Challenges to an arbitrator’s appointment are not everyday events, and successful challenges are rare. However, there may be instances where a party is dissatisfied with the arbitrator/s appointed and may seek to remove them from the tribunal but the party challenging the arbitrator should be aware that the hurdle to success is set high.

The grounds for challenge, the procedure for challenge and the consequences of a successful arbitrator challenge will depend on the rules that the parties have agreed will apply to the arbitration. If the parties have not agreed on any rules, the rules of the arbitral law of the seat of the arbitration will apply.

Grounds for challenge under arbitral rules

ICC Rules

Section 14(1) of the ICC Rules 2017 provides that a challenge to arbitrator can be made “for an alleged lack of impartiality or independence, or otherwise”. The inclusion of ‘otherwise’ is unclear but could cover other misconduct of the arbitration proceedings.

UNCITRAL Rules

Section 12(1) of the UNICTRAL Rules 2013 requires that “Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence”. However, the party must become aware of the reasons for the challenge after the appointment has been made.

LCIA Rules

Section 10.2 of the LCIA Rules 2014 provides that the “LCIA Court may determine that an arbitrator is unfit to act… if that arbitrator: (i) acts in deliberate violation of the Arbitration Agreement; (ii) does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry”. However, a party may only challenge an arbitrator (whom it has either nominated, or participated in the appointment) for reasons of which it becomes aware after the appointment was made.

National Law – England and Wales

Under section 24 of the English Arbitration Act 1996 (the “Act”), a party may apply to the English court to remove an arbitrator on any of the following grounds:

- Circumstances exist that give rise to justifiable doubt as to his/her impartiality.
- The arbitrator does not possess the qualifications required by the arbitration agreement.
- The arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.
- The arbitrator has refused or failed to conduct the proceedings properly or with “reasonable despatch”, if substantial injustice will be caused to the applicant.

The relevant test for an application under the first bullet point is whether a fair-minded and informed observer, having considered the facts, would consider that there was a possibility that the tribunal was biased.
In addition, a party to an arbitration may be able to challenge an award under section 68 of the Act, on the ground the tribunal did not comply with its duty under section 33 (a duty on the tribunal to act fairly and impartially) and this has caused or will cause substantial injustice to the applicant.

The test for setting aside an award on the ground of lack of impartiality is whether there is an existence of circumstances giving rise to justifiable doubts as to the arbitrator’s impartiality.

Examples of scenarios which might give rise to a challenge:

- An arbitrator has a financial interest in the dispute.
- An arbitrator is in the same barrister’s chambers as counsel.
- An arbitrator or arbitrator’s law firm is acting, or has previously acted, for a party.
- An arbitrator has previously been involved in the case.
- An issue conflict.

Procedure for challenging an arbitrator

**ICC Rules**

A party must submit a written statement to the Secretariat (specifying the facts and circumstances on which the challenge is based) either within 30 days from receipt by that 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 (if such date is subsequent to the receipt of such notification) (Article 14.2).

The Secretariat will then allow the arbitrator, the other members of the tribunal and the other parties to the arbitration, the opportunity to comment in writing on the challenge, following which the Court will make its decision on inadmissibility.

**UNCITRAL Rules**

The party challenging the arbitrator must send notice of its challenge to all other parties, the arbitrator concerned and all other arbitrators within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 (disclosure of circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence) and 12 (justifiable doubts as to the arbitrator’s impartiality or independence) became known to that party (Article 13.1 and 13.2).

If all parties do not agree to the challenge or the challenged arbitrator does not withdraw within 15 days of the challenge, within 30 days of the date of the notice of challenge the party may seek a decision from the appointing authority (Article 13.4).

**LCIA Rules**

A party shall within 14 days of the formation of the Arbitral Tribunal or (if later) within 14 days of becoming aware of any grounds for challenge, deliver a written statement of the reasons for its challenge to the LCIA Court, the tribunal and all other parties (Article 10.3). If all other parties agree in writing to the challenge within 14 days of receipt of the written statement, the LCIA Court shall revoke that arbitrator’s appointment (Article 10.5). If not agreed, the LCIA Court will decide the challenge in writing providing reasons for its decision (Article 10.6).

**National courts – England and Wales**

If the party challenging the arbitrator has exhausted any available application under the relevant arbitral rules, the national courts can play a role (Section 24 of the Act). However, the power of the court is a reserve one.

To minimise the risk of delaying tactics, the Act provides for the arbitration to proceed to an award while the application to the court is pending. It is important that parties observe any time limit (within arbitral rules, if applicable) for raising an arbitrator challenge, or risk waiving the right to object.

**Consequences of a successful challenge**

**ICC Rules**

Upon acceptance of a challenge to an arbitrator, the Court has discretion to decide whether or not to follow the
original nominating process (Article 15.4). The Court can also determine that the remaining arbitrators shall continue the arbitration (Article 15.5).

**UNICITRAL Rules**

The replacement arbitrator will be appointed in accordance with the original appointment process (Article 14). The proceedings will then resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise (Article 15).

**LCIA Rules**

The LCIA Court may determine whether or not to follow the original nominating process for replacing the arbitrator (Article 11.1). The LCIA Court may determine that any opportunity given to a party to make any re-nomination shall be waived if not exercised within 14 days (or such lesser or greater time as the LCIA Court may determine), after which the LCIA Court shall appoint the replacement arbitrator without such re-nomination (Article 11.2).

**National courts – England and Wales**

Section 27(3) of the Act provides for the replacement of the arbitrator who has been removed and, in the event there is no agreement between the parties to the contrary, the substitute arbitrator is to be appointed in accordance with the original appointment process. The reconstituted tribunal will determine whether and if so to what extent the previous proceedings should stand. This does not affect any right of a party to challenge those proceedings on any ground which had arisen before the arbitrator was removed.

In many cases, the costs of the challenge application will be dealt with at the end of the arbitration as part of the general allocation of liability for costs. However, an unmeritorious challenge may be sanctioned in costs in the interim.

**Final considerations**

A party should reflect carefully before mounting any challenge to an arbitrator’s independence or impartiality. Tactical or speculative challenges should, on the whole, be discouraged. The risk is not so much that the challenge is dismissed, but rather the risk that the party’s credibility is damaged so that, going forward, its substantive case is viewed with some scepticism by the tribunal. However, where a party has genuine concerns as to an arbitrator’s independence or impartiality, he should not delay, as any delay could be fatal to a challenge.

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