

## FOUNDATIONS AND PROCEDURE OF CHALLENGE OF ARBITRATORS IN INTERNATIONAL ARBITRATION

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**Abstract:** *Arbitration is an efficient method of settlement of disputes between the parties in a speedy manner. The other advantages are that parties to the dispute by agreement choose the arbitrators, arbitration procedure and applicable arbitration rules. The basic requirement in international arbitration is that an arbitrator must be independent and impartial throughout the arbitral proceedings. According to the UNCITRAL Model Law on Arbitration when a person approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. A party to the arbitration may challenge the arbitrator. However, the arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. According to the arbitration rules, the challenge shall specify the grounds for the challenge and include corroborating materials to substantiate the challenge. Subject to the applicable arbitration rules, the parties are free to agree on a procedure for challenging an arbitrator. The object of this paper is to examine the grounds for challenge of arbitrators and challenging procedure under different international and institutional arbitration rules with the help of decided cases.*

**Key words:** *International Arbitration, impartiality and independence, UNCITRAL Arbitration Rules, UNCITRAL Model Law.*

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### 1. Introduction

Fair and just processes for resolving disputes are indispensable in our society.<sup>428</sup> Arbitration is efficient and speedy method of settlement of commercial disputes between the parties. International arbitration has developed extensively in the course of the twentieth century via the passage of a series of international conventions that have sought to provide a framework within which this system can operate effectively.<sup>429</sup>

Arbitrators are expected to act like judges who will provide justice to all parties and guarantee them a fair hearing and a just award.<sup>430</sup> All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice.<sup>431</sup> In case of existence of any partiality by arbitrator, a party may challenge the arbitrator.

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<sup>428</sup> Canon I of the Code of Ethics for Arbitrators in Commercial Disputes (2004) the Code sponsored by the American Arbitration Association (AAA) and the American Bar Association (ABA).

<sup>429</sup> Dr. Ranee K.L. Panjabi, *Economic Globalization: The Challenge for Arbitrators*, 28 Vand. J. Transnat'l L. 173 (1995).

<sup>430</sup> Deng Ruiping a1 and Duan Xiaosong aal, *Promoting Impartiality of International Commercial Arbitrators through Chinese Criminal Law: Arbitration by "Perversion of Law"*, 10 BYU Int'l L. & Mgmt. Rev. 109 (2014).

<sup>431</sup> *Locabail(UK) Ltd v. Bayfield Prop. Ltd* [2000] Q.B. 451.

The basic requirement in international arbitration is that an arbitrator must be independent and impartial, throughout the arbitral proceedings. A party to the arbitration may challenge the arbitrator only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed by the parties. The object of this paper is to examine the grounds for challenge of arbitrators and challenging procedure under different international and institutional arbitration rules with the help of decided cases.

## 2. Requirement of Independent and Impartial arbitrator:

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.<sup>432</sup> Every arbitration law requires either expressly or implicitly that an arbitrator be impartial and independent.<sup>433</sup>

The dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.<sup>434</sup> Considering the finality and weight of an arbitral award, notions of fairness dictate that the unbiased arbitrators who issue the award should decide the dispute on the basis of the evidence presented, unbiased by personal interests. Nevertheless, issues relating to conflicts of interest increasingly plague international arbitration.<sup>435</sup>

While different arbitral institutions employ different language in their rules, the rules of all the major institutions generally impose the same requirements for arbitrator independence and impartiality.<sup>436</sup> To allow arbitrators to fulfill their duty to disclose, many arbitral rules provide a process for the arbitrator to make these disclosures.<sup>437</sup> Most rules now request the arbitrators to disclose "the existence of interests or relationships that are likely to affect their impartiality or that might reasonably create an appearance that they are biased against one party or favorable to another." This duty of disclosure is imposed upon the arbitrators throughout the entire course of the proceedings, until the award has been rendered.<sup>438</sup> The fundamental rule of the arbitration process is that arbitrators must be independent and impartial. This principle can be found in all most all the international and national arbitration rules.<sup>439</sup>

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<sup>432</sup> General Principle 1, IBA Guidelines on Conflicts of Interest in International Arbitration, 2014].

<sup>433</sup> Tibor Varady, John J. Barcelo III, Arthur T. von Mehren, *International Commercial Arbitration, A Transnational Perspective*, Second Edition, Thomson West, 2003, page 381.

<sup>434</sup> *Jivraj v. Hashwani* [2011] UKSC 40.

<sup>435</sup> Lindsay Melworm, *Baised? Prove it: Addressing Arbitrator Bias and the Merits of Implementing Broad Disclosure Standards*, 22 *Cardozo J. Int'l & Comp. L.* 431 (2014).

<sup>436</sup> Advance Waivers of Arbitrator conflicts of interest in International commercial Arbitration Seated in New York, Report of the International Commercial Disputes Committee of the New York City Bar Association, 27 *Am. Rev. Int'l Arb.* 21 (2016)].

<sup>437</sup> Edward C. Dawson, *Speak Now or Hold your Peace: Pre-arbitration Express Waivers of Evident-Partiality Challenges*, 65 *Am. U.L. Rev.* 307 (2013)]

<sup>438</sup> Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 *UMKC L. Rev.* 93, (1998).

<sup>439</sup> The ICC Arbitration Rules, Article 11; The Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) Rules, Article 4.6; The Belgian Centre for Arbitration and Mediation Rules (CEPANI), Article 14; The China International Economic and Trade Arbitration Commission (CIETAC), Article 24; The LCIA Rules, Article 5.3; The Singapore International Arbitration Centre's Arbitration Rules (SIAC), Rule 13.1; The Stockholm Chamber of Commerce Arbitration Rules, Article 18; The Vienna International Arbitration Centre's (VIAC) Arbitration Rules, Article 16; the World Intellectual Property Organization's (WIPO) Arbitration Rules, Article 22; The Russian Arbitration rules, Article 11; The American Arbitration Association (AAA)

The UNCITRAL Model Law provides that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.<sup>440</sup> The similar provision is found in the UNCITRAL Arbitration Rules, 2013.<sup>441</sup>

The 2014 IBA Guidelines, which are often used as guidance in international arbitrations regarding arbitrator conflicts and disclosure obligations, contain provisions regarding the impartiality and independence of an arbitrator that are similar to those of the major arbitral institutions.<sup>442</sup> Although the IBA Guidelines do not have the force of law, a number of courts have relied upon them in decisions regarding removal of arbitrators.<sup>443</sup>

### **3. Grounds and procedure for challenge of arbitrator:**

It has been recognized that arbitration rulings must be subject to some judicial review to ensure that the arbitral proceeding has operated within the state's legal framework. This supports a conclusion that the judicial authority should act as a watchdog in supervising arbitrators and providing a remedy when necessary.<sup>444</sup> Most of the national legal systems of the world allow the parties to challenge the arbitrators, except for a few common law countries.<sup>445</sup> Arbitral institutions frequently have their own procedure for challenging arbitrators appointed by them or under their auspices.<sup>446</sup> The following paragraphs deal with the grounds for challenge and its procedure under the different arbitration rules:

#### **UNCITRAL Model Law**

According to the UNCITRAL Model Law, an arbitrator from the time of his appointment shall disclose any such circumstances likely to give rise to justifiable doubts as to his impartiality or independence.<sup>447</sup> An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.<sup>448</sup>

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Arbitration Rules and Mediation Procedures, 2013, Rule 18 (a)(i); The U.S., FAA, Section 10, The English Arbitration Act, 1996, Chapter 24; The Singapore International Arbitration Centre (SIAC) Rules, 2016 Rule 13.1.

<sup>440</sup> Article 12 (1).

<sup>441</sup> Article 11.

<sup>442</sup> Advance Waivers of Arbitrator conflicts of interest in International commercial Arbitration Seated in New York, Report of the International Commercial Disputes Committee of the New York City Bar Association, 27 Am. Rev. Int'l Arb. 21 (2016).

<sup>443</sup> Gary B. Born, *International Arbitration Cases and Materials*, 2<sup>nd</sup> edition, 2015, Kluwer Law International BV, the Netherlands, page 140.

<sup>444</sup> Deng Ruiping a1 and Duan Xiaosong aal, *Promoting Impartiality of International Commercial Arbitrators though Chinese Criminal Law: Arbitration by "Perversion of Law"*, 10 BYU Int'l L. & Mgmt. Rev. 109 (2014).

<sup>445</sup> Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 UMKC L. Rev. 93, (1998).

<sup>446</sup> Tibor Varady, John J. Barcelo III, Arthur T. von Mehren, *International Commercial Arbitration, A Transnational Perspective*, Second Edition, Thomson West, 2003, page 381.

<sup>447</sup> Article 12 (1).

<sup>448</sup> Article 12 (2).

Article 13 of the Model Law deals with procedure for challenge. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of Article 13 (3).<sup>449</sup> A party who intends to challenge send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.<sup>450</sup>

If a challenge under any procedure agreed upon by the parties or under the procedure of Article 13 (2) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.<sup>451</sup>

### **The UNCITRAL Arbitration Rules:**

According to the UNCITRAL Arbitration Rules, 2013, any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's Impartiality or independence.<sup>452</sup> A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.<sup>453</sup> Under the UNCITRAL Arbitration Rules the challenge procedure is as follows:<sup>454</sup>

A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the disclosure of circumstances likely to give rise to justifiable doubts or if the circumstances exist that give rise to justifiable doubts (Articles 11 and 12 ) became known to that party.<sup>455</sup> The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge. When an arbitrator has been challenged by a party, all parties may agree to the challenge.

The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.<sup>456</sup> If, within 15 days 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 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.<sup>457</sup>

### **The ICC Arbitration Rules:**

The International Chamber of Commerce (ICC) Arbitration Rules Article 14 provides that whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the

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<sup>449</sup> Article 13 (1).

<sup>450</sup> Article 13 (2).

<sup>451</sup> Article 13 (3).

<sup>452</sup> Article 12 (1).

<sup>453</sup> Article 12.

<sup>454</sup> Article 13.

<sup>455</sup> Article 13 (1).

<sup>456</sup> Article 13 (3).

<sup>457</sup> Article 13 (4).

submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

**The CAM-CCBC Arbitration Rules:**

According to the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) Rules, the parties can challenge the arbitrators for lack of independence or impartiality or for other justified reason within fifteen days from awareness of the fact. The challenge will be decided by a Special Committee composed of three members of the List of Arbitrators appointed by the President of the CAM/CCBC.<sup>458</sup>

**CEPANI Arbitration Rules, 2013:**

According to Belgian Centre for Arbitration and Mediation Rules, a challenge for reasons of any alleged lack of independence or for any other reason, shall be communicated to the secretariat in writing and shall contain the facts and circumstances on which it is based. The Challenge Committee shall decide without any recourse on the challenge of an arbitrator. The reasons for the decision shall not be communicated.<sup>459</sup>

**CIETAC Arbitration Rules, 2015:**

According to Article 32 of the China International Economic and Trade Arbitration Commission, a party having justifiable doubts as to the impartiality or independence of an arbitrator may challenge that arbitrator with supporting evidence, within 15 days from the date becoming aware of reasons for challenge. The challenged arbitrator may withdraw voluntarily, otherwise, the Chairman of CIETAC shall make a final decision on the challenge with or without stating the reasons. An arbitrator who has been challenged shall continue to serve on the arbitral tribunal until a final decision on the challenge has been made by the Chairman of CIETAC.

**The London Court of International Arbitration (LCIA) Rules, 2014:**

LCIA Rules provide that the LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.<sup>460</sup>

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 (without reasons).<sup>461</sup> In other circumstances, the LCIA Court shall decide the challenge and, if upheld, shall revoke that arbitrator's appointment.<sup>462</sup>

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<sup>458</sup> Article 5.4.

<sup>459</sup> Article 16.

<sup>460</sup> Article 10.1 (iii).

<sup>461</sup> Article 10.5.

<sup>462</sup> Article 10.6.

### **The SIAC Rules, 2016:**

According to Singapore International Arbitration Centre's Arbitration Rules (SIAC), any arbitrator may be challenged on the grounds of impartiality or independence.<sup>463</sup> If the other party does not agree to the challenge, or the arbitrator does not withdraw voluntarily, the court shall decide the challenge and the decision is not subject to appeal.<sup>464</sup>

### **The Stockholm Chamber of Commerce Arbitration Rules, 2017:**

The Stockholm Chamber of Commerce Arbitration Rules provide that a party may challenge any arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess the qualifications agreed by the parties. A party wishing to challenge an arbitrator shall submit a written statement to the Secretariat stating the reasons for the challenge. If the other party agrees to the challenge, the arbitrator shall resign. In all other cases, the Board shall take the final decision on the challenge.<sup>465</sup>

### **The VIAC Arbitration Rules, 2013:**

According to Article 20 of the Vienna International Arbitration Centre's (VIAC) Arbitration Rules, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not fulfil the qualifications agreed by the parties. The challenge shall specify the ground for the challenge and include corroborating materials to substantiate the challenge. If the challenged arbitrator does not resign, the Board shall rule on the challenge.

### **The WIPO Arbitration Rules, 2014:**

According to World Intellectual Property Organization's (WIPO) Arbitration Rules, any arbitrator may be challenged by a party if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence.<sup>466</sup> The other party may agree to the challenge or the arbitrator may voluntarily withdraw.<sup>467</sup> If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made by the Center in accordance with its internal procedures.<sup>468</sup>

### **The Russian Arbitration Rules, 2010:**

Russian Arbitration Rules provide that the any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.<sup>469</sup> The all parties may agree to the challenge or if the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing Authority.<sup>470</sup>

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<sup>463</sup> Rule 14.

<sup>464</sup> Rule 16.

<sup>465</sup> Article 19.

<sup>466</sup> Article 24.

<sup>467</sup> Article 28.

<sup>468</sup> Article 29.

<sup>469</sup> Article 12.

<sup>470</sup> Article 13.

### **The English Arbitration Act, 1996:**

According to English Arbitration Act, 1996, a party to arbitral proceedings may apply to the court to remove an arbitrator on the ground that circumstances exist that give rise to justifiable doubts as to his impartiality.<sup>471</sup> The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending. The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section. The leave of the court is required for any appeal from a decision of the court under this section.<sup>472</sup>

### **The American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures, 2013:**

The AAA Arbitration Rules provide that any arbitrator be disqualified for: (i). partiality or lack of independence, (ii). inability or refusal to perform his or her duties with diligence and in good faith, and (iii). any grounds for disqualification provided by applicable law.<sup>473</sup> The AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.<sup>474</sup>

### **The China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules, 2015:**

A party having justifiable doubts as to the impartiality or independence of an arbitrator may challenge that arbitrator in writing and shall state the facts and reasons on which the challenge is based with supporting evidence.<sup>475</sup> The challenged arbitrator may withdraw. In other circumstances, the Chairman of CIETAC shall make a final decision on the challenge with or without stating the reasons.<sup>476</sup>

## **4. Judicial decisions on Challenge of arbitrators:**

Despite the growing attractiveness of the arbitral process, arbitration is not without its shortcomings.<sup>477</sup> Challenge can be raised against any arbitrator, including arbitrators who have been selected by an appointing authority, by agreement between the parties, by another party, or (less commonly) by the challenging party itself.<sup>478</sup> The procedure for challenge of an arbitrator appears either in the law of the country where the arbitration takes place, or in any rules of arbitration that have been adopted by the parties.<sup>479</sup>

There are certain institutional arbitration rules under which the arbitral institution decides exclusively on a challenge. Most arbitration acts provide a system by which the parties may

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<sup>471</sup> Chapter 24.

<sup>472</sup> Chapter 24.

<sup>473</sup> Rule 18.

<sup>474</sup> Rule 18 (c).

<sup>475</sup> Article 32 (2).

<sup>476</sup> Article 32 (6).

<sup>477</sup> Lindsay Melworm, *Baised? Prove it: Addressing Arbitrator Bias and the Merits of Implementing Broad Disclosure Standards*, 22 *Cardozo J. Int'l & Comp. L.* 431 (2014).

<sup>478</sup> Gary B. Born, *International Arbitration Cases and Materials*, 2<sup>nd</sup> edition, 2015, Kluwer Law International BV, the Netherlands, page 146.

<sup>479</sup> Allan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4<sup>th</sup> edition 2004, Sweet & Maxwell, London, page 247.

agree on a challenge procedure, which includes a third person (usually an arbitral institution) who decides on the challenge.<sup>480</sup> For example, the UNCITRAL Model Law rules provide that the challenging party may request the court or other authority to decide on the challenge.<sup>481</sup> These provisions establish a largely stand-alone mechanism whereby objections to arbitrators may be resolved expeditiously by a contractually-agreed appointing authority, without recourse to national courts, under prescribed contractual standards of impartiality.<sup>482</sup>

Article 13 of UNCITRAL Model Law sets out a twofold procedure governing challenges to arbitrators. In a preliminary phase, challenges are handled within the arbitral proceeding, according to either a procedure agreed to by the parties or the default procedure set out in paragraph (2) of Article 13. Challenges that have not been successful at that preliminary phase may subsequently be brought to a court or competent authority, whose decision on the matter is final.<sup>483</sup> While the parties are free to agree on a challenge procedure applicable in the arbitral proceeding, it is clear from paragraph (1) that court intervention pursuant to paragraph (3) is mandatory.<sup>484</sup> Court control over the impartiality and independence of an arbitrator is indispensable.<sup>485</sup> A court intervening pursuant to paragraph (3) Article 13 of Model Law does not merely review the previous decision of the arbitral tribunal or institution on the challenge, it also reviews the challenge fully and makes an independent decision as to whether it should be allowed.<sup>486</sup>

The following judicial decisions explain the situations of challenge of arbitrators and vacature of the arbitral award on the grounds of partiality or bias by the arbitrators.

Courts, led by the U.S. Supreme Court, have steadily reduced other avenues to challenge arbitral awards.<sup>487</sup> The U.S. Federal Arbitration Act ("FAA") is silent about removing arbitrators while the proceedings are pending. Instead, it mandates the vacatur of an arbitral award where an arbitrator is biased or has engaged in certain misconduct.<sup>488</sup>

In *Morelite Construction Corporation v. N.Y.C. District Council Carpenters' Benefit Funds and Others*,<sup>489</sup> the U.S. Court of Appeals, Second Circuit held that an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, "would have to conclude" that an arbitrator was partial to one side.

In *Commonwealth Coatings Corp v. Continental Casualty Co*,<sup>490</sup> an arbitration was held, but the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and were never revealed to it by this arbitrator, by the prime contractor, or by anyone else until after an award had been made.

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<sup>480</sup> Tibor Varady, John J. Barcelo III, Arthur T. von Mehren, *International Commercial Arbitration, A Transnational Perspective*, Second Edition, Thomson West, 2003, page 385].

<sup>481</sup> Article 13.

<sup>482</sup> Gary B. Born, *International Commercial Arbitration*, Volume I, Wolters Kluwer, 2009, page 1532.

<sup>483</sup> UNCITRAL 2012 *Digest of Case Law on the Model Law on International Commercial Arbitration*, page 68.

<sup>484</sup> UNCITRAL 2012 *Digest of Case Law on the Model Law on International Commercial Arbitration*, page 69.

<sup>485</sup> Tibor Varady, John J. Barcelo III, Arthur T. von Mehren, *International Commercial Arbitration, A Transnational Perspective*, Second Edition, Thomson West, 2003, page 388.

<sup>486</sup> UNCITRAL 2012 *Digest of Case Law on the Model Law on International Commercial Arbitration*, page 69].

<sup>487</sup> Edward C. Dawson, *Speak Now or Hold your Peace: Pre-arbitration Express Waivers of Evident-Partiality Challenges*, 65 Am. U.L. Rev. 307 (2013).

<sup>488</sup> Yulia Andreeva, *How Challenging is the Challenge, or can U.S. Courts Remove Arbitrators before an Arbitration has come to an End?* 19 Am. Rev. Int'l Arb. 127 (2008).

<sup>489</sup> 748 F.2d 79, (2d Cir. 1984).

<sup>490</sup> 393 US 145 (1968), available at <https://www.law.cornell.edu/supremecourt/text/393/145>.

The petitioner challenged the award on this ground, among others, but the District Court refused to set aside the award. The Court of Appeals affirmed. The Supreme Court set aside the award for failure to disclose business connections with one of the parties, even though the award was unanimous and no claim is made of actual partiality, unfairness, bias, or fraud.

In *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*,<sup>491</sup> the magistrate judge in this case vacated an arbitration award, finding that the arbitrator's failure to reveal certain matters violated his "duty to disclose." Because an arbitrator's failure to disclose, in and of itself, provides no basis to vacate an award, and because the facts here do not demonstrate evident partiality by the arbitrator, the U.S. Court of Appeals for the Fourth Circuit reversed the magistrate judge's vacatur of the arbitration award and remanded the case with instructions to reinstate the award.

In *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*,<sup>492</sup> the primary question presented on this appeal is whether the failure of two arbitrators to disclose their concurrent service as arbitrators in another, arguably similar, arbitration constitutes "evident partiality" within the meaning of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 10(a)(2). The U.S. Court of Appeals, Second Circuit Court reversed the district court decision and conclude that Scandinavian has not met its burden of establishing that Dassenko and Gentile's service in the Platinum Arbitration was indicative of bias in these proceedings so as to constitute a nontrivial conflict of interest, therefore, does not require vacatur.

There is no federal law in the United States dealing with court challenges to arbitrators for bias or other misconduct while the arbitral proceedings are pending. Although § 10 of the FAA sets forth narrow grounds on which

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**Academic profile:**



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- *Passed National Eligibility Test (NET) in 1995 to qualify for lectureships in universities and colleges; accredited by University Grants Commission (UGC), India.*
- *Passed certificate program 'General Course on Intellectual Property' from World Intellectual Property Organization (WIPO) Academy, November 2008, Geneva.*
- *LLM in labour law, 1993, Osmania University, Hyderabad, Andhra Pradesh, India.*
- *Bachelor of Law, 1990, SK University, Andhra Pradesh, India.*
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- *23 years of experience in teaching undergraduate and post-graduate courses in law. From February 1993 to September 2006 has been worked in the rank of Assistant Professor and from 1st October 2006 to till date working as an Associate Professor (in UAEU from August 21, 2007).*
- *February 1993 to September 1997: lecturer in law at Vijaya Law College, affiliated to Osmania University, AP, India.*
- *October 1, 1997 to August 18, 2007: Faculty of Law, Osmania University, Hyderabad, AP, India.*
- *Since August 21, 2007 to present: Associate Professor in Private Law Department, College of Law, United Arab Emirates University, Al Ain, UAE.*

<sup>491</sup> 173 F.3d 493, 500 (4th Cir.1999).

<sup>492</sup> 668 F.3d 60, 64 (2d Cir. 2012).

an arbitral award may be vacated, on the face of the statute, none of these grounds can be used to forestall the arbitration itself.<sup>493</sup>

The UKs court in *AT & T Corporation v. Saudi Cable Co (SCC)*,<sup>494</sup> explained the circumstances under which court may intervene with the award. The AT&T requested for arbitration with ICC claiming that it validly terminated the contract with SCC. Both the parties nominated their arbitrators and the ICC confirmed Mr. Fortier as a third arbitrator and Chairman of the tribunal. The grounds of the challenge were that, at all relevant times before 29th November 1998, AT&T was unaware that Mr Fortier was a non-executive director of a competitor company of AT&T. The Court of Appeal held that any benefit which could indirectly accrue to Nortel as a result of the outcome of the arbitration would be of such minimal benefit to Mr Fortier that it would be unreasonable to conclude that it could influence him. Mr. Fortier's nondisclosure did not constitute a real danger of bias such that the court should intervene in AT&T's favor.

*In Desbois v. Industries A.C. Davie Inc.*, Court of Appeal of Quebec, Canada, 26 April 1990,<sup>495</sup> the case involved a dispute relating to a shipbuilding contract. As the Quebec government had subsidized the shipbuilder, a minister of the Quebec government signed the contract to guarantee the performance of the shipbuilder's obligation. The contract also contained a clause providing that disputes would be resolved by arbitration and that the minister would act as arbitrator. After having stated that the impartiality and independence of the tribunal were fundamental features of arbitration, the court held that a clause providing that disputes relating to a contract will be arbitrated by a party to that contract is inconsistent with the requirements of impartiality and independence, and is therefore null as contrary to public policy.<sup>496</sup>

The existence or absence of independence and impartiality on the part of an arbitrator in the challenge of an award proceeding is a question over which French Courts enjoy full reviewing power.<sup>497</sup> In *d Tecso v. Neoelectra Group* of 10 March 2011, the Court of appeal annulled award for lack of independence and impartiality of one of the co-arbitrators. The co-arbitrator nominated by the defendant had been of counsel between 1989 and 2000 with the same law firm as defendant's counsel in the arbitration and had given only vague information regarding his activity with said law firm after 2000. The Court of appeal found that this attitude gave rise to reasonable doubts regarding the co-arbitrator's independence and impartiality.<sup>498</sup>

In *state of Qatar v. Creighton Ltd (Cayman Islands)*,<sup>499</sup> the ICC arbitrators issue awards in favour of Creighton directing Qatar to pay Creighton damages. Creighton sought enforcement of the awards in France and United States. Qatar sought to have the awards set aside in France on the grounds of impartiality and illegality of the arbitrator appointed by Creighton. It was found that the arbitrator appointed by Creighton had assisted Creighton before arbitration and subsequently appointed as arbitrator for Creighton. The Court of Appeal found that the

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<sup>493</sup> Yulia Andreeva, *How Challenging is the Challenge, or can U.S. Courts Remove Arbitrators before an Arbitration has come to an End?* 19 Am. Rev. Int'l Arb. 127 (2008).

<sup>494</sup> [2000] EWCA Civ. 154].

<sup>495</sup> [1990] CanLII 3619 (QC CA), available on the Internet at <http://canlii.ca/t/1pjlq>.

<sup>496</sup> UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, page 65.

<sup>497</sup> Judge Dominique Hascher, *Salient Issues in International Commercial Arbitration: Independence and Impartiality of Arbitrators: 3 Issues*, 27 Am. U. Int'l L. Rev. 789 (2012).

<sup>498</sup> French Case Law, Annual Report, available at <http://www.cabinet-castellane-avocats.fr/pdf/2011-10-01-french-case-law-annual-report.pdf>].

<sup>499</sup> 25 Yearbook Comm. Arb'n 451), Cour de Cassation (Supreme Court of France) 16 March 1999.

arbitrator's behavior during the proceedings did not reflect any previous connections with Creighton, therefore, did not affect his impartiality.

### **5. Burden of Proof:**

A party seeking vacatur of an arbitration award on grounds of evident partiality has the burden of proof, and, to meet this burden, he or she must demonstrate that a reasonable person would conclude that an arbitrator was partial to the other party to the arbitration.<sup>500</sup>

The burden of proving evident partiality “rests upon the party asserting bias.”<sup>501</sup> The burden of proving facts which would establish a reasonable impression of partiality rests squarely on the party challenging the award. The court in this case concluded that an award would be vacated where there was “a reasonable impression of partiality.”<sup>502</sup> To be specific, the party who alleges that an arbitration award was procured by corruption, fraud, or other undue means must: “(1) establish the fraud by clear and convincing evidence; (2) demonstrate that the fraud was not discoverable by the exercise of due diligence before or during the arbitration hearing; and (3) demonstrate that the fraud was materially related to an issue in the arbitration.”<sup>503</sup>

There is an obvious solution to concerns about bias situations. Potential arbitrators should disclose everything of any conceivable interest to the parties after a complete conflicts check that includes the parties, counsel, and witnesses. If this is done, a party must make a timely objection before the arbitration takes place, or waive its objection. This approach is easy to articulate but difficult to implement in practice.<sup>504</sup>

### **6. Conclusion:**

The reference made to various international and institutional arbitration rules suggest that a party to the arbitration may challenge any arbitrator. However, the challenge is allowed only if circumstances exist that give rise to justifiable as to his impartiality or independence. A party may not challenge the arbitrator on the basis of circumstances known to that party at the time of the appointment by him or in whose appointment he has participated. He can only challenge on the grounds of which he became aware after the appointment has been made. The challenge can be done either in accordance with institutional arbitration rules or under national law. The parties to the arbitration may agree to exclude the jurisdiction of courts with regard to challenge of arbitrators.

The review of different court decisions disclose that there is no uniform standards with regard to setting aside of award on the grounds of bias by arbitrators. Improving the arbitration disclosure standards in international and institutional arbitration rules may help to reduce the possibility of challenging the final arbitral award on the grounds of arbitrator's independence and impartiality.

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<sup>500</sup> ANR Coal Co. v. Cogentrix of North Carolina, Inc., 173 F.3d 493, 500 (4th Cir.1999).

<sup>501</sup> Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 64 (2d Cir. 2012).

<sup>502</sup> Sheet Metal Workers etc. v. Kinney Air Conditioning Co., 756 F.2d 742, 745-46 (9<sup>th</sup> Cir. 1988).

<sup>503</sup> Davenport v. Dimitrijevic, 857 So. 2d 957, 961 (Fla. Dist. Ct. App. 2003).

<sup>504</sup> Stephen K. Huber, *the Role of Arbitrator: Conflicts of Interest*, 28 Fordham Urb. L.J. 915 (2002).

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