rev 93,94 (1998)
[7] Chiara Cuovannuci Orlandi, Ethics for International Arbitrators,67 UMKC L Rev 93,94 (1998)
[8] Art, 9(1) of Swiss Rules of International Arbitration January 2006
[9] Bond,MJ A Geography of International Arbitration
[10] www.cn.cietac.org internet source accessed September 2015

Rules, International bodies also apply these rules in International disputes, just to mention one of many, The International Chamber of Commerce Rules of Arbitration [ICC Rules] require arbitrators to be "independent of the parties"[11]and, although they do not expressly state that arbitrators must be impartial, this is implicit.[12]

It is easy to establish and challenge the "independence" of an arbitrator because financial, social and any other personal links can be proved but difficult to deal with impartiality since it's all about the state of mind so in most cases once there is lack of independence then it is presumed that the arbitrator is likely to be impartial as well. "An arbitrator might be 'independent' in the sense of not having any financial or personal links, yet still be 'partial' to one side because of a friendship [or animosity] with respect to one of the lawyers."[13] In the case of **Amco v Indonesia,** towards the start of the arbitration, the respondent challenged the claimant appointed arbitrator on the basis that (i) the arbitrator had previously given tax advice to the individual who controlled the claimants, and (ii) the challenged arbitrator's law firm and the claimant's counsel had enjoyed a joint office and profit sharing arrangement.

The profit sharing arrangement had been terminated before the arbitration commenced. The remainder of the tribunal rejected the challenge; the facts did not present a 'manifest' lack of independence. They stated that the mere appearance of partiality was insufficient for disqualification and that a party – appointing system inevitably involves some acquaintance between the arbitrator and the appointing party and or its council. Instead, they interpreted the bar as being a manifest or highly probable lack of independence.[14] From my own understanding it is not easy to establish partiality and bias because even if a relationship exists it is not the mere existence of that relationship which renders one partial and biased. Judging from most cases, I feel the relationship must be accompanied by an interest in the outcome and maybe a clear financial benefit of some sort. The issue goes back to the selection and appointing process, which is obvious one, will have to appoint someone he/she knew from the past as an arbitrator.

Past relationships doesn't mean one will be partial and biased towards the appointing party, though at times those past relationships has to be closely looked at, that's why the parties are allowed to challenge such appointments.

[11] www.arbitration.icca.org internet source accessed September 2015
[12] Y. Derains and E.A Schwartz, Guide to the ICC Rules of Arbitration 2nd Edn (The Hague: Kluwer Law International,2005,p 117
[13] www.arbitration.icca.org internet source accessed September 2015
[14] Amco Asia Corp v Republic of Indonesia, ICSID Case No ARB 81/1 September 25,1983

A challenge can be rejected or accepted, depending on the facts of the case. In the case of **SGS v Pakistan,**[15] the claimant challenged the respondent –appointed arbitrator on the basis that the arbitrator had been counsel for the successful respondent in **Azanian v Mexico**[16], a separate ICSID arbitration, in which the respondent counsel **SGS v Pakistan** had been an arbitrator. The claimant argued that this created a reasonable appearance that the respondent –appointed arbitrator would 'return the favour' in **SGS v Pakistan**[17]. The remainder of the tribunal rejected the challenge: the claimant's challenge was based on "simply a supposition, a speculation merely".

The word 'manifest' was interpreted as meaning 'clearly and objectively"[18] The reasons given for the rejection of the challenge shows that partiality and bias has to be proved 'beyond reasonable doubt and'[19] not just be presumed to exist.

The absence of independence and impartiality is the establishment of bias, once independence and impartiality are alleged to be breached then bias is presumed as well. As one court reasoned, "Unless an arbitrator publicly announces his partiality, or is overheard in a comment of private admission, it is difficult to imagine how proof [of bias] would be obtained."[20] In the case of **Perenco v Ecuador**, the parties agreed that any challenge to arbitrators would be resolved by the Secretary General of the Permanent Court of Arbitration [PCA] according to the IBA Guidelines.[21] During the arbitration, on July 6 2009, Ecuador formally denounced the Washington Convention. In August 2009, the claimant appointed arbitrator gave an interview in which he was asked his opinion on Ecuador's withdrawal. Following that interview, the respondent challenged the claimant –appointed arbitrator on the ground that his comments in the interview gave rise to justifiable doubts as to his impartiality or independence. The challenge was upheld, applying General Standards 1 and 2 of the IBA Guidelines, concluding that: "the combination of the words chosen by Judge Brower and the context in which he used them have the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to Judge Brower's impartiality."[22]

The issue of arbitrator behaviour is also of great importance to the parties, if the behaviour of the arbitrator seems to indicate an element of bias then such behaviour can be challenged regardless of the actual mental state.

[15] www.italaw.com ICSID Case No ARB /01/13 Published at (8ICSID Rep 354, 2005)
[16] Robert Azanian v United Mexican States, ICSID Case No ARB (AF) /97/2
[17] N.G Ziade. How many Hats Can a Player wear: Arbitrator, Counsel and Expert?
[18] www.arbitrationindia.org Indian Arbitration Volume 6 Issue 1January 2014
[19] Pietrowski,R.Evidence in International Arbitration Volume 22 Issue 3
[20] www.dadgostarialborz.ir internet source accessed September 2015
[21] www.blogs.law.nyu.edu
[22] www.ciarb.net.au Chartered Institute of Arbitrators in Australia

In countries like France where they have adopted the Model Law, the standard of partiality is said to require an analysis of "any circumstances that may affect the arbitrator's judgement and raise a reasonable doubt, in the mind of the parties, as to the arbitrator's [independence and impartiality]"[23] The interpretations of independence and impartiality may as well differ from case to case, depending on the facts of bias and partiality relied upon to challenge the arbitrator. "There are categories of misconduct, like direct financial stakes and business dealings with one of the parties[24], although even here the category is not absolute since minor shareholdings in one of the parties is generally not sufficient."[25]

The other issue is the issue of procedural fairness. "In other words, it is not sufficient for an arbitrator to be, as a matter of fact, independent from and impartial to the parties: he should also be able to inspire confidence in these qualities.

This is what English Courts have expressed as the rule that, justice should not only be done but should manifestly and undoubtedly be seen to be done."[26] In other words, what happens during the course of proceedings should show openly that the arbitrator is independent and impartial and not raise eyebrows amongst the parties to the dispute.

"Aggressive questioning of a witness or expression of opinion during proceedings are generally not considered sufficient to support a challenge, but on occasion have contributed to finding of partiality."[27]In this case the issue was that the challenge was rejected because it "alleged arbitrator bias was evidenced by aggressive questioning of some witnesses and attempts to rehabilitate others and that arbitrator acted more as an advocate than an impartial moderator."[28] Once one deviate from impartiality and independence then a challenge is acceptable, "The ICDR Rules and the UNCITRAL Rules provide for the challenge of an arbitrator if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality and independence."[29]

[23] Qatar v Creighton Ltd, Court de Cassation, 16 March 1999
[24] www.docstoc.com internet source accessed September 2015
[2525] AT & T Corporation v Saudi Cable Co, 2Lloyd Rep.127 [Ct .App. 200]
[26] www.mhwang.com Michael Hwang S.C on Selected Essays on International Arbitration SIAC 2013
[27] Cole Publ'g, Inc v John Wiley& Sons, Inc 1994 WL 532898
[28] www.law.queensu.ca internet source accessed October 2015
[29]UNCITRAL Rules Art, 10 of 1985 with amendment as adopted in 2006

Though the parties are at liberty to agree on certain disclosures or relationships between an arbitrator and a party to be considered sufficiently substantial to disqualify the arbitrator, independence and impartiality being the corner stone of arbitration, it is said " Independence and impartiality are qualities that must be maintained throughout the arbitral process. The arbitrator must not engage in any ex-parte communications with the parties regarding the merits of the case during the course of the proceedings, the secrecy of the tribunal's deliberations is fundamental to the arbitral process."[30] What it means is not outside discussions with one of the parties involved or any other person, one should not disclose his/her views to the public at all.

1.3 DIFFERENCES AND SIMILARITIES BETWEEN JUDICIAL IMPARTIALITY AND ARBITRAL IMPARTIALITY

An arbitrator performs the duties of a judge but in a private and flexible manner, for that reason arbitrator impartiality is framed in relation to concepts of judicial impartiality. In the absence of an arbitration agreement, what it means is those arbitral duties will be performed by the normal national court judges. This is the reason why some would refer arbitrators as private judges. In some countries, standards for arbitrator impartiality are borrowed from judicial standards of conduct. There is need to take seriously the arbitrator's impartiality, according to Justice Hugo Black of the US Supreme Court, he reasoned that, "We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges."[31]

In a purported concurrence on the merits in the same case, Justice Byron white reasoned that arbitrators should not "be held to the standards of judicial decorum of ... judges ... because they are men of affairs, not apart from the market place."[32]

It seems as if the issue of comparing arbitrators and judges is not clear as there is no clear consensus as to how they can be compared.

[30] Redfern and Hunter on International Arbitration 5th Edition 2009
[31] Common Wealth Coatings Corp v Cont'l Cas. CO, 393.U.S 145,148-149
[32] Common Wealth Coatings Corp v Cont'l Cas. CO, 393.U.S 145,148-149

Historically some jurisdictions permitted challenge to arbitrators on the same ground that judges could be challenged, though that has changed due to passage of time. "Today only a few jurisdictions continue rely expressly on judicial standards, though reasoning by analogy continues to find favour among both courts and commentators."[33]

"In France, until recent cases modified the approach, grounds for challenging arbitrators were limited to those for challenging a judge under Article 341 of the New Code of Civil Procedure."[34] It is as well reasoned that "an independent mind is indispensable in the exercise of judicial power, [and it is] one of the essential qualities of an arbitrator."[35] Besides in England, "the common law test for assessing allegations of arbitrator bias has also described as being the same as for a judge."[36] From my personal point of view it seems the same principles which are used for judges are the ones which are used for arbitrators in most countries especially in national laws, which differ from one jurisdiction to the other but it seems they are agreeing on this issue.

Similarly a leading Indian commentator has reasoned that arbitrators are bound by obligations that are "no less stringent than those demanded of judges"[37] and in fact they may be required to "behave a shade better since judges are institutionally insulated by the established court system, their judgements being also subjected to the corrective scrutiny of an appeal."[38] The fact that arbitrators are professionals who are deliberately selected by the parties and on the other hand judges are randomly assigned to cases which parties do not have a chance to select means a lot.

As a judge once its established that he/she has any connection to a party, he/she has to recues regardless of the parties' willingness to consent. In arbitration the parties can overlook those relationships and consent to the arbitrator to proceed so the issue of bias between the two cannot be judged the same way with same principles. These are some of the reasons why other national laws have shifted from judicial analogy as the basis to define arbitrator obligations.

[33] Luxembourg Code of Civil Procedure Art, 378, Portugal Article 10(1) of law No 31/86
[34] Fowchard Gaillard Goldman on International Commercial Arbitration 1024, at 562-63
[35] Judgement of 13 April 1972[JCP.Ed.g. Pt 11, No 17, 189 [cour de cassation]
[36] Hong-Lin Yu L Laurence Shore, Independence, Impartiality and Immunity of Arbitrators- US and English Perspective, 52INT & Comp LQ 935 (2003)
[37] Bunni. "Disputes Settlement by Arbitration", The FIDIC Forms of Contract: The 4th Edition of the Red Book 1992
[38] Nariman, F.S Standard of Behaviour of Arbitrators, 4 ARB. INTL 311, 311-12 (1988)

1.4 NEUTRALITY

> Besides being independent and impartial, there is also a third notion called 'neutrality' which generally encompasses the first two. The issue here is not all countries use the same terminology, some use 'independent' and 'impartial' while others refer the obligations of an arbitrator to be 'neutral'. Once it has been established that an arbitrator is biased and not neutral then a challenge will be accepted. Neutrality is all about the maxim, nemo judex in parte sau [no one may judge his own case], which simply means that one cannot be a referee in a game after having decided which team will win.

To avoid bias a neutral person should be elected, someone who does not have a predisposition or interest in the outcome. In re **The owners of steamship Catalina and The owners of Motor Vessel Norma**[39], this case was between a Portuguese and a Norwegian vessel, submitted to arbitration in London by the two respective ship-owners. During hearing, counsel for one side mentioned a case involving Italians. To which, the arbitrator responded as follows: "Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese, but the other side here are Norwegians and in my experience the Norwegians generally are a truthful people. In this case l entirely accept the evidence of the master of the Norwegian vessel." In connection with the application to remove the offending arbitrator, it was argued that a formal award not having yet been rendered, there was no evidence that an ultimate decision against the Portuguese would in fact rest on the biased perspective. Rejecting what might be called an argued too clever by half, the court confirmed that justice must not only be done but seen to be done. The arbitrator in this case was removed.

In my own opinion the issue of having an arbitrator removed is not about delaying the process, though some might see it as a way of buying out time, as that might mean that the proceedings will be stopped for a while and the issue of the challenged arbitrator will be looked at.

The main reason why there is that room for a challenge is to allow parties to challenge a biased arbitrator and to safe guard the arbitral integrity and having the process dealt with fairly. Fairness is the basis of arbitration, that's why arbitrators are not allowed to have links with either party that has an economic or emotional gain from the outcome of the case.

[39] Park, W.W. "Rectitude in International Arbitration", Arbitration International Volume 27 Issue 3

In a recent case the UK Court removed an arbitrator over bias concerns, in the case of **Sieera Fishing Company and Others v Frran and Others**[40] "The High Court in London has disqualified a Lebanese arbitrator from an ad hoc dispute involving a Sierra Leone seafood supplier, based in part on his undisclosed ties with one of the parties and his conduct after being challenged."[41] On 30 January, the court said sole arbitrator **Ali Zbeeb**, partner at Zbeeb Law & Associates in Beirut, had failed to disclose legal and business connections with one of the claimants in the arbitration; and that, in his communications after being challenged, he "gave the appearance of having descended into the arena and taken up the battle" on the claimants' behalf. These circumstances, as well as his role in drafting contracts on which the arbitration claim was based, gave rise to justifiable doubts about his impartiality, the court concluded.

The challenge arose in a London-seated ad hoc arbitration initiated by Lebanese national Hassan Said Farran, chairman of Beirut's Finance Bank, and Iraqi businessman Ahmed Mehdi Assad. The pair brought the claim in 2012 against Sierra Fishing Company (SFC), Lebanese-Sierra Leonean national Said Mohamed and the estate of his late father, seeking repayment of a loan that had financed SFC's purchase of two fishing vessels. Zbeeb was originally appointed by the claimants to sit on a three-person tribunal but declared that he would hear the case alone following the respondents' failure to appoint their own tribunal member.

The SFC parties objected to Zbeeb's appointment at an arbitral hearing in June last year, raising concerns that his father, Hussein Zbeeb – a partner at the same law firm – provided legal advice to Farran and was part of the executive management of Finance Bank. Zbeeb refused to step down, holding that the respondents had been aware of the connection and had lost their right to object by participating in the proceedings. He later declared in a written response, "I do not see why it is incumbent on me to perform the due diligence homework of [the respondents]".In the meantime, Farran and Assad submitted their statement of claim in the arbitration, seeking to enforce settlement agreements signed with the respondents in 2013 that provided for the repayment of the loan by means of a transfer of shares in SFC. The respondents did not serve a defence in the arbitration but wrote to Zbeeb to challenge his jurisdiction, arguing that he had never been properly appointed as arbitrator, sole or otherwise, and that he could have no jurisdiction over agreements that post-dated his appointment as arbitrator. They also indicated their intention to apply to the High Court for his removal for apparent bias if he refused to step down.

The SFC parties eventually filed their disqualification request with the court in September, after Zbeeb indicated his intention to proceed with the case and down a final award on the merits. As well as the ties between Zbeeb and Farran, the challenge cited the arbitrator's role in advising the claimants in the negotiation and drafting of the 2013 agreements that now appeared to form the entire basis of the arbitration claim; and his conduct in the arbitration.

[40] Sierra Fishing Company and Others v Farran and Others, 18 February 2015
[41] www.globalarbitrationreview.com internet source accessed October 2015

Upholding the challenge, **Mr Justice Popplewell** said he had little hesitation in concluding that Zbeeb's connections with Farran would "give rise to justifiable doubts about his ability to act impartially."[42] He cited Zbeeb's employment as in-house counsel at Finance Bank between 2005 and 2006; Zbeeb's father's role within the bank's management; and the evidence suggesting that Zbeeb's law firm derives financial income from instructions by Farran.

In most International cases, a neutral arbitrator as between a Nigerian seller and a Zimbabwean buyer would be an arbitrator from none of the two countries involved in the dispute. In cases like this a more suitable arbitrator would be at least someone from AUE, an arbitrator from middle East will be more neutral since he is not from any of the countries and more so from a different continent. The issue here is not that a Nigerian or a Zimbabwean arbitrator lacks qualifications but it would be too much for one to preside over such a dispute, because the chances are high the other party will challenge on the grounds of bias. It is always best to have a neutral third party who does not have any link with any of the parties to the dispute.

[42] "ASM Shipping Ltd of India v TTMI Ltd of England", Arbitration Law Reports and Review 2005

CHAPTER 2

2.1 ARBITRATOR'S DUTY TO DISCLOSE

Before one becomes an arbitrator, he/she is already a human being in existence in the same world with the parties to the dispute, in some cases if it's a national dispute which means to some extend the arbitrator might be in the same town with the parties involved. So it's possible that there can be some previous relations which might prejudice the arbitral process or might not cause any problem to the arbitration process at all. Disclosure is done therefore as a way to avoid unnecessary surprises in the middle of the process of arbitration as such can cause unnecessary delays. Once the arbitrator discloses whatever he/she feels might cause a delay in the process or a challenge which can lead to his withdrawal at a later stage or his removal, he still requires the consent of both parties involved for him to be able to serve as such. Consent from both parties can only be obtained once the unknown facts are made known to the parties to enable them to decide.

All connections with any of the parties must be disclosed before or during the proceedings, as long as these connections can be regarded as issue conflicts. "Parties to the arbitration can, however, accept the nomination of an arbitrator if and when they are made aware of the connections which the proposed arbitrator may have with the other parties, their counsel and possibly, the other members of the Arbitral Tribunal."[43] The issue here is all about relationships with any party involved in the process. It's up to the parties on what to do after the disclosure, even if you feel the relationship was in the past, present but not that serious, or a future planned deal that will involve one of the parties involved, it has to be disclosed.

The main reason behind disclosure is to prove independence, impartiality and neutrality to the parties, though the parties can waive their rights. "It is also accepted in French arbitration law that the parties may waive the independence of the arbitrator, but they can only do so to the extent they are aware of the existing relationship of the arbitrators with the parties or with the parties' counsel."[44] Disclosure is the cornerstone of the duties of the arbitrator; therefore, an arbitrator has to do full disclosure of all potential conflicts. Full disclosure includes even those relationships that one will feel are of less importance, those that are less likely to be challenge. The arbitrator has to disclose and let the parties decide

[43] www.auilr.org Good faith in International Arbitration" American University International Law Review 27 No 4 (2012)

[44] www.auilr.org Good faith in International Arbitration" American University International Law Review 27 No 4 (2012)

his fate to those disclosures, whether he will be challenged or not will depend on the gravity of the said disclosure.
An arbitrator must investigate and search for all potential links which can cause a conflict, such as those relationships which can exist indirectly for example a relationship between a party to the dispute and the arbitrator's law firm. According to IBA Guidelines, "It should not be permitted for an arbitrator to be declared independent based on the arbitrator's lack of actual knowledge due to failure to perform a conflict search."[45] What it means is that ignorance is not an excuse at all, for an arbitrator who fails to disclose due to failure to do proper investigations. After disclosure all the parties will be having all the information which they can use to challenge or evaluate conflicts against the arbitrator's ability to serve.

Being open about everything that one was previously unaware of builds confidence in the mind of the parties to arbitration and it's a sign of transparency and honesty on the arbitrator's part. It is stated in the IBA Guidelines that "a party shall inform the arbitrator, the Arbitral Tribunal, the other appointing authority (if any) about any direct or indirect relationship between it [or other company of the same group of companies] and the arbitrator. The party shall do so at its own initiative before the beginning of the proceedings or as soon as it becomes aware of such relationship."[46]

The issue of disclosure is not all about the arbitrator; it is an issue about fairness and the integral part of the arbitration process itself. As a result, even the parties themselves, they are allowed to make investigations regarding disclosed and undisclosed publicly available information.

This is supported by the IBA Guidelines as follows, "a party shall provide any information already available to it and shall perform a reasonable search of publicly available information"[47] When information is said to be publicly available what it means it's not a secret even though you might not be aware of such information, it is that information which is easy to get from other people.

Arbitrators are supposed to be honest and disclose so as to allow the parties to assess the situation fairly themselves. "The independence of the arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a judge, which excludes any relation of dependence particularly with the parties."[48] Once one is appointed as an arbitrator

[45] www.auilr.org "Good faith in International Arbitration" American University International Law Review 27 No 4 (2012)
[46] www.auilr.org Good faith in International Arbitration" American University International Law Review 27 No 4 (2012)

[47] www.voldgiftsforeningen.dk internet course accessed October 2015
[48] www.auilr.org Good faith in International Arbitration" American University International Law Review 27 No 4 (2012)

he/she is no longer an ordinary person who can have private relationships hidden with any one at any given time. Like a judge an arbitrator has to be neutral, besides an arbitrator is also allowed to withdraw from appointment just the same way judges recue themselves when there is a conflict of interest.

Disclosure according to Martin Hunter, "When I am preparing a client in arbitration, what I am really looking for in a party nominated arbitrator is someone with the maximum predisposition towards my client but with the minimum appearance of bias,"[49]If bias is said to be on minimum appearance from my own point of view it means the disclosed information shouldn't be that serious as to render the arbitrator partial to the party who nominated him.

> The fact that disclosure can lead to disqualification of an arbitrator does not mean that some information which seems to be of less importance, to disqualify an arbitrator does not need to be disclosed. This is clearly stated in the UNCITRAL Model Law, which requires disclosure of all facts that are "likely to give rise to justifiable doubts"[50], as to the arbitrator's impartiality or independence but also provides for disqualification only when circumstances "give rise to justifiable doubts," [51]about an arbitrator impartiality and independence.

> Failure to disclose information can in itself be evidence of partiality or improper intent. For example, Article 4.1 of the IBA Rules of Ethics states that "failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification."[52] Some national courts have also reasoned that a non –disclosure "is itself an act suggestive of bias."[53]

While others do not consider non-disclosure as such, in such cases they believe that arbitrators should only disclose circumstances that in their own opinion might call for a challenge of their independence. Personally I support the idea that arbitrators must disclose everything because that's the only way we can have less or no interruptions while proceedings are conducted because all the challenges about independence and impartiality will have been dealt with at the early stages. This is the only way we can challenge and replace the arbitrators at the same time balancing fairness with arbitral integrity.

[49] M.Hunter, Ethics of the International Arbitration, The Journal of the Chartered Institute of Arbitrators, Nov 1987, p 219
[50] UNCITRAL Model Law Article 12 (1) of 1985 with amendment as adopted in 2006
[51] UNCITRAL Model Law Article 12 (2) of 1985 with amendment as adopted in 2006
[52] IBA Guidelines of Rules of Ethics Article 4.1
[53] Forest Elec, Corp v HCB Contractors, 1995 WL37586 [ED.Pa 1995]

2.2 WHAT AN ARBITRATOR SHOULD DISCLOSE

The issue of what to disclose is a bit tricky and confusing so the IBA Guidelines have been established to try and provide a guideline on that. Guidelines on Conflict of interest in International Arbitration S 4(c) (11) have the guidance as to what an arbitrator should disclose. French case law traditionally holds that "an arbitrator is under the duty to disclose all circumstances which may reasonably call into question his independence in the mind of the parties and should particularly inform the parties of any relationship which is not common knowledge and which could reasonably expected to have an impact on his judgement in the parties' eyes."[54] Although the duty to disclose is widely recognised l personally feel it's easy to discuss about it and somehow difficult to apply in real situations that's why we always have challenges at the end of the disclosure of some undisclosed relations.

To support my argument, there are many cases in which the duty to disclose was just rendered pointless. In **Nidera vLeplatre**[55] , "a widely known judgement that renders pointless the arbitrator's duty to disclose, the claimant argued that one co-arbitrator had not disclosed that he was the chairman of a professional association of which the defendant was a member.

The court of appeal found that this situation was publicly known by all involved in agricultural trade, including the applicant, and underlined that the defendant was one among the eight hundred competing members of the professional association chaired by the co- arbitrator. As a consequence, claimant's objection to the regularity of the constitution of the arbitral tribunal as aground for annulment of the award was rejected.

The situation was close to giving rise to an estoppel as the Court of Appeal remarked that Nidera had not challenged the chairman of the tribunal during the arbitration proceedings in spite of this publicly known fact."[56] From my own point of view it's not easy to determine whether the facts are at the disposal of the public or not.

The fact that not all information is available to the public makes it necessary to disclose information, "Before accepting a mandate, an arbitrator shall disclose any circumstances that may affect his or her independence or impartiality. He or she shall disclose promptly any such circumstances that may arise after accepting the mandate."[57] The issue of disclosure is not what the arbitrator wants or thinks about his or her situation but everything that may cause reasonable suspicion in the mind of the other party. According to Professor EL Kosheri "What matters in the large majority of cases is not the existence of business or personal relations, but the

[54] www.auilr.org Good faith in International Arbitration" American University International Law Review 27 No 4 (2012)

[55] Nidera v Leplatre December 16, 2010 Paris Court of Appeal

[56] digitalcommons.wcl.american.edu internet source accessed August 2015

[57] www.auilr.org Good faith in International Arbitration" American University International Law Review 27 No 4 (2012)

declaration of such relations by the arbitrator. It is secrecy that is the problem."[58] Arbitrators are supposed to be overly cautious by disclosing all relationships even those that they think are of less impact to their appointment.

2.3 WAIVER OF RIGHTS

There are questions here which require genuine answers; can fairness and integrity be waived? If so to what extent can it be waived and who does so? In the CISID System Arbitration Rule 27 states clearly that a party who fails to object promptly to an alleged violation of a rule is deemed to have waived its rights to object.

There is a time limit for every objection, "Under the Model Law, challenges related to impartiality or independence must be filed with the arbitral tribunal within 15 days of the party becoming aware of the circumstances giving rise to justifiable doubts as to those issues."[59]When there is a time limit what actually happens is that once that time lapses, they will simply take your silence as a waiver of your rights.

In the case of **The Island Territory of Curaucao v Solitron Devices Inc**[60], a US court has held that failure to make an objection that an arbitrator was not impartial, when the grounds for the objection were known to the party early on in the proceedings, constituted a waiver of the objection and it could not be raised in court proceedings to confirm the award and enforce judgement thereon." That's failure to comply with time limits should bar any attack of the award on this basis.

The General Standards Guidelines in the IBA Rules on Conflict of Interests also have the categories of waivable and non-waivable rights;

[58] www.auilr.org Good faith in International Arbitration" American University International Law Review 27 No 4 (2012)

[59] Model Law , Art 13 (2)

[60] The Island Territory of Curaucao v Solitron Devices Inc 356 F Supp 1 [USDN7 1973]

1.RED LIST

(A) NON –WAIVABLE RED LIST

Circumstances which fall into this list automatically disqualify an arbitrator without compromise as long as an arbitrator has financial or personal interest and also if the arbitrator's Law firm derives financial income from that same party.

(B) WAIVABLE RED LIST

Generally, circumstances that can disqualify an arbitrator who has legal connection with a party or has indirect or direct interest on the outcome of the dispute, this can only happen unless well informed parties, expressly agreed to waive despite the conflict of interest.

11. ORANGE LIST

The orange list, is all about those circumstances which can give one justifiable doubts, for example an arbitrator whose firm was once involved with a party within a period of 3 years, or currently acting for a party in other cases just to mention a few of those relationships. Once disclosure is made, the parties have 30 days to object, otherwise failure within that time period otherwise the potential conflict of interest is deemed waived.

111. GREEN LIST

Green list consists of those circumstances which the arbitrator has no duty to disclose. For example, previous publications of general opinions on an issues similar to the case, or that an arbitrator has had previous legitimate contact with one of the parties.

Guidelines on waivable and non –waivable circumstances do help to solve conflicts and challenge, it was commented by the **High Court in ASM Shipping Ltd v TTMI Ltd of England**[61] **,** that the IBA "Guidelines are to be applied with robust common sense without unduly formulaic interpretation. Also in Switzerland, the Federal Supreme Court held that IBA Guidelines are "a valuable working tool to contribute to the uniformity of standards in the International arbitration in the area of conflicts of interest. As such this instrument should impact on the practice of the courts and the institutions"[62], administrating arbitration proceedings."[63] All the Guidelines which are used in most cases around the world in arbitration cases are just there to balance fairness and safe guard the arbitral integrity.

[61] [2005] EWHC 2238 [Comm] ;[2006] 2 All E.R (Comm)122
[62] www.lalive.ch internet source accessed October 2015
[63] Swiss Federal Supreme Court, case No 4A-506/2007

CHAPTER 3

3.1 GROUNDS FOR A CHALLENGE

There are applicable rules at each and every stage of arbitration, from the appointing stage up to the enforcement stage which means even at the challenging stage some rules have to be followed as well. First of all, before challenging an arbitrator, one has to establish the applicable rules, for example, the UNCITRAL Rules states: "in the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge [and replacement] of an arbitrator... shall apply."[64]These rules allow a challenge to be commenced on the basis of an alleged inability or failure to perform a mandate.

Besides the issue of failure to be independent and impartial as well as being neutral, there are also other reasons which are also grounds for challenge. According to the Vienna Rule, any party can apply for the termination of an arbitrator's mandate "if he otherwise fails to perform his duties or unduly delays the proceedings."[65] This allows a challenge where arbitrator fails to comply and perform their functions in accordance with the Vienna Rules. At times the issue of progress of arbitration is affected by the speed, of proceedings, or failure to consider another party's request and all those issues are good grounds for an arbitral challenge. It's not all about challenging an arbitrator but the issue here is about having the arbitral process which is fair to the parties as they are the ones whom would have agreed to their dispute being settled out of court through arbitration.

Besides fairness the integral part of the arbitration process is also as important as the outcome itself, which means it has to be safeguarded by allowing any wrong doing as a ground for a challenge. The grounds for a challenge of an arbitrator are always written down somewhere in the laws of arbitration. One cannot just challenge an arbitrator without a ground for the challenge and also a supporting act which allows the challenge, to be lawful. The ICSID Convention allows the challenge of an arbitrator as a result of "any fact indicating a manifest lack of qualities."[66] Of "high moral character and recognized competence in the fields of law, commerce, industry or finance who may be relied upon to exercise independent judgement."[67]

[64] eguides.cmslegal.com internet source accessed October 2015
[65] Eguides.cmslegal.com internet source accessed October 2015
[66] ICSID Convention Art. 57 International Centre for Settlement of Investment Disputes (ICSID/ 15 April 2006)

[67] www.jus.uio.no internet source accessed October 2015

An arbitrator can comply with other requirements, such as giving full and continuous disclosure but that is not the reason why he or she cannot be challenged for other misconducts.

The LCIA Rules permits the LCIA court to remove an arbitrator who fails to conduct an arbitration process properly in accordance with the arbitration agreement and LCIA Rules, Art. 10 (2) : "if any arbitrator acts in deliberate violation of the Arbitration Agreement (including these Rules) or does not act fairly and impartially as between the parties or does not conduct or participate in the arbitration proceedings with reasonable diligence, avoiding unnecessary delay or expense, that arbitrator may be considered unfit in the opinion of the LCIA Court."[68]

The UCNITRAL Rules provide;

1. Any arbitrator may be challenged if circumstances exist, that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by him only for reasons of which he become aware after the appointment has been made.[69]

According to the UNCITRAL Rules, the word 'justifiable' mean that the challenge must have a clear reason which can be easily established. The relevant case law to support this position, the appointing authority in the challenge Decision of 11 January 1995[70] noted that: "if the doubt had merely to rise in mind of a party contesting the impartiality of an arbitrator, 'justifiable' would have been almost redundant. The word must import some other standard – a doubt that is justifiable in an objective sense. In other words, the claimant here has to furnish adequate and solid grounds for doubts. Those grounds must respond to reasonable criteria. In sum, would a reasonably well informed person believe that the perceived apprehension – the doubt is justifiable? It is ascertainable by that person and so serious as to warrant the removal of the arbitrator?"

The ICC Rules are succinct on the issue. Article 11 simply notes that "A challenge of an arbitrator, whether for an alleged lack of independence or otherwise, shall be made by submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based. The breadth of this provision is striking and grants the ICC Court unlimited discretion to remove the arbitrator. Since the ICC court procedure for deciding challenges is an administrative one with no reasons provided, the application in practice of this rule is visible only in the results.

[68] "Challenge Digests", Arbitration International, 2011
[69] UNCITRAL Rules Art. 10. 2 of 1985 with amendment as adopted in 2006
[70] Challenge decision of 11 January 1995, reprinted in [1997] XX11 YCA 227, 234, at para 23

It has been noted by commentators that challenges more frequently succeed based on a failure to disclose a relationship with one or more of the parties than on alleged misconduct during the arbitral proceeding."[71]

The issue of justifiable doubts as to arbitrator independence and impartiality are the major issues, once the doubt is justified then the challenge is accepted. Arbitrators are supposed to have certain qualities, as long as one lacks those qualities a challenge will be raised on the ground of ineligible for appointment. Lack of qualities of an arbitrator has to be proven by objective evidence because mere belief of lack of independence and impartiality will not be enough to disqualify the contested arbitrator. In the case of **Companian de Aguas del Aconquisa SA and Vivendi Universal v Argentine Republic [72]** "where it was concluded that the challenging party must rely on established facts and not any mere speculation or inference."

Grounds for challenge according to the English Law, there is an act which specifically deals with those grounds which was established in 1996. The more comprehensive 1996 English Arbitration Act;

1. A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds:

(a) That circumstances exist that give rise to justifiable doubts as to his impartiality;
(b) That he does not possess the qualifications required by the arbitration agreement;
(c) That he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;
(d) That he has refused or failed to do so-
(i) Properly to conduct the proceedings or

(ii) To use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice will be caused to the applicant.[73]

Unlike other Act the English Act of 1996 goes further to specify other grounds which there will be no any other option except to challenge the arbitrator, such as in cases where an arbitrator becomes physically or mentally incapable. In such a situation there is nothing one can do except to use that unfortunate incident as a ground for a challenge which l feel such a ground is much more reasonable because once one is mentally incapable there is no way he or she can give a sound judgement. No one can dispute the removal of such an arbitrator because it will be for the best since the arbitrator won't be able to conduct the proceedings.

[71] Derains and Schwartz, n 67 at 187
[72] ICSID case No ARB/ 97/3; IIC 69(2001)
[73] English Arbitration Act 1996, s 24 (1)

3.2 **PROCEDURE FOR THE CHALLENGE**

Usually the procedure for challenging an arbitrator should be in the rules of arbitration adopted by the parties. The issue of having a procedure to follow is all about making the whole process fair to both parties to the dispute. According to Article 6(1) of the ECHR, the guarantee of a 'fair hearing' in a broad sense, there are two preliminary points, first the guarantee of a 'fair hearing' is mainly procedural in nature, in that it relates to the constitution of the arbitral and the conduct of the proceedings. The premise is that a fair trial in that procedural sense will presumably lead to a just decision on the merits. But while it is certainly possible objectively to define a 'just' decision on the merits, it is certainly possible to delineate procedural fairness. Having an established procedure for challenging an arbitrator is believed to be an element of fair hearing in the sense that the parties are aware of which procedure to follow once they wish to challenge an arbitrator for lack of independence, impartiality and neutrality.

"Most national laws provide for a challenge to an arbitrator to be made during the course of the arbitration as well as on an application to set aside the award."[74] To minimise delay challenges can be raised as objections during the course of the proceedings. The issue of objections during the course of proceedings is in some jurisdictions but some do not practice it. "There is a gap in the US Federal Arbitration Act which leaves the parties to avenue of judicial review of an appointment until after an award have been rendered, unless the rules of procedure adopted by the parties provide for earlier review."[75]

Which means if the parties do not adopt their own rules of procedure, they will be bound by the Act to wait till after the award has been rendered, for the review of appointment to take place? From my own reasoning l think it's a waste of time and also promotes repetition of the same procedure of appointing again and starts a process which was once dealt with.

"As a matter of form, any challenge to an arbitrator should be submitted in writing. Permissible times vary from institution to institution but generally require parties to object promptly upon discovering the facts on which their challenge is based. It is advisable for parties to substantiate their objections as fully as possible, because they may not have a further opportunity to develop their complaint in writing and it's highly unlikely they will be afforded the opportunity to be heard orally. The submission should be filed with the institution [if any] and the other parties to the arbitration, as well as with all members of the tribunal. The decision making body will then establish a timetable for responses to the challenge by other parties, the arbitrator in question and frequently other members of the tribunal, in some instances permitting several rounds of submissions."[76]

[74] www.fortismuyal.com internet source accessed October 2015
[75] Morelite Construction Corp v New York City District Carpenters Benefit Funds 748 F 2d [1984]
[76] The Procedural mechanics of submitting a challenge Arbitration 70

As a matter of fact, the parties involved will not just respond to the challenge anyhow but the decision making body will have to make sure that every party gets the opportunity to respond to the challenge so as to balance fairness and arbitral integrity. They will establish a time table which will allow all the parties to take turns to respond to the challenge and that time table will allow them to do as many rounds as necessary to ensure timely proceedings.

(i) ICC CHALLENGE PROCEDURE

The ICC Rules stipulates, in relation to challenges based on independence, that the challenging party must send to the Secretariat ... a written statement specifying the facts and circumstances on which the challenge is based"[77] The challenge must be in a written form, which should state facts and circumstances upon which the challenge is based on, only facts to the challenge will be accepted not general information, this is the first step towards establishing a challenge according to the ICC Rules.

The challenge must be submitted, "either within 30days from the receipt by the party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based on if such date is subsequent to the receipt of such notification."[78] The reason of having a time limit is so as to make a quick challenge and minimise the duration of interruption to the arbitration. It is far much better and easy to challenge an arbitrator on the early stages before much has been done towards the proceedings of the case, because no delay on the process is done especially if the challenged arbitrator decides to personally withdraw, this will make the process of removing and appointing a new arbitrator much easier.

Regardless of being time conscious, the ICC does not give reasons for their decision on a challenge. "The decision of the court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated."[79] The fact that the reasons are not communicated is a matter of debate, I think to a larger extent it's good not to state the reason because once the reasons are given, definitely those reasons will be prone to a challenge again and as a result that will prolong the process of arbitration, though others think otherwise.

The aspect of not giving reasons has been criticised as lacking transparency to the affected party and the public interest in understanding the basis of the challenge decision. Indeed in one of the cases where a respondent State had accepted the ICC as appointing authority, having

[77] digi.library.tu.ac.th internet source accessed October 2015
[78] ICC Rules Art 14 (2) of the current rules in force as from January 2012
[79] ICC Rules Art 7(4) of the current rules in force as from January 2012

received an adverse challenge decision, it decided to sue the ICC in its own courts on the basis that it had not received reasons. Recourse filed by the Republic of Argentina against the ICC on 8 February 2006, requesting that the ICC decision be overturned for failure to provide reasons. Two preliminary injunctions were granted by the National Contentious Administrative Court of Appeal.[80] The issue of balancing fairness with arbitral integrity in this case lead the Court of Appeal to grant the preliminary injunctions. Fairness is supposed to be upheld always when dealing with arbitral challenges otherwise, the integral part of arbitration process will be distorted.

(ii) THE UNCITRAL CHALLENGE PROCEDURE

The UNCITRAL Rules has a time limit of 15days in which a written challenge should be submitted from the time the challenging party become aware of the facts upon which the challenge is based. The written challenge must be sent to the other party, all members of the tribunal as well as the challenged arbitrator. Reasons for the challenge must be stated in the written submission but it should not contain evidence. Giving evidence when submitting a challenge is prohibited because there will be a time for the reasons to be requested, if the challenge has been accepted.

The revised UNCITRAL Rules which took effect on August 15, 2010 have simplified the procedure, "if within15days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case within 30days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority"[81] The revised rules seek to simplify the procedure, and limit the disruption period caused by the challenge. Before the appointing authority gives a decision, they wait to see if the challenged party will voluntarily withdraw from the appointment. Usually the arbitrator voluntarily withdraws when he realises the gravity of the challenge, so as to save himself from the questioning from the parties.

(iii) THE LCIA CHALLENGE PROCEDURE

Just like the UNCITRAL Rules, the LCIA also has a time limit of 15 days. In practice the LCIA Court will constitute a three-person panel to decide whether the challenge should be dismissed or accepted, they have to do so in writing with reasons. "In 2006 in order to assist the transparency of the process, the LCIA decided to publish challenge decisions in a suitably redacted form."[82] Besides having some similarities with the UNCITAL Rules, the LCIA goes further to include the reasons of their decision whenever there is a challenge.

According to the LCIA Rules the issue of giving reasons is there for transparency on their decision. I think the LCIA Rules tried to balance fairness and arbitral integrity by issuing

[80] Estado Nacional Procuration del Tesoro de la Nacion cl Camara de Cemercio Intercional dated 3 July 2007
[81] Harris, "The Arbitral Tribunal", The Arbitration Act 1996,2014
[82] Nicolas and Portasides, LCIA Court Decision on challenges to Arbitrators

their reasons for their decision; it's good for justice to be seen to be done at each and every step during the arbitral process.

(iv) CHALLENGE UNDER THE ICSID RULES

"Any challenge to an arbitrator made under the provisions of the Washington Convention must be made promptly and in any event before the proceeding is declared closed."[83] This is not an open-ended time delay. In the case of **Suez and others v Argentina,** "the remaining members of the tribunal considered that a challenge brought 52 days after it had become aware of the facts giving rise to the challenge [and incidentally just before the final hearing in the case] had not been brought promptly."[84] Once the proceedings are closed, one can only challenge the award, which means the remedy will be annulment of the award.

The ICSID Rules also require the reasons for a challenge, in a document to the Secretary General of ICSID and all members of the tribunal. "If the challenge is directed against one arbitrator in an arbitral tribunal of three, the decision is taken by the other two arbitrators, who may accept or reject it. If they cannot agree, the decision will be made by the Chairman. The decision will also be made by the Chairman if the challenge is directed against a sole arbitrator, or against the majority of the arbitral tribunal."[85] The decision must be reasoned.[86] So long as the constitution of the arbitral tribunal is in doubt because of a challenge to one or more of the arbitrator, the arbitral proceedings are suspended.[87] If the challenge is upheld a vacancy is created in the arbitral tribunal. It must be filled before the proceedings resume, if the challenge is rejected the arbitration proceeds.

A four-point test was established so as to evaluate the quality of independence and impartiality required for an ICSID arbitrator:

(a) PROXIMITY

"How closely connected is the challenged arbitrator to one of the parties by reason of the alleged connection? The closer the connection between an arbitrator and a party, the more likely the relationship may influence an arbitrator's independence of judgement and impartiality."[88]

[83] ICSID Arbitraion Rules, r 9 (1) Convention, Regulations and Rules as amended and effective April 10 2006
[84] Suez and Others v Republic of Agentina, Disqualification Decision ICSID case No ARB/03/17; IIC 312 (2007)
[85] ICSID Arbitration Rules r9 (4) International Centre for Settlement of Investment Disputes (ICSID/ 15 April 2006)
[86] http://icsid.worldbank International Centre for Settlement of Investment Disputes (ICSID/ 15 April 2006)
[87] ICSID Arbitration Rules r 9 (6) International Centre for Settlement of Investment Disputes (ICSID/ 15 April 2006)
[88] www.ita.law.uvic.ca internet source accessed September 2015

(b) INTENSITY

"How intense and frequent are the interactions between the challenged arbitrator and one of the parties as a result of the alleged connection? The more frequent and intense the interaction is by virtue of the relationship between an arbitrator and a party, the more probable that such relationship will affect the arbitrator's independence of judgement and impartiality."[89]

(c) DEPENDENCE

"To what extent is the challenged arbitrator depending on one of the parties for benefits as a result of the connection? The more an arbitrator is dependent on a relationship for benefits or advantages the more likely that the relationship may influence the arbitrator's independence of judgement and impartiality."[90]

(d) MATERIALTY

"To what extent are benefits accruing to the challenged arbitrator as a result of the alleged connection significant and therefore likely to influence in some way the arbitrator's judgement? Obvious significant benefits derived from a relationship will be more likely to influence an arbitrator's judgement and impartiality, than negligible or insignificant benefits."[91]

The four-point test helps access the situations better as a result I have realised that the more an arbitrator and a party are involved the more the arbitrator is prone to be challenged for that. It's allowed to challenge whenever the two become too close to each other than expected, the closer they become the more likely independence and impartiality is affected. One will always do the best towards anything that give him / her a benefit at the end so once the arbitrator benefits from the outcome of the arbitral process the more he will work towards attaining that benefit no matter what, which means he will do away with the arbitral principles of independence and impartiality for the sake of what he will gain.

3.3 PREJUDMENT

Prejudgment is one of the worst things which is not expected of an arbitrator and once established with evidence; such an arbitrator will be removed from the tribunal. In the case of **National Grid PLC v, The Republic of Agentina**[92]

[89] www.ita.law.uvic.ca internet source accessed September 2015
[90] www.ita.law.uvic.ca internet source accessed September 2015

[91] www.ita.law.uvic.ca internet source accessed September 2015

[92] National Grid PLC V The Republic of Argentia, LCIA case No UN7949, 3 December 2007, para 38

"The respondent state challenged one of the arbitrators on the basis of comments made during the hearing on the merits based on Article 10 UNCITRAL Rules which states: "Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence." The respondent state submitted that the particular statement prejudged one of the issues in the arbitration. The claimant noted that the statement had been made in the course of posing a hypothetical question to the claimant's expert. No allegation was made of any connections between the arbitrator and one of the parties, and the analysis was consequently limited to a review of whether there was a lack of impartiality. The challenge was heard by the division of the LCIA Court by agreement of the parties. The division applied an objective test of impartiality. It concluded that any statement had to be analysed as a whole and in its context. If this exercise was done by a reasonable third party in the case in question, there was no reasonable apprehension of bias. The context of hypothetical questions to an expert and immediate correction by the arbitrator of the concern raised orally by the respondent state following the statement eliminated any appearance of bias which may have been created by the challenged sentence."

> According to the ruling given to the **National Grid PLC** case, it shows that every statement said has to be analysed before one can rely on it as a prejudgment, besides statements are supposed to be accompanied by either action or relationship between the challenged arbitrator and the respondent party so as to show a link between the two. Once there is a link then it's easy to establish bias, the issue here is, how one can be biased towards someone he doesn't have any connection with. That's the main reason why the arbitral integrity has to be safeguarded otherwise if such challenges are accepted the arbitration process will lose its respect as a process with rules which are supposed to be abide by both parties.

Even where comments made do show how an arbitrator is thinking, the US courts have made it clear that this is a natural result of evaluating evidence as a case progress. For example, in the case of **Fairchild and Co, Inc v Richmond**[93], it was held "Arbitrator's legitimate efforts to move the proceedings along expeditiously may be viewed as abrasive or disruptive to a disappointed party... such displeasure does not constitute grounds for vacating an arbitration award ... Evident partiality is not demonstrated where an arbitrator consistently relies upon the evidence and reaches the conclusions favourable to one party... The mere fact that arbitrators are persuaded by one party's arguments and choose to agree with them is not of self sufficient to raise a question as to the evident partiality of the arbitrators." [94]

[93] Fair child and Co Inc v Richmond F and Pr Co, 516 F supp 1305, 1313 (DDC1981)
[94] www.italaw.com internet source accessed October 2015

The issue of prejudgement is not easy to establish more so to give evidence of it when raising a challenge, it seems impossible, unless there are other issues such as an existence of a relationship which was never disclosed. Otherwise relying on what an arbitrator said during the course of the proceedings will be his word against yours. Of course a challenge should be raised during the course of the proceedings, but with enough supporting evidence otherwise the challenge will simply be rejected.

3.4 ISSUE CONFLICT

There is also what is called relationship to the subject, this is usually in those cases whereby an arbitrator is supposed to address an issue which he or she is arguing in another case and simultaneously acting in another case as counsel to a party defending from the arbitrator's relationship to the subject, matter in dispute. It is difficult for an arbitrator to address the same issue with an open mind.

The question here is whether an individual, who as counsel proposed certain views about specific provisions in investment treaties, can decide upon such provisions as an independent and impartial arbitrator. In the **Republic of Ghana v Telecom Malaysia case,** the District Court of The Hague determined that a position previously advocated by an arbitrator when acting as counsel was not to be attributed to him or her as a personal belief. It specifically held as follows: "It could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open minded than if he had not defended such a point of view before.

Therefore, in such a situation there is, in our opinion, no automatic appearance of partiality vis-a-vis the party that argues the opposite in the arbitration."[95]

The fact that an arbitrator once made statements in his capacity as a counsel or in his or her scholarly writing does not render that arbitrator biased and that cannot be used as proof of bias. A rather similar issue arose in a case before the International Court of Justice. "In that case the court was requested by the United Nations General Assembly to provide an advisory opinion. Israel challenged the participation of a member of the Court in the proceeding.

[95] N.G. Ziade "How Many Hats Can a player Wear: Arbitrator, Counsel and Expert" ICSID Convention: A Commentary Vol 13/2 1996

> The challenge was based, among other reasons on an interview given by the court member in his personal capacity to a newspaper two months before his election to the court. The court decided not to preclude its challenged member from participating in the proceedings as it found that he had 'expressed no opinion on the question put in the present case"[96]

In a dissenting opinion, judge Buergethal opined, however that while it was 'technically true' that the challenged Court member "did not express an opinion on the specific question that had been submitted to the Court by the General Assembly of the United Nations" what he had said in the interview "created an appearance of bias that… required the court to preclude his participation in these proceedings."[97] From the present case it seems that the reasons for having an arbitrator precluded from the proceeding were to uphold fairness of the process since the interview had already created an element of bias.

> A scenario, in which issue conflicts can be challenged, example: The "arbitrator is currently acting as counsel or expert in another case raising similar legal issues. The issue here is simple, "how many hats can a player wear?" This is how other commentators would say about the said scenario. This issue gained prominence in the wake of a judgement of October 18, 2004 by the District Court of the Hague with respect to the challenge to an eminent arbitrator in the **Republic of Ghana v Telekom Malaysia case.** This case had been submitted to arbitration under the UNCITRAL Rules on the basis of the Ghana – Malaysia BIT, and the proceeding was being administered by the Permanent Court of Arbitration.The Republic of Ghana challenged the arbitrator's simultaneous dual role as counsel for an investor in an ICSID annulment proceeding, and as arbitrator in the UNCITRAL proceeding."[98] The "District Court considered that advocating the annulment of an ICSID award while assessing its merits as an arbitrator in the UNCITRAL proceeding required incompatible attitudes."[99]

[96] N.G. Ziade "How Many Hats Can a player Wear: Arbitrator, Counsel and Expert" ICSID Convention: A Commentary Vol 13/2 1996

[97] N.G. Ziade "How Many Hats Can a player Wear: Arbitrator, Counsel and Expert" ICSID Convention: A Commentary Vol 13/2 1996

[98] N.G. Ziade "How Many Hats Can a player Wear: Arbitrator, Counsel and Expert" ICSID Convention: A Commentary Vol 13/2 1996

[99] www.arbitration-icca.org internet source accessed September 2015

"The court held as follows; "Account should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the [ICSID] award. This attitude is incompatible with the attitude [the arbitrator] has to adopt as an arbitrator in the present case ie, to be unbiased and open to all the merits of the [ICSID] award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrator. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the [annulment] proceedings against the [ICSID] award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid the appearance of not being able to keep these two parts strictly separated."[100]It is very difficult for one arbitrator to have different views about the same issues at the same time, somehow it's unheard off. It's more like you will be arguing to yourself, which is not practical unless it's done on different occasions not at the same time.

www.arbitration-icca.org internet source accessed September 2015

CHAPTER 4

4.1 ARBITRATION IN ARAB COUNTRIES

According to Islamic Shari'ah Laws, the arbitrators do not have the same powers as those granted to the Judge; therefore, an arbitrator may be challenged. The authority of the arbitrator can be challenged any time before the issuance of the arbitral award. "Islamic doctrine unanimously considers that an arbitrator may not be dismissed once a judge confirmed his appointment."[101] What it means is that once a judge confirmed the appointment of an arbitrator, it's more likely that arbitrator has the powers of the judge so you can no longer challenge such an arbitrator.

According to the Medjella, "any of the parties may challenge the arbitrator prior to the issuance of the arbitral award. However if the arbitrator was appointed by one of the parties, which appointment was confirmed by the judge named by the competent authorities and granted a delegation power, therefore, the arbitrator shall have the capacity of the judge's representative and shall acquire the same position and powers."[102] In most Arabic countries, to a certain extent arbitration is regarded as delegation of power, once the judge confirms an arbitrator, that arbitrator becomes immune to any challenges since he or she occupies the position of a judge.

Besides being confirmed by the judge and also an agreement of the parties not to remove an arbitrator, any party is allowed to challenge the arbitrator before the arbitral award is rendered. This is possible whether both parties agree to this regard or when only one of them request revocation. Which means to a certain extent the Arab countries also apply the same principles that an arbitrator can be challenged, dismissed and replaced as long as it's done fairly and to further the arbitral integrity. Just like any other countries, the Arab countries do abide by their arbitral principles so as such I will have a look at least two Arab countries in relation to the issue of arbitral challenge, removal and replacement of arbitrators.

[101] Arbitration with the Arab Countries 3rd Revised and Expanded Edition , Abdel Hmid at el

[102] Ali Mezfagani, "Islamic Law and Arbitration," Revue de l' Rbitraae 2 [2008] 211

4.2 **CHALLENGE OF ARBITRATOR IN THE UNITED ARAB EMIRATES**

INDEPENDENCE AND IMPARTIALITY

"Are there any requirements relating to arbitrator's independence and impartiality in United Arab Emirates? The answer to the question is yes, because most institutional arbitration rules have express provisions requiring arbitrators' independence and impartiality [for example, Article 9.1 of Dubai International Arbitration Centre Rules]. According to the centre rules, an arbitrator can be challenged or disqualified from sitting on a matter for the same reasons as a judge. A judge is challenged or disqualified for the following reasons:

(a) He is the spouse of any of the litigants, or a relative or in-law of the litigants to the fourth degree.
(b) His spouse has an existing dispute with any of the parties (or their spouse)
(c) He is an agent, trustee or guardian of any of the parties in his private capacity.
(d) He has given legal opinion or has pleaded for any of the parties in the lawsuit, or given any written statement during the course of one."[103]

The issue of challenging an arbitrator' independence and impartiality is applicable and acceptable in the United Arab Emirates. As we know each and every country has got its own rules and laws, the laws of the United Arab Emirates might differ slightly from European countries but not that much as compared to other Arab countries as they say the apple does not fall far from the tree. The good thing is that even if there are differences with European countries the issue and the idea remains the same, how to have fair arbitration and how to safe guard the arbitral integrity.

"Under the Federal Code of Civil Procedure, arbitrators may only be dismissed by unanimous consent of the parties. However, the court originally having jurisdiction over the dispute may dismiss the arbitrator upon the request of one of the parties, and order the appointment of another according to the same method used for appointing the dismissed arbitrator, if it is established that the arbitrator deliberately omitted to comply with the terms of the arbitration agreement, despite warning him in this respect in writing."[104]

[103] www.ukpracticallaw.com internet source accessed September 2015
[104] Article 207 (3) of **The UAE Civil Procedure Code, Federal Law No. (11) of 1992**

According to the Federal Code of Civil Procedure, an arbitrator can be challenged of deliberately omitting to comply with what is required of him. Meaning failure to disclose all the close relationships which are prohibited is as well failure to comply with the requirements of the position. There is a slight difference from what other laws say, because it goes further to give a written warning to the arbitrator before being challenged and dismissed. This means an arbitrator can only be challenged for reasons occurring or appearing after his appointment.

By virtue of the United Arab Emirates New Draft Arbitration Law, "an arbitrator may not be challenged except if circumstances emerge that give rise to serious doubts as to his impartiality or independence. Furthermore, a party may not challenge the arbitrator it appointed or participated in his appointment except for reasons discovered after making such appointment."[105]In United Arab Emirates the arbitrator is challenged for partiality and biases just like anywhere else where they allow arbitral challenge. United Arab Emirates law goes further to explain that one cannot challenge a party whom he or she personally elect unless there are justifiable reasons for that and that those reasons must have been known after the making of such an appointment. To a certain extent l feel they try to deal with those parties that try to sabotage the arbitral process by delaying and wasting a lot of time, challenging the same arbitrators they personally appoint. The United Arab Emirates Legislators has also adopted other provisions from the Egyptian Arbitration Act[106] and also from the UNCITRAL Model Law.[107]

The United Arab Emirates also has some time limits within which a challenge must be submitted. "The challenge against an arbitrator must be submitted in writing to the arbitral tribunal itself within 15 days following the date when the challenging party become aware of the constitution of the arbitral tribunal or of the circumstances justifying the challenge."[108] Such challenge must indicate its supporting grounds. If the arbitrator does not withdraw within 7days from the date of submitting the challenge, the challenging party may refer its request to the court competent pursuant to this Draft, within 15 days starting from the expiry of the aforementioned 7 days."[109]Besides the challenge being in writing, the Article goes further to give at least a duration of 7 days upon which the arbitrator is expected to withdraw before the issue goes to a competent court.

[105] Article 19 (2-3) of the New Draft Arbitration Law of UAE 2003
[106] Article 18 of the Egyptian Arbitration Act Law No 27 of 1994
[107] Article 12 of the UNCITRAL Model Law of 1985 with amendment as adopted in 2006
[108] www.internationallawoffice.com internet source accessed September 2015
[109] Article 5 of the New Draft Arbitration Law of UAE

According to Article 20, "if the arbitrator was removed, the arbitral proceedings made after the date when the reasons for challenge arose, including the arbitral award, are considered void."[110] In such a case the arbitral process will have to start again as everything which was done will not be considered at all. Therefore, the United Arab Emirates Draft has adopted the provisions of the Egyptian Arbitration Act[111], but shortened the time- period granted to the arbitrator for withdrawal to 7 days while Egyptian Arbitration Act grant 15 days to withdrawal. Furthermore, the Draft did not adopt the Egyptian provision rejecting the request for challenge submitted by the same party who has previously challenged the same arbitrator in the same arbitration. This may be an accurate position of the United Arab Emirates Legislator in order to prevent all delaying tactics that may be used by the parties.

"On the other hand, when an arbitrator unable to perform his mission or fails to start his task or interrupts the performance thereof in a manner which causes undue delay to the arbitral proceedings or if the arbitrator does not fulfil the capacity requirements agreed upon by the parties, and if the arbitrator does not withdraw in these cases and if the parties have not agreed to revoke him, then the court competent according to this Draft may terminate the mission of the arbitrator upon the request of either party"[112] In these instances that the court decides, the decision of the court is not subject to any recourse.

Under the United Arab Emirates Draft Law, the vacancy created as a result of a challenge will have to be filled, "If the mission of the arbitrator was terminated due to his removal, withdrawal or any other reason, a replacement arbitrator shall be appointed according to the same procedure followed when appointing the arbitrator whose mission was terminated."[113]The United Arab Emirates New Draft Law does not differ that much from other countries or International Laws in terms of arbitral challenge, it also adopted some of its provision from the Egyptian Laws, though it changed some of the provisions to a certain extent .

4.3 ARBITRATION CHALLENGE IN ALGERIA

Besides the United Arab Emirates, I also chose to have a closer look at another Arab country of Algeria, so as to have a better insight of the issue of arbitral challenge in the Arab countries. In domestic arbitration of Algeria, "it is [not?] possible to remove arbitrators during the arbitration proceedings, unless all parties have agreed to do so."[114] Which means the removal has to be agreed to by both parties otherwise an arbitrator cannot be removed once the proceedings started. The Algerian Legislator also support the same view that if any arbitrator is aware of a possible challenge, has to notify the parties

[110] Article 20 of the New Draft Arbitration Law of UAE 2003
[111] Article 19 of the Egyptian Arbitration Act Law No 27 of 1994
[112] www.trac.ir Rules of Arbitration established under the Auspices of the Asian-African Legal Consultative Organization 2005
[113] Article 22 of the New Draft Arbitration Law of UAE 2003
[114] Article 1018 para 4 of the New Algerian Code of Civil and Administrative Procedure

of such and may not accept the appointment unless the parties agree to waive their rights.

GROUNDS FOR A CHALLENGE IN ALGERIA

According to the Algerian Code of Civil and Administrative Procedure they are:[115]

1) Where the arbitrator does not meet the qualifications agreed upon between the parties
2) Where there is a ground for challenge stipulated in the arbitration rules agreed upon between the parties
3) Where there are reasonable doubts as to the arbitrator's independence resulting from circumstances of the case, mainly the presence of an interest, an economic relation or family bound with one of the parties, whether directly or indirectly

The party who appointed arbitrator according to Algerian Laws is only allowed to challenge that arbitrator in relation to the reasons that he became aware of after appointment. The new law also adopted the following rule: "In case of a dispute, and if the arbitration rules did not include the method of its settlement or the parties did not agree on the challenge procedure, then the judge shall settle this issue by virtue of an order upon the request of the most diligent party. The decision of the judge is not subject to any means of recourse."[116] Indeed just like any other country the Algerian Law allow the challenge, removal and replacements of arbitrators as long as the procedures are followed, balancing fairness with arbitral integrity.

[115] Article 1016 of the New Algerian Code of Civil and Administrative Procedure
[116] Article 1016 last paragraph of the New Algerian Code of Civil and Administrative Procedure

CHAPTER 5

5.1 REPLACEMENT ARBITRATOR

A replacement arbitrator, as the name suggest is an arbitrator who would be elected to fill a vacancy which was once occupied by someone. The said vacancy could have been created as a result of a challenge which was accepted and the arbitrator was removed from the tribunal, or it could as a result of a withdrawal by the challenged arbitrator. The issue here is two sided, whether the vacancy will be filled or left open, depends on the applicable rules and also the issue of the stage at which the case has reached when the challenge was raised. In most jurisdictions they say the vacancy has to be filled no matter what and the same procedure used at first will have to be followed again. Others believe that if the arbitral tribunal was of three members and only one has been successfully challenged and removed; there is no need to start the process so they allow the two remaining members to conclude the case.

There is no uniformity as to the issue of replacement of an arbitrator. "Some stipulate that the newly constituted tribunal must decide alone, others require that the newly constituted tribunal to consult the parties, others require the institution to make the decision. Some work on the premise that repetition must be the exception rather than the rule, while others adopt the opposite approach. Some set out the possibility of repeating all or part of the proceedings, others stipulate that only hearings should be repeated, while yet other rules set out that repetition applies to procedural stages."[117]

According to the revised UNCITRAL Rules:[118]

(1) "Subject to paragraph (2), in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its rights to appoint or to participate in the appointment."[119]

(2) "If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; (b) after the closure of the hearings,

[117] Party instigated arbitration challenges: A Practical Guide, Daisy Mallett et al
[118] Art .14 UNICITRAL Model Law of 1985 with amendment as adopted in 2006
[119] www.eguides.cmslegal.com CMS Guide to Arbitration Volume 1

authorize the other arbitrators to proceed with the arbitration and make any decision or award."[120]

The rules of replacement arbitrator differ from one jurisdiction to the other though sometime they apply similar rules. The Swiss Rules are adopted from the UNCITRAL Rules, but they went further to add the issue of time limit for nomination of the replacement arbitrator which the UNCITRAL Rules did not mention in Article 14 of its' rules. On the other hand, other institutions leave the issue to be decided by a competent court. "The ICC Rules and the LCIA Rules both stipulate that it is at the court's discretion whether or not to follow the original nominating process. Thus, especially when the chairman is placed, the ICC Court or the LCIA Court may decide to appoint the replacement arbitrator without involvement of the parties or the remainder of the tribunal."[121] These two articles say the same, in terms of the issue of replacement arbitrator, though they give the powers to the Court, to the extent that even if the parties are not involved the replacement arbitrator will be appointed by the Court which has the discretion to do so.

After the new arbitrator has been appointed, whether by a competent court or by the parties themselves, there is still another issue as to the issue of the proceedings. There is also mixed reaction as to what will happen, some say the proceedings will just have to start again the same way they did before the removal of an arbitrator and others are of the view that the proceedings should simply continue from where they stopped due to the challenge of the now replaced arbitrator. "Under the Swiss Rules, the premise is that proceedings continue once the tribunal has been reconstituted with no repetition. However, the new tribunal is free to decide otherwise."[122] The Swiss Rules of course leave room for the tribunal to decide otherwise if they feel it's necessary to start the whole process. For fairness reasons l think it will be fair for the replacement arbitrator if he really gets to know what happened before he joined the arbitral team, sort of a briefing will be sufficient rather than to just continue.

[120] www.eguides.cmslegal.com CMS Guide to Arbitration Volume 1

[121] ICC Rules art. 12(4); LCIA Rules Art 11(1)

[122] Art 14 of the Swiss Rules of International Arbitration January 2006

CONCLUSION

In conclusion I will say the issue of balancing fairness and arbitral integrity when there is a challenge is the most sensitive issue yet the most important part of arbitration law, because once there is no fairness and integrity there is no arbitration. The independence, impartiality and neutrality of an arbitrator are the core principles of being a good and acceptable arbitrator. Parties agree to arbitration as a method of settling their dispute, hoping for a fair and unbiased judgement to the dispute. To safe guard the fairness of the process and the integrity of the arbitration, many rules and laws have been set, at national and International levels.

Neutrality of the arbitrators towards the parties to the dispute is the only way to achieve fairness in arbitration. The reason why the arbitrators are challenged is because, they would have done the prohibited, and for examples there are prohibited degrees of relationships. All forms of relationships are not allowed at all, both blood relationships and business relations are subject to be challenged. When there is a relationship, the chances are high the arbitrator will be biased somehow, be it he will get a financial benefit or otherwise that doesn't matter the issue is in such a situation such an arbitrator will be challenged.

Just like Judges in the courts, the arbitrators are expected to withdraw from their appointment or even refuse before being appointed, that is as soon as he or she realises that there will be a conflict of interest which will be challenged during the course of the proceedings. When a Judge in court realises that there is a relationship or a conflict of interest he simply recues himself the same is expected or arbitrators that's why they are in some instances regarded as private judges.

In some cases, before withdrawing from the appointment, it is best for the arbitrator to do his or her part to investigate and disclose all potential issues which can be challenged in future. Disclosure is supposed to be done at the beginning of the proceedings and it's a continuous process which has to be done anytime one has anything to disclose, which he or she feels can be of importance if known to the parties and the tribunal.

The parties are at liberty to decide on the disclosure, whether to remove the arbitrator or to waive their rights in regard to the disclosure. Yet the parties may agree to overlook some facts which seem to be of less importance to the arbitration process though there are some of the disclosures which they cannot waive in terms of the law.

The issue of arbitral challenge and replacement of arbitrators, balancing fairness with arbitral integrity is applicable in most countries that use arbitration as method of settling disputes. There might be differences in the wording of the arbitral rules but the fact remains the same, they all strive for fairness and arbitral integrity. All countries even the Arab countries which are known mostly for Shari'ah Laws also do allow the challenge and replacement of arbitrators even if they have their own ways of doing it. The issue is the reasons are the same, Arab

countries do not allow one to be an arbitrator in a case he or she will have a benefit from the award.

Failure to disclose will lead to a challenge and once that challenge is accepted, in most cases it will lead to the removal of an arbitrator from the arbitral tribunal because mostly those that are accepted are those which are worth the question of independence and impartiality. Since there is no uniform approach to the challenges, some are accepted and some rejected, depending on the facts of the challenge which will have to be brought forward usually in a written form as per the procedures of bringing up a challenge.

The issue of time limits also has to be abide by for the challenge to be valid; otherwise it will be rejected, if brought late. Once an arbitrator is successfully challenged, he will be removed and as a result of that removal, a vacancy is created. In some cases, the vacancy has to be filled though in other cases if there are two remaining arbitrators, they may be allowed to continue and issue the award without replacing the removed arbitrator. If the arbitrator is to be replaced, some laws say the previous procedure which was used to appoint the removed has to be followed to appoint the replacement. Others are of the view that it is time consuming and they suggest that the court competent can do the appointing of the replacement arbitrator. Whichever procedure is used during the process of challenging and replacing of the arbitrator is all, for the benefit of the parties whose choice of using arbitration have to be respected. That's how fairness and arbitral integrity can be balanced.

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