Challenges to arbitrators

by *Practical Law Arbitration*

Maintained • **China, England, France, Germany, Hong Kong - PRC, International, Singapore, Switzerland, USA (National/Federal), Wales**

This note provides practical guidance on the grounds for challenging an arbitrator and the procedure for making a challenge under various institutional rules and national laws.

Issue conflict

Tactical issues: to challenge or not to challenge

Scope of this note

This note highlights the grounds and procedure for challenges to arbitrators under the major international arbitration rules and some key national laws. It also gives examples of the most common scenarios that may give rise to a challenge and, where possible, provides an indication of whether a challenge might succeed in a particular case. Finally, this note considers the tactics of challenging an arbitrator and the consequences of a successful challenge.

One of the key advantages of ***arbitration*** is the parties' ability to participate in the selection of the arbitral tribunal. However, there may be circumstances where, following the constitution of the tribunal, a party decides that it is not satisfied with a particular arbitrator and wishes to challenge that arbitrator and remove them from the tribunal. In most cases, such challenges are based on doubts about the arbitrator's independence or impartiality. In these circumstances, it is important to understand and follow the appropriate procedure to avoid inadvertently waiving the right to make a challenge.

For details of challenging arbitrators in investment treaty arbitration under the ICSID Rules and for decisions on challenges brought under those rules, see, *Practice note, Challenges to arbitrators in ICSID arbitration*.

Arbitrators must be independent and impartial

A fundamental aspect of the arbitration process is that arbitrators must be impartial and, in most cases, independent. This is especially important given the limited possibilities for challenging awards. Recognising this, most of the major international arbitration rules and modern national arbitration laws impose, in some form or another, requirements of independence or impartiality on arbitrators. Lack of impartiality is sometimes referred to as "bias". Most rules and legal systems distinguish between two types of bias:

- Actual bias (that is, the arbitrator in fact lacks impartiality).
- Apparent bias (that is, there are circumstances that would lead a reasonable observer to conclude that the arbitrator lacks impartiality).

Use of "independence" and "impartiality": different standards?

Various arbitration rules and laws use different wording to describe the requirements of independence and impartiality. Some refer to "impartiality" alone, others to "independence" alone and others still to both "impartiality" and "independence".

The definition of "independent" in Black's Law Dictionary is "not subject to the control or influence of another". The general view is that the concept of "independence" relates to the relationship between an arbitrator and one of the parties. This is judged objectively.

The definition of "impartial" is "unbiased, disinterested". The concept of "impartiality" is connected with bias for or against one of the parties, or in relation to the issues in dispute. Whether someone is impartial is a question of their subjective state of mind.

In practice, however, there is a considerable overlap between the two terms. In most cases, a lack of independence matters only if there is also doubt as to the arbitrator's impartiality. Furthermore, the same evidence may be relevant to both inquiries, since a lack of impartiality can be established only after considering the objective facts and circumstances, including any relationship between the arbitrator and a party.

This is borne out by the discussions of the Departmental Advisory Committee on Arbitration Law (***DAC***) in the context of what became *section 24* of the AA 1996. Section 24(1)(a) of the AA 1996 gives the court power to remove an arbitrator on the ground that "circumstances exist that give rise to justifiable doubts as to his impartiality". The DAC considered that there was no need to include lack of independence as an additional ground for removal; a lack of independence would be significant only if it gave rise to justifiable doubts as to the impartiality of the arbitrator (*paragraph 101, DAC Report, February 1996*). The DAC used the example of a situation where one member of a set of barristers' chambers appears as counsel before an arbitrator from the same chambers. It dismissed the notion that this situation, of itself, could constitute a lack of independence justifying the removal of the arbitrator. However, it should be noted that, in international arbitration, this circumstance has been the basis for several arbitrator challenges (see *Examples of scenarios which might give rise to a challenge: Arbitrator is in same barristers' chambers as counsel*).

Furthermore, in some cases arbitrators have been successfully challenged in circumstances where their lack of independence arguably did not give rise to any doubt about their impartiality. In these circumstances, the desire is to avoid even the appearance of arbitrator partiality. This typically is more of a concern where an arbitral institution, as opposed to the other members of the arbitration panel, is charged with deciding the challenge to the arbitrator.

For further discussion on impartiality and independence, and on other factors relevant to the selection of arbitrators, see *Practice note, Selection of party-nominated arbitrators*.

To compare the requirements as to impartiality and independence in different jurisdictions, see *Q&A Comparison Tool, Question 16, Practical Law Arbitration Global Guide*.

Institutional rules

London Court of International Arbitration (LCIA)

The *LCIA Rules 2014 and 2020* require that all arbitrators "shall be and remain at all times impartial and independent of the parties" (*article 5.3*) and that potential arbitrators sign a declaration stating "whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, and if so, specifying in full such circumstances in the declaration". The 2014 and 2020 Rules also require the arbitrator to declare that they will "devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration" (*article 5.4*).

International Chamber of Commerce (ICC)

The *ICC Rules 2012, 2017 and 2021* require arbitrators to be and remain "impartial and independent" of the parties (*article 11(1)*). They also require prospective arbitrators to sign a statement of acceptance, availability, impartiality and independence (*article 11(2)*). In February 2016, the ICC adopted a Guidance Note (incorporated in the ICC *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration* (Section III A)) on disclosure of conflicts of interest. The Guidance Note states that any doubts must be resolved in favour of disclosure, and gives examples of situations in which a conflict of interest may exist (see *Legal update, ICC Court adopts guidance note on conflict disclosures by arbitrators*).

International Centre for Dispute Resolution (ICDR)

The *ICDR Rules 2009 and 2021* require arbitrators to be "impartial and independent", and prospective arbitrators must disclose any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence (*article 14(1) and (2), ICDR Rules 2021; article 7, ICDR Rules 2009)*.

International Institute for Conflict Prevention and Resolution (CPR)

The *CPR Rules 2014 and 2019* require arbitrators to be "independent and impartial". Prospective arbitrators must disclose any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality (*Rule 7*).

United Nations Commission on International Trade Law

The ***United Nations Commission on International Trade Law*** (UNCITRAL) *Arbitration Rules 2010, 2013 and 2021* require prospective and incumbent arbitrators to disclose any circumstances that are likely to give rise to justifiable doubts as to their impartiality or independence (*article 11*). The Annex to the UNCITRAL Rules 2010, 2013 and 2021 contains model statements of independence. The *UNCITRAL Rules 1976* contain similar provisions.

JAMS

The JAMS Arbitrators Ethics *Guidelines* require arbitrators to ensure that they have "no known conflict of interest regarding the case" and to endeavour to avoid any appearance of a conflict of interest (*Guideline V*). The JAMS *Comprehensive Arbitration Rules & Procedures 2021* require the parties to disclose "any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives" (*rule 15(h)*).

Financial Industry Regulatory Authority (FINRA)

The *Financial Industry Regulatory Authority* (FINRA) *Code of Arbitration Procedure for Customer Disputes* and *Code of Arbitration Procedure for Industry Disputes* require arbitrators to "disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination" (*Customer Rule 12405(b); Industry Rule 13408(b)*). The Codes also empower FINRA to remove any arbitrator for conflict of interest or bias (*Customer Rule 12407(a); Industry Rule 13410(a)*).

National laws

In addition, most modern arbitration laws provide for the removal of arbitrators who are not independent or impartial (or both):

- *Section 24(1)* of the English Arbitration Act 1996 (AA 1996) ("impartial").
- Article 1036(2) of the German Code of Civil Procedure or Zivilprozessordnung (ZPO) ("impartial" and "independent").
- Article 180(1)(c) of the Swiss Private International Law Act (PILA) ("independent" and "impartial").
- Section 8 of the Swedish Arbitration Act 1999 ("impartial").
- The US ***Federal Arbitration Act*** (FAA), *9 U.S.C. §§ 1-16*; *201-208*; *301-307*, focuses on the effect of partiality on an award; section 10(a)(2) provides that an award may be vacated if there was "evident partiality" in an arbitrator.
- Section 25 of the Hong Kong Arbitration Ordinance (Cap 609) ("impartial" and "independent").
- Article 12(2) of the *UNCITRAL Model Law on International Commercial Arbitration (1985) (as amended in 2006)* (which has been adopted in a number of jurisdictions, including Singapore (by virtue of the International Arbitration Act (Ch. 143A)) ("independent" and "impartial").

IBA Guidelines on Conflicts of Interest in International arbitration

The assessment of whether an arbitrator is independent and impartial is complicated by the fact that there are no uniform rules governing the issue. The *International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration* (IBA guidelines) represent an attempt to produce a set of principles to promote common standards of independence and impartiality, regardless of legal culture and background. They were first published in 2004, followed by revised versions in October 2014 and August 2015 (see *Legal update, IBA publishes revised guidelines on conflicts of interest*). The IBA Conflicts Committee's report, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, summarises the application of the IBA guidelines during the first five years from their inception. The report collates case law and information gathered from arbitral institutions regarding reference to the IBA guidelines in arbitrator challenges. The report has been described as a "work in progress", with future sub-committees continuing to monitor case law and identify areas for possible improvement.

The IBA guidelines comprise a series of general standards, followed by non-exhaustive lists of circumstances (IBA Lists), which give guidance on the practical application of the general standards.

General Standard 1 of the IBA guidelines (general principle) provides:

"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."

General Standard 2 of the IBA guidelines (conflicts of interest) provides that an arbitrator shall decline to accept an appointment or refuse to continue to act as arbitrator if:

"(a)… he or she has any doubt as to his or her ability to be impartial or independent.

(b) ... facts or circumstances exist, or have arisen since the appointment, that, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence…".

Under General Standard 2(c), doubts are justifiable if:

"…a reasonable third person having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."

The explanation to General Standard 2 describes this as "an appearance test" to apply "objectively".

The IBA Lists are divided by colour (red, orange and green), with different disclosure requirements and consequences for each colour:

- Red: situations constituting disqualifying conflicts of interest (divided into non-waivable and waivable situations). General Standard 2 (d) provides that justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the non-waivable red list.

- Orange: situations where there may be a disqualifying conflict of interest present, which the arbitrator should disclose.

- Green: situations where there is no disqualifying conflict of interest, and no disclosure is necessary.

The IBA guidelines are not legally binding, but are often used by parties, arbitrators and, sometimes, the courts when considering the independence and impartiality of an arbitrator. However, for an example of a case in which the guidelines were held not to reflect the English law on bias in arbitrators, see *W Ltd v M SDN BHD [2016] EWHC 422 (Comm)*, discussed in *Legal update, "Weaknesses" in IBA Guidelines on Conflicts of Interest (English Commercial Court)*. The extent of their use by arbitral institutions is less clear. In general, the major institutions seem to view the IBA guidelines as a useful guide for arbitrators regarding their disclosure obligations. However, most do not commit to applying the guidelines when considering challenges to arbitrators, although some may refer to them as part of their analysis of the challenge.

Although the use of the IBA guidelines in private international arbitrations is widespread, the decision in *Republic of Mauritius v United Kingdom (Reasoned Decision on Challenge, 30 November 2011)* indicates that they will be of limited application in inter-state arbitrations. In that case, a tribunal in an inter-state arbitration under the United Nations Convention on the Law of the Sea 1982 rejected a challenge to an arbitrator appointed by one of the parties. It found that the law and practice of courts and tribunals not seised of inter-state disputes, which included the IBA guidelines, was irrelevant to the determination of an arbitrator challenge in an inter-state arbitration. The IBA guidelines had not been adopted by states, nor did they form part of a general practice accepted as law (see *Legal update, Arbitrator challenge fails in inter-state arbitration*). For further discussion of this topic, see *Practice note, Challenges to arbitrators in ICSID arbitration: Grounds for challenge*.

For more information on the IBA guidelines generally, see *Practice note, Selection of party-nominated arbitrators: The IBA Guidelines on Conflicts of Interest*.

Grounds for challenge under arbitration rules

The arbitration rules that the parties have agreed to apply to their arbitration may contain grounds on which an arbitrator may be challenged, as may the national arbitration law at the seat of the arbitration. Any mandatory rule of law concerning arbitrator qualifications will apply regardless of the applicable rules.

Although there are some subtle differences in formulation, there is little substantial difference in practice between the grounds for challenge under most of the major international arbitration rules. ICSID arbitration is arguably an exception; see *Practice note, Challenges to arbitrators in ICSID arbitration.*

LCIA Rules 2014 and 2020

The LCIA Court may revoke any arbitrator's appointment on its own initiative, at the written request of all other members of the arbitral tribunal or on a written challenge by any party if (among other things) the arbitrator becomes "unfit to act" or "circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence" (*article 10.1, LCIA Rules 2014 and 2020*). The LCIA Court may determine that an arbitrator is unfit to act if the arbitrator:

- Acts in deliberate violation of the arbitration agreement.
- Does not act fairly or impartially as between the parties.
- Does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry (*article 10.2.*).

Although a party may challenge an arbitrator it has appointed, or in whose appointment it has participated, it may do so only if it became aware of the reason for the challenge after the appointment (*article 10.3*).

The LCIA publishes links to anonymised challenge decisions in an online database. Each digest in the database provides a summary of the challenge, the background to the dispute and an anonymised excerpt of the relevant decision (see *Legal update, LCIA publishes database of challenge decisions online*). The database contains decisions from 2010 onwards; however, abstracts of challenge decisions in the period 1996-2010 are available in hard copy (see Thomas W Walsh and Ruth Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction* (2011) 27 Arbitration International 283).

ICC Rules (2012, 2017 and 2021)

Article 14(1) of the *ICC Rules 2012, 2017 and 2021* provides that an arbitrator can be challenged "for an alleged lack of impartiality or independence, or otherwise" (reflecting the requirement in article 11(1) of the ICC Rules 2012, 2017 and 2021 for arbitrators to be "impartial and independent").

The use of the word "otherwise" could cover misconduct of the arbitration proceedings (for example, by breach of the duty to act fairly and impartially) (*article 22(4), ICC Rules 2012, 2017 and 2021*).

The ICC Court applies an objective test when deciding challenges to arbitrators. In 2015, the ICC decided that it would, where requested, communicate its reasons for decisions on arbitrator challenges (see *Legal update, ICC Court may give reasons for administrative decisions*).

The ICC Court may also be asked to decide a challenge in ad hoc arbitrations which the ICC is administering or in which it is the designated appointing authority. In these cases, the ICC Court applies the arbitration rules applicable to the arbitration. If the relevant arbitration rules do not contain any provisions governing challenge of arbitrators, the ICC Court will apply any provisions of the arbitration law of the seat of arbitration.

For more in-depth discussion about challenges to arbitrators under the ICC Rules 2012 (and, by analogy, the ICC Rules 2017 and 2021), see *Webster and Buhler, Handbook of ICC Arbitration: Commentary, Precedents, Materials (Sweet & Maxwell, 4th ed, 2018)*.

AAA Rules and ICDR Procedures

Under the *Commercial Arbitration Rules and Mediation Procedures* of the *American Arbitration Association*, an arbitrator may be disqualified for:

- Partiality or lack of independence.
- Inability or refusal to carry out their duties diligently and in good faith.
- Any ground for disqualification specified by the applicable law.

(*Rule R-18, AAA Commercial Arbitration Rules*.)

However, parties may agree in writing that party-appointed arbitrators may be "non-neutral", in which case there is no requirement for impartiality or independence and there can be no challenge for partiality or lack of independence (*Rule R-18(b), AAA Commercial Arbitration Rules*).

The grounds for challenge under the *ICDR International Dispute Procedures* are the same, namely, that a party may challenge an arbitrator "whenever circumstances exist which give rise to justifiable doubts as to the arbitrator's impartiality or independence" (*article 15, ICDR Procedures 2021*).

Under the ICDR Procedures 2021, if an arbitrator or a party has doubts as to an arbitrator's impartiality or independence, the arbitrator or the party must disclose this information to all parties and the administrator. If a party fails to do so, this is considered a waiver of the right to challenge an arbitrator based on those circumstances (*article 14(5), ICDR Procedures 2021*).

The ICDR's Administrative Review Council rules on request for arbitrators' disqualification. The ICDR's decision on the challenge is made in the ICDR's sole discretion (*article 5, ICDR Procedures 2021*).

CPR Rules

Under the *CPR Administered Arbitration Rules 2019*, if circumstances exist or arise that lead to justifiable doubt regarding an arbitrator's independence or impartiality and of which a party becomes aware after the appointment has been made, then an arbitrator may be challenged (*rule 7.5*).

UNCITRAL Rules (1976, 2010, 2013 and 2021)

A party to arbitration under the *UNCITRAL Rules 2010, 2013 and 2021* may challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (*article 12(1)*). This is the same test as that under the LCIA Rules, the ICDR Procedures, the Singapore International Arbitration Centre (SIAC) Rules and the Stockholm Chamber of Commerce (SCC) Rules. A party may challenge an arbitrator whom it has appointed, or in whose appointment it has participated, only if it became aware of the grounds for complaint after the appointment was made (*article 12(2)*).

The use of the word "justifiable" imports an objective standard for impartiality and independence, so the question is whether the complaint is objectively reasonable. According to one appointing authority deciding a challenge under the UNCITRAL Rules, the test is whether a reasonably well-informed person would believe that the perceived doubt was justifiable (*challenge decision of 11 January 1995, reprinted in (1997) XXII YCA 227, page 234 at paragraph 23*). See also *Vito G Gallo v Government of Canada (14 October 2009)* discussed in *Legal update, Decision on challenge to arbitrator in NAFTA arbitration under UNCITRAL Rules)*.

Article 12(3) provides for challenges where the arbitrator fails to act, or it becomes impossible for the arbitrator to perform their functions.

The grounds for challenge under the UNCITRAL Rules 1976 are set out in article 10 and are substantially the same as under the later versions of the rules. In addition to a challenge based on lack of impartiality and independence, the grounds include the possibility of a challenge for failure or inability to act (*article 13(2),1976 Rules*).

SIAC Rules (2010, 2013 and 2016)

Under the *SIAC Arbitration Rules*, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties (*rule 11.1, SIAC Rules 2010 and 2013; rule 14(1), SIAC Rules 2016*). A party may challenge the arbitrator it has nominated only for reasons of which it becomes aware after the appointment has been made (r*ule 11.2, SIAC Rules 2010 and 2013; rule 14(2), SIAC Rules 2016*).

SCC Rules (2010 and 2017)

Under the *SCC Rules*, a party may challenge an arbitrator if there are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties (*article 15(1), SCC Rules 2010*; *article 19(1), SCC Rules 2017*). A party may challenge an arbitrator it has appointed, or in whose appointment it has participated, only if it became aware of the grounds for complaint after the appointment was made (*article 15(1), SCC Rules 2010*; *article 19(2), SCC Rules 2017*).

The SCC publishes reviews of SCC Board decisions on arbitrator challenges, which provides information on the number of challenges and whether they were sustained or dismissed, as well as discussing the SCC standard for arbitrator impartiality

and explaining the procedure for challenges (see *Legal updates, SCC publishes review of decisions on arbitrator challenges 2010-2012*, *SCC publishes review of decisions on arbitrator challenges (2013-2015)* and *SCC publishes review of decisions on arbitrator challenges (2016-2018)*).

HKIAC Rules (2013 and 2018)

Article 11 of the Hong Kong International Arbitration Centre's (HKIAC's) *Administered Arbitration Rules* 2013 and 2018 sets out the grounds for challenge. An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (*article 11.6, HKIAC Rules 2013 and 2018*). A party may challenge the arbitrator it designated only for reasons of which it became aware, or ought to have become aware, after making the designation.

Where the arbitration agreement was concluded before 1 September 2008, international arbitrations administered by the HKIAC are governed by the UNCITRAL Rules 1976, as modified by the HKIAC's *Procedures for the Administration of International Arbitration*. For such cases, see *Grounds for challenge under arbitral rules: UNCITRAL Rules (1976, 2010, 2013 and 2021)*.

CIETAC Rules (2005, 2012 and 2015)

A party to arbitration under the *China International Economic and Trade Arbitration Centre* (CIETAC) *Arbitration Rules* who has justifiable doubts as to an arbitrator's impartiality or independence may request that arbitrator's withdrawal from the tribunal (*article 26(2), CIETAC Rules 2005; article 30(2), CIETAC Rules 2012; article 32(2), CIETAC Rules 2015*).

JAMS Rules

The parties have ten days following the appointment of an arbitrator to disclose any circumstance likely to give rise to justifiable doubt about the arbitrator's impartiality or independence, including any personal interest by the arbitrator in the outcome of the arbitration and any past or present relationship with any party or representative. The arbitrator's obligation of disclosure continues throughout the arbitration process (*rule 15(h), JAMS Comprehensive Arbitration Rules & Procedures 2021 (JAMS Rules 2021)*).

Under the *JAMS Arbitrators Ethics Guidelines*, JAMS arbitrators must disclose any known or apparent conflicts of interest. This disclosure obligation begins as soon as the arbitrator learns of his or her potential selection by the parties, and continues throughout the arbitration.

Any party may challenge the continued service of the arbitrator at any time as follows:

- The challenge may be based only on information that was not available to the parties at the time the arbitrator was selected.
- The challenge must be in writing and sent to all parties.

- Other parties that wish to respond to the challenge must do so within seven days of receiving the challenge (*rule 15(i), JAMS Rules 2021*).

FINRA Rules

All FINRA arbitrators submit background information and their employment history to FINRA when they join a FINRA roster. FINRA compiles this information in a database of disclosure reports on each arbitrator. Every arbitrator must keep their disclosure report up to date.

Each FINRA arbitrator must also screen for conflicts on each case which they are asked to serve. When FINRA identifies the arbitrator to be appointed, a FINRA staff person provides the arbitrator with the following information, at a minimum:

- The names of all parties.
- The names of all lawyers.
- The nature of the dispute.

After receiving this case information from FINRA, each arbitrator must disclose the following to FINRA:

- Any direct or indirect financial or personal interest in the outcome of the arbitration.
- Any existing or past, direct or indirect, financial, business, professional, family, social, or other relationships with:
    - any of the parties;
    - any of the lawyers; and
    - anyone who the arbitrator learns may be a witness or co-panellist.
- Any existing or past service as a mediator for any of the parties.

(*Customer Rule 12405; Industry Rule 13408*.)

When an arbitrator makes a disclosure, FINRA provides the disclosure to the parties, unless the arbitrator declines the appointment or voluntarily withdraws from the case after appointment (*Customer Rule 12405(c); Industry Rule 13408(c)*). The arbitrator's disclosure obligation is ongoing throughout the case.

At any time before the first hearing session begins, FINRA may remove an arbitrator for conflict of interest or bias, at the request of a party or on FINRA's own initiative. FINRA can grant a party's request if the interest or bias is definite and capable of being reasonably demonstrated, rather than remote or speculative. (*Customer Rule 12407(a); Industry Rule 13410(a)*.) After the first hearing session begins, FINRA may remove an arbitrator only based on information that should have been disclosed and was not previously known by the parties (*Customer Rule 12407(b); Industry Rule 13410(b)*).

Any party may ask an arbitrator to recuse himself for good cause. The arbitrator who is the subject of a recusal request decides the request. (*Customer Rule 12406; Industry Rule 13409*.)

Grounds for challenge under national laws

If the parties have not agreed on any arbitration rules, or if the chosen rules do not deal with challenges to arbitrators, applicable provisions about challenge and removal of arbitrators may be found in the arbitration law of the seat of arbitration. Some of these provisions may have mandatory application.

England and Wales

Under *section 24* of the AA 1996, 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 doubts as to the arbitrator's impartiality (*section 24(1)(a)*).
- The arbitrator does not possess the qualifications required by the arbitration agreement (*section 24(1)(b)*).
- The arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to the arbitrator's capacity to do so (*section 24(1)(c)*).
- The arbitrator has refused or failed to conduct the proceedings properly or with "reasonable despatch", if substantial injustice will be caused to the applicant (*section 24(1)(d)*).

Section 24 of the AA 1996 permits the removal of an arbitrator while an arbitration is underway.

Where an application is made under section 24(1)(d) of the AA 1996 (failure properly to conduct proceedings), evidence of substantial injustice must be adduced (see *T v V and others [2017] EWHC 565 (Comm)*, discussed in *Legal update, Removal of arbitrator: importance of establishing substantial injustice (English Commercial Court)*).

Bias in the context of section 24(1)(a) means apparent bias as well as actual bias. The relevant test for an application under section 24(1)(a) (existence of circumstances giving rise to justifiable doubts as to impartiality) is whether a fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased. In *Laker Airways Inc v FLS Aerospace Ltd and another [1999] EWHC B3 (Comm)*, Rix J confirmed that, in addition to the subsection (a) test, an arbitrator would also be disqualified for actual bias if he or she had a pecuniary or proprietary interest in the case.

In *Halliburton Co v Chubb Bermuda Insurance Ltd (formerly Ace Bermuda Insurance Ltd) [2020] UKSC 48* (*Halliburton*) (discussed in *Legal update, Halliburton v Chubb: Supreme Court dismisses Halliburton's appeal and confirms legal duty to disclose matters that might reasonably suggest bias*), the Supreme Court confirmed that the assessment of the fair-minded and informed observer of whether there is a real possibility of bias is an objective one, which has regard to the realities of international arbitration and the customs and practices of the relevant field of arbitration.

When applying the test:

- The court will assume that an "informed" observer takes a balanced approach and appreciates that context forms an important part of the material to be considered (*Helow v Secretary of State for the Home Department and another [2008] UKHL 62*). See also the guidance of the Supreme Court in *Halliburton* on the relevance of custom and practice in specialist forms of arbitration.

- The arbitrator's explanations as to their knowledge or appreciation of the relevant circumstances are also a factor that the fair-minded observer may need to consider when reaching a view as to apparent bias (*Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350*). In *Paice and another v MJ Harding (t/a MJ Harding Contractors) [2015] EWHC 661 (TCC)*, Coulson J held that the explanations given by the adjudicator made apparent bias more likely, rather than less likely, having regard in particular to the "aggressive" and "unapologetic" terms in which they were expressed (see *Legal update, Claimants' prior contact with adjudicators office gave rise to possibility of bias (TCC)*). See also *Cofely Ltd v Bingham and another [2016] EWHC 240 (Comm)*, in which Hamblen J concluded that the arbitrator had acted in an aggressive and hostile manner, and had inappropriately descended into the arena (see *Legal update, Arbitrator removed for apparent bias (English Commercial Court)* and *Blog post, When the kings depart: costs and the removal of an arbitrator*). For an example of a case where the arbitrator's conduct in corresponding with only one of the parties following a request to stand down by the other party was, in all of the circumstances, accepted by the court as an error of judgment rather than evidence of a real risk of bias, see *Newcastle United Football Co Ltd v The Football Association Premier League Ltd [2021] EWHC 349 (Comm)* (discussed in *Legal update, Court rejects application for a public hearing and dismisses bias challenge to sports arbitrator (English Commercial Court)*).

  In *Ovsyankin v Angophora Holdings Ltd [2021] EWHC 3376 (Comm)*, the court had to consider whether the fact that the applicant had made an unsuccessful challenge to arbitrators under article 10 of the *LCIA Arbitration Rules*, and in the section 24 proceedings was seeking repayment of fees paid to them, gave rise to a "confrontational dispute" between the challenging party and the arbitrators such that a reasonable observer would have doubts about the arbitrators' impartiality. The court rejected that argument and found that it would be strange if the applicant were to succeed in a challenge brought under section 24 merely because it had failed in a challenge under the LCIA Rules and was bringing unmeritorious claims in the section 24 application. It noted that arbitrators are aware that their conduct and decisions may be challenged and do not generally allow this to influence their dispassionate assessment of the disputes before them.

- The court must judge whether there was a real possibility of bias at the time the application is heard and on the basis of the material before the court (see *Halliburton*). Hypothetical examples of what may happen in the light of a particular relationship will not meet the test, unless there is evidence that they actually occurred (see *A and others v B and another [2011] EWHC 2345 (Comm)*, discussed in *Legal update, No unconscious bias where arbitrator instructed by party's solicitors in unrelated litigation (Commercial Court)*). In *Manchester City Football Club Limited v The Football Association Premier League Limited and others [2021] EWHC 628 (Comm),* Moulder J considered whether any lack of impartiality prior to the date of hearing can be cured by a change of circumstances. Although not necessary for her decision in that case, she concluded that where the tribunal had not taken any material step in relation to the substantive aspects of the case, there was no reason why impartiality should not be assessed at the date of the hearing in the light of the then circumstances, a conclusion that she regarded as being consistent with the decision in *Halliburton*. For further discussion, see *Legal update, Court finds Premier League arbitration panel did not breach principles of impartiality and independence (English Commercial Court)*.

- The court may consider the IBA guidelines when determining whether there are justifiable doubts as to the arbitrator's impartiality. Further, a failure by an arbitrator to disclose matters falling within the guidelines may, of

itself, reinforce those doubts (see *Sierra Fishing Company and others v Hasan Said Farran and another [2015] EWHC 140 (Comm)*,discussed in *Legal update, Court removes arbitrator under section 24 English Arbitration Act 1996 (Commercial court)*, in which the court removed an arbitrator who had been a legal adviser to the bank of which the defendant was a chairman, and whose father continued to advise both the defendant and the bank). See also *Newcastle United Football Co Ltd v The Football Association Premier League Ltd [2021] EWHC 349 (Comm)* for a further example of a case in which the IBA guidelines were taken into account by the English court. However, the IBA guidelines do not, in all respects, represent English law. For an example of a case in which the guidelines were held not to reflect the English law on bias in arbitrators, see *W Ltd v M SDN BHD [2016] EWHC 422 (Comm)*, discussed in *Legal update, "Weaknesses" in IBA Guidelines on Conflicts of Interest (English Commercial Court)*. Note though that following *Halliburton*, there is now a legal duty to disclose under English law, and a failure to disclose in certain circumstances may further reinforce doubts as to impartiality (see *Legal update, Halliburton v Chubb: Supreme Court dismisses Halliburton's appeal and confirms legal duty to disclose matters that might reasonably suggest bias).*

- The fact that an arbitrator is regularly appointed or nominated by the same party or legal representative may be relevant to the issue of apparent bias, particularly if it raises questions of material financial dependence (*A and others v B and another [2011] EWHC 2345 (Comm)*, discussed in *Legal update, No unconscious bias where arbitrator instructed by party's solicitors in unrelated litigation (Commercial Court)*). See also *H v L and others [2017] EWHC 137 (Comm)*, discussed in *Legal update, Appointment of arbitrator in related insurance arbitrations was not a ground for removal (English Commercial Court)*).

  Note the guidance given in *Halliburton* in relation to repeat appointments. In that case, the Supreme Court clarified that an arbitrator's acceptance of appointments in multiple references with overlapping subject matter and one common party might give rise to a real possibility of apparent bias. Whether it does so will be fact-specific and depend on the arbitration clause and the relevant arbitral customs and practices (see *Legal update, Halliburton v Chubb: Supreme Court dismisses Halliburton's appeal and confirms legal duty to disclose matters that might reasonably suggest bias*).

  Examples of cases in which the circumstance of repeat appointments was considered include:

  - *Cofely Ltd v Bingham and another [2016] EWHC 240 (Comm)*, discussed in *Legal update, Arbitrator removed for apparent bias (English Commercial Court)*, in which the arbitrator had received 25% of his income over the past three years from appointments in cases involving the claimant in the arbitration; and

  - *Manchester City Football Club Limited v The Football Association Premier League Limited and others [2021] EWHC 628 (Comm)* (discussed in *Legal update, Court finds Premier League arbitration panel did not breach principles of impartiality and independence (English Commercial Court)*), where the English Commercial Court had to consider whether the method of appointment of arbitrators to the panel of arbitrators from whom the tribunal was drawn "gave rise to justifiable doubts" as to their objective impartiality. In alleging apparent bias, Manchester City argued, among other things, that it was the Premier League that proposed and appointed people to the panel, that the process was based on personal connections rather than defined selection criteria and, because panel members were appointed for a term of only three years, they lacked security of tenure and were in a "subordinate position" to the Premier League for both appointment and reappointment.

    Moulder J found, on the facts, that a fair minded and informed observer would not conclude that, as a result of the method of appointment and reappointment to the panel, the arbitrators were "beholden" to the Premier League. The absence of an "open" competition and written selection policy for appointment to the panel, and the fact that personal and subjective preference might play a part, was not material unless the result is a real possibility of a lack of independence that compromises the duty of fairness and impartiality. As was recognised in Halliburton, in arbitrations where specialist knowledge is required, the pool

of potential candidates may be small. Furthermore, an observer would consider the professional reputation and experience of the arbitrators in question and would give weight to that factor in the circumstances of this case.

For further discussion, see *Blog post, Arbitrator bias: should we judge a book by its cover?*.

Challenge to the award

A party to an arbitration with its seat in England, Wales or Northern Ireland may also be able to challenge an award under *section 68* of the Act, on the ground that the tribunal did not comply with its duty under *section 33* and this has caused or will cause substantial injustice to the applicant. Section 33(1)(a) imposes a duty on the tribunal to act fairly and impartially as between the parties.

The test for setting aside an award on the ground of lack of impartiality is the same under section 68 of the AA 1996 as it is under section 24, namely, the existence of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality. In *ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm)* (*at paragraph 39(3)*), Morison J considered that, if the court concluded that there was a real possibility of bias, that constituted serious irregularity which either had caused or would cause substantial injustice to the applicant (so it would not be necessary for the applicant to adduce additional evidence of substantial injustice). That view was endorsed by Colman J in *Norbrook Laboratories v Ltd v Tank [2006] EWHC 1055 (Comm)* and by Andrew Smith J in *ASM Shipping Ltd of India v TTMI Ltd of England [2007] EWHC 1513 (Comm)*.

For a detailed discussion on challenges to awards under section 68 of the AA 1996, see *Practice note, Challenging the award under section 68 of the English Arbitration Act 1996: serious irregularity*.

United States

The FAA makes no provision for challenges to or removal of an arbitrator during the course of the arbitration. In *In re Sussex*, 781 F.3d 1065 (9th Cir. 2015), the US Court of Appeals for the Ninth Circuit took the rare step of granting a writ of mandamus and vacated the district court's decision to remove an arbitrator for conflict of interest. The Ninth Circuit reasoned that court intervention mid-arbitration should occur only in extreme cases and that the case below was "emphatically" not an extreme case (see *Legal update, District Court Erred by Intervening Mid-Arbitration: Ninth Circuit*). In *AVIC Int'l USA, Inc. v. Tang Energy Grp., Ltd.*, 614 F. App'x 218 (5th Cir. 2015), the court declined to stay arbitration, holding that courts may not rule on arbitrator challenges until after the final award (see also *Queens Med. Center v. Travelers Cas. & Surety Co. of Am.*, 2018 WL 1719703, at *6-7 (D. Hawai'i Apr. 9, 2018) and *John Hancock Life Ins. Co. (U.S.A.) v. Employers Reassurance Corp.*, 2016 WL 3460316, at *3 (D. Mass. June 21, 2016)).

A party bringing a judicial challenge to an arbitrator before the final award is rendered does so at its peril. In *Adam Technologies Int'l SA de CV v. Sutherland Global Servs., Inc.*, 729 F.3d 443 (5th Cir. 2013), the court held that it had no statutory authority to consider a challenge to the arbitrators after the arbitration process had proceeded but before issuance of the arbitral award. After the award, the party who brought the challenge sought to vacate the award on the ground that the tribunal was improperly constituted. The court refused to consider that challenge in view of the pre-award challenge (*Sutherland Global Servs., Inc. v. Adam Techs. Int'l SA de C.V.*,639 F. App'x 697, at *2 (2d Cir. 2016)).

New York state courts, by contrast, have found that they have the "inherent" authority to disqualify an arbitrator before an award is rendered when there exists a real possibility that injustice will result (see *Matter of Excelsior 57th Corp. (Kern)*, 630 N.Y.S.2d 492, 494 (1st Dep't 1995)). Whether the FAA rule pre-empts the New York rule is not settled.

After an award has been made, section 10(a)(2) of the FAA provides for an award to be vacated where there was "evident partiality or corruption in the arbitrators, or either of them" but the standard for determining a post-award challenge is not settled. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), the US Supreme Court set aside an award where an arbitrator failed to disclose that he or she had a business relationship with one of the parties. The opinion states that arbitrators should disclose to the parties any information that "might create an impression of possible bias." However, lower courts have applied that standard differently, with some finding that failure to meet that standard will not automatically be a ground to vacate an award (see, for example, *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002)).

In *Morelite Const. Corp. (Div. of Morelite Elec. Serv., Inc.) v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79 (2d Cir. 1984), the US Court of Appeals for the Second Circuit declined to follow the opinion of *Commonwealth Coatings*, concluding that it was merely a plurality opinion without binding effect. Instead, the court fashioned a reasonable person standard, stating that evident partiality "will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration". Courts have emphasised a set of helpful, non-exclusive factors to guide the application of the evident partiality test in the context of a purportedly disqualifying conflict:

- The extent and character of the interest, pecuniary or otherwise, of the arbitrator in the proceedings.
- The directness of the relationship between the arbitrator and the party he or she is alleged to favour.
- The connection of that relationship to the arbitrator.
- The proximity in time between the relationship and the arbitration proceeding.

(*Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 74 (2d Cir. 2012) and *Three S Del., Inc. v. Dataquick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007).)

More recently, in *Andes Petroleum Ecuadro Ltd. v. Occidental Exploration and Production Co.*, after his appointment in this case, one of the arbitrators accept an appointment in another case in which he served with counsel for Andes and did not update his disclosures. The court held that this nondisclosure did not establish that the arbitrator was partial. (2021 WL 5303860 (S.D.N.Y. Nov. 15, 2021).)

To challenge an award for evident partiality by a non-neutral party-appointed arbitrator (which is the practice in US domestic insurance and other industry disputes), a party must show by clear and convincing evidence that the arbitrator's undisclosed relationship with the appointing party either violates the arbitration agreement or prejudicially affects the award (see *Legal Update Second Circuit Sets Higher Burden to Prove Evident Partiality of Party-Appointed, Non-Neutral Arbitrators*).

To the extent the case law provides a general rule, it is that "evident partiality requires proof that would cause an objective, disinterested observer who is fully informed of the relevant facts relating to the arbitrator's conduct or alleged conflicts of interest to have a serious doubt regarding the fundamental fairness of the arbitral proceedings" (Restatement (Third) U.S. Law of Int'l Comm. Arb. § 4.18(b) PFD (2019)).

Applying the reasonable person standard, in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007), the US Court of Appeals for the Second Circuit held that, where an arbitrator knows of

a potential conflict, the arbitrator must either investigate it and then, if appropriate, disclose the conflict, or disclose the potential conflict and state their intention not to investigate it. A failure to investigate may also be a ground to challenge the arbitrator. In *Raymond James & Assocs., Inc. v. Terran Orbital Corp.*, 839 F. App'x 171, 172 (9th Cir. 2021), the US Court of Appeals observed that Canon II of *The Code of Ethics for Arbitrators in Commercial Disputes* provides requires arbitrators to "ascertain[ ] by reasonable efforts" information regarding potential conflicts extends to "relationships involving ... current employers, partners, or professional or business associates." Based on this standard, the court held, the arbitrator was not required to investigate relationships between parties to the arbitration and a law firm the arbitrator left five years earlier.

In *Ruhe v. Masimo Corp.*, 640 F. App'x 685 (9th Cir. 2016), 36 hours before the final hearing in the arbitration, the respondent made a for-cause challenge to the continued service of the arbitrator on the ground that the arbitrator's brother had represented the respondent's chief competitor in two highly contentious litigation losses to the respondent. The arbitrator noted that the respondent "furnish[ed] no coherent explanation" as to how his brother's litigation practice "would cause a person reasonably to doubt [his] impartiality in this case." Although the US district court found evident partiality based on the brother's litigation against the respondent (14 F.Supp.3d 1342), the Ninth Circuit reversed and reinstated the award for the reasons expressed by the arbitrator.

The parties may also have a duty to reasonably investigate concerns about arbitrator impartiality and to raise concerns during the proceedings. Otherwise, they risk being deemed to have waived their right to object (see *Dealer Computer Services, Inc. v. Michael Motor Co.*, 485 F. App'x 724 (5th Cir. 2012), discussed in *Legal update, Fifth Circuit finds that a party waived its right to raise evident partiality objection*; see also *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 31 (2d Cir. 2004) (finding waiver based on party's failure to inquire from AAA regarding arbitrator's prior relationship with other party and object during arbitration)). In a recent case, the court confirmed an arbitral award over objection, where the losing party had knowledge at the time of the hearing of the facts allegedly indicating the arbitrator's partiality but did not raise any objection relating to arbitral bias prior to the arbitrator's award (*Meyer v. Kalanick*, 477 F. Supp. 3d 52, 55 (S.D.N.Y. 2020); see also *LGC Holdings, Inc. v. Julius Klein Diamonds, LLC*, 238 F.Supp.3d 452, 467-69 (S.D.N.Y. 2017) (party must raise objection promptly after a party acquires "knowledge of facts possibly indicating bias or partiality on the part of an arbitrator")).

In *U.S. Electronics Inc. v. Sirius Satellite Radio Inc.*, 934 N.Y.S.2d 763 (2011), the New York Court of Appeals adopted the Second Circuit's "reasonable person" standard to determine whether there was evident partiality. By that standard, evident partiality will be found where a reasonable person would have to conclude that an arbitrator was partial to one of the parties to the arbitration (see *Legal update, New York Court of Appeals refuses to vacate arbitral award and adopts Second Circuit reasonable person standard when applying Federal Arbitration Act*). For example, a New York appellate court in *TCR Sports Broad. Holding, LLP v. WN Partner, LLC*, annulled an award where the same lawyers were representing interests of the arbitrators and Major League Baseball (MLB) at the same time as they represented one of the clubs who had a dispute with MLB heard in the arbitration (59 N.Y.S.3d 672, 680 (1st Dep't 2017)).

Applying the reasonable person test, the Second Circuit rejected a bias challenge to an arbitral award where the chair of the tribunal was serving as a party-appointed arbitrator of an affiliate of one of the parties in another matter. The court rejected the challenge because the arbitrator did not have "any familial, business, or employment relationship with [the parties], or ... any financial interest in the outcome of his arbitrations" (*Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 675 F. App'x 89, 90-91(2d Cir. 2017)). Additionally, where the arbitration agreement requires that the arbitrators have extensive industry, this requirement "often comes at the expense of complete impartiality" (*LGC Holdings,* 238 F.Supp.3d at 468).

In extreme circumstances, a court may even order discovery, including a deposition of the challenged arbitrator, to determine the nature of the alleged partiality of the arbitrator (see *InfoBilling, Inc. v. Transaction Clearing*, LLC, 2013 WL 1501570 at *7 (W.D. Tex. Apr. 10, 2013)). In a recent case, where the institution removed a tribunal chair for not disclosing a disclosable relationship, a court rejected a challenge to the co-arbitrators as allegedly tainted by the removal of the chair (*Huntsman Intern., LLC v. Albemarle Corp.*, 2021 WL 1253822 (Sup. Ct. N.Y. Co. Apr. 5, 2021)).

For more information on arbitrator disqualification in the US, see *Practice note, Challenges Based on Arbitrator Bias in US Arbitration*.

France

Under Article 1456 of the Code of Civil Procedure (CCP), arbitrators have a duty to be independent and impartial and to disclose any circumstance that can impact on these two qualities. Those duties exist not only before accepting their mandate but also during the time they act as arbitrator. Accordingly, the arbitrator has a continuing obligation to disclose any circumstances which may give rise to a challenge. This general duty applies to arbitrators in both domestic and international arbitrations.

An arbitrator can be challenged on any of the following grounds:

- The existence of "[a]ny circumstance" that can affect the arbitrator's independence or impartiality (*article 1456(2), CCP*). French case law indicates that these circumstances include situations likely to create a definite risk of bias in favour of one of the parties (*Paris Court of Appeal, 2 June 1989, 1991 Rev arb 87*).
- Legal incapacity, refusal to act or resignation (*article 1457, CCP*).
- Consent of all the parties (*article 1458, CCP*).

The extent of an arbitrator's duty to disclose information to parties has been extensively debated following the *Tecnimont* saga, which first started in December 2007, when an ICC arbitral tribunal issued a partial award on liability. One of the parties challenged the partial award on the basis that one of the arbitrators failed to disclose information that could have been deemed to affect his impartiality and independence. In a 2016 Paris Court of Appeal ruling, the court refused to set aside the partial award because the facts relied on (allegedly discovered after the time limit for bringing a challenge against an arbitrator had expired), were public knowledge and easily accessible. In addition, it held that to be relevant, new evidence must significantly exacerbate the doubtfulness of independence and impartiality (see *Legal update, J&P AVAX v Tecnimont SpA: third time's the charm*).

In Vidatel Ltd c/ PT Ventures SGPS SA, Mercury Servicios de Telecomunicacoes SA et Geni SA, Cour d'appel de Paris, n° 19/10666 (26 January 2021), the Paris Court of Appeal upheld a 2019 ICC award rendered by a five-member panel entirely appointed by the ICC Court, dismissing, among other things, a request for annulment on the basis of lack of independence of the chairman and one of the co-arbitrators. In its decision the court clarified that once arbitrators have accepted their appointment, they are expected to disclose all relevant information (see *Legal update, Paris Court of Appeal upholds ICC award rendered by five-member panel appointed by ICC*).

For further discussion, see *Practice note, Arbitration in France*.

Germany

Article 1036 of the Code of Civil Procedure (Zivilprozessordnung) (ZPO) provides that an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess qualifications agreed by the parties. Justifiable doubts exist if, from the perspective of the parties, there are objective grounds

that would raise doubts in the mind of a circumspect and reasonable person (see *Docket No. 34 SchH 008/10*, discussed in *Legal update, Higher Regional Court of Munich on challenge of an arbitrator*).

Before accepting appointment, a potential arbitrator must disclose any circumstances likely to give rise to doubts as to their impartiality or independence. The duty to disclose continues after appointment and throughout the arbitration (section 1036(1), ZPO).

In *Docket No. 34 SchH 13/16*, the Higher Regional Court of Munich considered a unique case of repeated challenges to the impartiality of the arbitral tribunal and used this opportunity to provide general guidelines on the applicable principles for challenges to an arbitral tribunal's impartiality (see *Legal update, Higher Regional Court of Munich on challenge to impartiality of an arbitral tribunal*).

In 2021, the German Federal Court of Justice issued a significant decision in which it recused a judge for fear of bias on the basis of a friendship between the spouse of the challenged judge and a party in the court proceedings. The decision is significant in part because it will likely extend to arbitrators since the rules for a judge's impartiality and independence are similar to those for arbitrators in Germany (see *Legal udpate, German Federal Court of Justice recuses judge on grounds of bias on basis of friendship between spouse and party to case*).

A party may challenge an arbitrator whom it has appointed, or in whose appointment it has participated, only if it became aware of the grounds for challenge after the appointment. An arbitrator must disclose any such circumstances as soon as he or she becomes aware of them.

For further discussion, see *Practice note, Arbitration in Germany*.

Switzerland

Under article 180(1) of the *Private International Law Act* (PILA), an arbitrator may be challenged if:

- They do not meet the qualifications agreed on by the parties.
- There is a ground for challenge under the rules of arbitration agreed on by the parties.
- Circumstances exist that give rise to justifiable doubts as to the arbitrator's independence.

A party may challenge an arbitrator in whose appointment it participated only if it became aware of the ground for challenge after appointment (*article 180(2), PILA*).

For a detailed discussion on challenges to arbitrators in Switzerland, see *Practice note, Arbitration in Switzerland*.

Hong Kong

Section 25 of the Hong Kong Arbitration Ordinance Cap 609 (*AO*), provides that an arbitrator or the arbitrators may be removed where either:

- There are justifiable doubts regarding the arbitrator's impartiality or independence.
- The arbitrator does not possess the qualifications agreed to by the parties.

Parties may also remove an arbitrator by agreement if the arbitrator becomes unable to perform their duties. If the arbitrator refuses to withdraw, or the parties are not able to agree, the arbitrator can be removed by court order (*section 27, AO*).

For a detailed discussion on challenges to arbitrators in Hong Kong, see *Practice note, Arbitration in Hong Kong*.

Singapore

Under article 12(2) of the UNCITRAL Model Law (as adopted into Singapore law by the International Arbitration Act (Ch. 143A)), an arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

A party may only challenge an arbitrator whom it appointed, or in whose appointment it participated, if it became aware of the grounds for challenge after the appointment.

For further discussion of challenging arbitrators in Singapore, see *Practice note, Arbitration in Singapore*.

Malaysia

Circumstances giving rise to justifiable doubts about an arbitrator's impartiality or independence are grounds for challenging the appointment of an arbitrator (section 14(3), Malaysian Arbitration Act 2005 (MAA 2005)).

Any person who is asked to be an arbitrator has a statutory duty to disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence (section 14(1), MAA 2005). The duty to disclose arises from the time of appointment and continues throughout the arbitral proceedings.

Also, under section 37 of the MAA 2005, an award may be set aside if the award is in conflict with the public policy of Malaysia, including in circumstances where:

- The making of the award was induced or affected by fraud or corruption.
- A breach of the rules of natural justice occurred during the arbitral proceedings, or in connection with the making of the award.

In *Low Koh Hwa @ Low Kok Hwa (practising as sole Chartered Architect at Low & Associates) v Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan [2021] MLJU 430*, the Malaysian High Court considered an application to set aside an award on grounds that the award was in conflict with Malaysian public policy because the arbitrator had failed to provide adequate disclosure of his relationship with the representative of one of the parties. The court had to consider the extent of the arbitrator's duty of disclosure under the MAA 2005 and whether there was apparent bias as a result of the relationship under scrutiny. The court confirmed that an arbitrator is under a continuing duty under Malaysian law to make full and timeous

disclosure of facts and circumstances which are likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. It found, on the facts of the case, that arbitrator apparent bias had resulted in the award being in conflict with the public policy of Malaysia, and that a breach of the rules of natural justice had occurred during the arbitral proceedings or in connection with the making of the award. In so doing, it considered and applied principles set out in the judgment of the English Supreme Court in the *Halliburton* case. For further discussion of the Malaysian court's decision, see *Legal update, Malaysian High Court applies Halliburton v Chubb on arbitrator bias and duty of disclosure*.

Other jurisdictions

To compare the requirements for independence and impartiality under a selection of other national laws, see *Q&A Comparison Tool, Question 16, Practical Law Arbitration Global Guide*.

Time limits and waiver

It is important that parties observe any time limit for raising an arbitrator challenge, or risk waiving the right to object. For example, article 14(2) of the ICC Rules 2012, 2017 and 2021 makes it clear that a challenge must be made within the prescribed time limit for the challenge to be admissible. Other rules, such as the LCIA Rules, the ICDR Procedures and the SIAC Rules (2010, 2013 and 2016), contain provisions which state that a party who does not promptly raise objections to any non-compliance with the rules will be treated as having waived its right to object (see *article 32.1, LCIA Rules 2014* and *2020*; *article 25, ICDR Rules 2014*; *and article 31, ICDR Procedures 2021; SIAC Rules 2010 and 2013; Rule 41.1 SIAC Rules 2016*). These provisions suggest that if a party considers that an arbitrator is not complying with the requirement to be impartial and independent (see *article 5.3, LCIA Rules 2014* and *2020*; *article 7(1), ICDR Rules 2014 and article 14, ICDR Procedures 2021*), it will be deemed to waive the right to object if it does not make a challenge promptly.

Similarly, under English law, a party who does not comply with time limits for challenging an arbitrator and continues to take part in the arbitration will lose the right to object (*section 73(1)(c) and (d), AA 1996*, which concern objections for failure to comply with the arbitration agreement or an irregularity affecting the tribunal or the proceedings, respectively). This was illustrated in *ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm)*. In that case, ASM had objected in correspondence to the arbitrator's involvement in the arbitration, but when the arbitrator refused to recuse himself, ASM had not applied to the court to remove him under *section 24* of the AA 1996. Instead, it waited until an unfavourable interim award was made and then applied to set aside the award under *section 68*. Morison J held that ASM had lost the right to object. Rather than waiting for an award and then challenging it, ASM should have raised its objection, let the hearing proceed without prejudice and then immediately applied to the court for the arbitrator's removal. The judge made clear that a wait-and-see approach is not acceptable. (For more information on the loss of the right to object under English law, see *Practice note, Loss of the right to object: section 73 of the English Arbitration Act 1996*.)

Similarly, in the US, the losing party waives its right to challenge an arbitrator's non-disclosure when it could have investigated the facts earlier (see, for example, *Goldman, Sachs & Co. v. Athena Venture Partners, L.P.*, 803 F.3d 144 (3d Cir. 2015)).

Even if the arbitral rules or law do not expressly provide for waiver of any right to object, it is prudent to make any challenge in a timely manner.

Procedure for challenging an arbitrator under arbitration rules

The procedure for challenging an arbitrator is governed by the arbitration rules under which the arbitration is being conducted. If there are no rules governing arbitrator challenges, the provisions of the arbitration law of the seat apply (see *Procedure under national laws*).

It is important to follow the relevant procedure carefully and to observe any time limits for making challenges. Otherwise, the opportunity to challenge may be lost (see *Time limits and waiver*).

LCIA Rules 2014 and 2020

Timing and form

A party who intends to challenge an arbitrator must, within **14 days** of the formation of the tribunal or (if later) after becoming aware of the grounds for challenge, send a written statement of the reasons for its challenge to the LCIA Court, the tribunal and all the other parties (*article 10.3, LCIA Rules 2014* and *2020*).

Who will make the decision?

Unless the challenged arbitrator withdraws or all the other parties agree to the challenge within 14 days of receipt of the written statement, the LCIA Court will determine the challenge (*article 10.6, LCIA Rules 2014, article 10.5, LCIA Rules 2020*). In practice, the President of the LCIA Court sets up a three-person division to decide the challenge and most divisions are chaired by either the president or a vice-president. In deciding challenges, the LCIA Court takes into account various sources of practice and procedure, which may include the IBA guidelines.

The LCIA Court gives the parties reasons for its challenge decisions. The decision describes the circumstances and the grounds for the challenge, and then explains the reasons why the LCIA Court has accepted or rejected the challenge. The LCIA Court's decision on the challenge is conclusive and binding (*article 29.1, LCIA Rules 2014* and *2020*). Therefore, the parties are precluded from appealing against the decision in the courts of the seat (to the extent that this may otherwise be permitted by the arbitration law of the seat, as, for example, in France).

The LCIA may also be called on to decide arbitrator challenges in ad hoc arbitrations where it is the designated appointing authority. In cases where the arbitration rules provide for arbitrator challenges, the LCIA applies those rules in deciding the challenge (as, for example, in the case of arbitration under the UNCITRAL Rules administered by the LCIA or where the LCIA was the designated appointing authority). If the arbitral rules do not contain any provisions governing challenge of arbitrators, the LCIA applies any provisions of the arbitral law of the seat of arbitration.

An unusual case in which the parties agreed that a challenge in an arbitration under the UNCITRAL Rules should be referred to the LCIA was *National Grid plc v Republic of Argentina (LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd L Kessler)*. In that case, the appointing authority was the ICC, but the parties agreed to refer Argentina's challenge of the arbitrator appointed by National Grid to the LCIA (presumably because the LCIA would give reasons for its decision, unlike the ICC at the time). The division of the LCIA Court that decided the challenge applied the UNCITRAL Rules.

ICC Rules (2012, 2017 and 2021)

Timing and form

A party challenging an arbitrator under the ICC Rules must submit to the Secretariat a written statement specifying the facts and circumstances on which the challenge is based (*article 14(1), ICC Rules 2012, 2017 and 2021*). To be admissible, the challenge must be sent either within **30 days** from receipt by the challenging party of the notification of the appointment or confirmation of the arbitrator, or within **30 days** from the date when the challenging party was informed of the facts and circumstances on which the challenge is based, if that date is after receipt of notification of appointment (*article 14(2), ICC Rules 2012, 2017, and 2021*). The Secretariat gives the arbitrator concerned, the other party and the other members of the tribunal "a suitable period of time" to comment in writing on the challenge (*article 14(3), ICC Rules 2012, 2017 and 2021*).

Who will make the decision?

The ICC Court decides on the challenge in plenary session. When making its decision, the ICC Court applies an objective test, and takes into account, among other things, the timing of the challenge and whether it appears to have been made in good faith. The ICC has made it clear that it is not bound by the IBA guidelines and decides challenges in accordance with its practice under the ICC Rules. However, it may consider the IBA guidelines in deciding issues of independence and impartiality.

The ICC Court's decisions on challenges are final (*article 11(4), ICC Rules 2012, 2017 and 2021*). Therefore, the parties cannot seek review by the ICC Court itself, and they can apply to the courts of the seat for the arbitrator's disqualification only where this is permitted by the arbitration law of the seat. In *AT&T Corp v Saudi Cable Co [2000] EWCA Civ 154*, the Court of Appeal held that the finality provision in respect of decisions of the ICC Court did not operate to exclude the English court's jurisdiction to consider an application to disqualify an arbitrator (although the court would "pay the closest attention" to the ICC Court's interpretation of the ICC Rules).

Article 11(4) of the ICC Rules 2012, 2017 and 2021 also provides that decisions on challenges will be communicated to the parties without providing reasons. However, in response to growing user demand, since October 2015, the ICC Court has been giving reasons for decisions on arbitrator challenges, where the parties have requested it to do so before the decision is rendered (see *Legal update, ICC Court may give reasons for administrative decisions*).

AAA Rules and ICDR Procedures

AAA Rules

At the request of a party or of its own initiative, the AAA decides a challenge and informs the parties of its decision. Its decision is conclusive (*Rule R-18, AAA Rules*). The AAA's *Administrative Review Council* hears the challenge.

ICDR Procedures

A party wishing to challenge an arbitrator must send notice of the challenge to the administrator within **15 days** of being notified of the arbitrator's appointment or within **15 days** after the circumstances that gave rise to the challenge became known to that party (*article 8(1), ICDR Rules 2009; article 14(1), ICDR Rules 2014; article 15(1), ICDR Procedures 2021*).

The challenge should state the reasons for the challenge in writing (*article 8(2), ICDR Rules 2009; article 14(1), ICDR Rules 2014; article 15(1), ICDR Procedures 2021*). The administrator notifies the other parties of the challenge (*article 8(3), ICDR Rules 2009; article 14(2), ICDR Rules 2014; article 15(2), ICDR Procedures 2021*). If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the administrator makes the decision on the challenge (*article 9, ICDR Rules 2009; article 14(3), ICDR Rules 2014; article 15(3), ICDR Procedures 2021*). The ICDR's *Administrative Review Council* hears the challenge.

For a further discussion of arbitrator appointments and challenges under the rules of the AAA, ICDR, and other institutions that administer arbitrations in the US, see the *New York City Bar Association's Committee on Arbitration's Report on Arbitrator Appointment Procedures of Arbitral Institutions in Commercial Arbitrations*.

CPR Rules

The procedure to be followed is that:

- The challenging party has 15 days to make a challenge after it:
    - receives notification of the appointment of the arbitrator; or
    - becomes aware of the circumstances giving rise to the challenge.
- The challenge must be in writing and state with specificity the reasons for the challenge.
- The challenge must be sent to CPR, the tribunal and the other party. If the appointment was made under the screened selection process, the challenge is sent to CPR and the other party, but not the tribunal. Under the screened selection process, CPR presents the tribunal with a redacted challenge for comments to screen the arbitrators from knowing which party challenged (*rule 7.6*).

CPR follows its *Challenge Protocol* in respect of challenges exercised under any of the CPR Rules.

UNCITRAL Rules (1976, 2010, 2013 and 2021)

Timing and form

A party who intends to challenge an arbitrator must 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 it became aware of the relevant circumstances (*article 11(1), UNCITRAL Rules 1976* and *13(1), UNCITRAL Rules 2010, 2013 and 2021*).

The notification, which should be sent to all other parties, the challenged arbitrator and the other members of the tribunal, should set out the reasons for the challenge (*article 11(2), UNCITRAL Rules 1976* and *13(2), UNCITRAL Rules 2010, 2013 and 2021*).

A party may later supplement their challenge if, for example, further relevant details emerge following a disclosure by the arbitrator. The Secretary-General of the Permanent Court of Arbitration has held that the 15-day limit does not apply to such supplements, provided they do not raise wholly new grounds of challenge. Instead, the admissibility of such supplements is a procedural matter determined by the appointing authority in its discretion (see *Legal update, Challenge to arbitrator in ECT case accepted on basis of justifiable doubts as to impartiality (PCA)*).

Who will make the decision?

If the other party does not agree to the challenge and the arbitrator does not accept the challenge, the appointing authority decides on the challenge (if an authority has not already been designated, the parties should designate an appointing authority as provided in article 6) (*article 12, UNCITRAL Rules (1976)*). Whether the reasons for the decision are communicated to the parties depends on the practice of the administering institution (if any) or the appointing authority.

Under the 2010, 2013 and 2021 rules, the procedure (set out in article 13) is the same as under the UNCITRAL Rules 1976, except that if, within **15 days** of notice of challenge, the parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue the challenge (*article 13(4)*). If it does, within 30 days from the date of notice of challenge, it must seek a decision on the challenge by the appointing authority.

SIAC Rules (2010, 2013 and 2016)

Timing and form

A party intending to challenge an arbitrator must send notice of challenge within **14 days** after receipt of the notice of appointment of the arbitrator being challenged or within **14 days** after the circumstances giving rise to the challenge became known to that party. The exception is where the challenge is based on the arbitrator's lack of the agreed qualification, in which case a party must object that the arbitrator is not qualified within 14 days of being notified of the arbitrator's appointment *(Rule 12.1, SIAC Rules 2010 and 2013; Rule 15.1, SIAC Rules 2016*).

The notice of challenge must be in writing and must state the reasons for the challenge. It must be filed with the Registrar of SIAC and, at the same time, sent to the other party to the arbitration, the challenged arbitrator and the remaining members of the tribunal (*Rule 12.2; SIAC Rules 2010 and 2013; Rule 15.2, SIAC Rules 2016*). The Registrar may suspend the arbitration proceedings pending resolution of the challenge (*Rule 12.2 SIAC Rules 2010 and 2013; Rule 15.4, SIAC Rules 2016*).

Who will make the decision?

If within seven days of the notice of challenge, the other party to the arbitration has not agreed to the challenge and the arbitrator has not voluntarily withdrawn, under the 2013 and 2016 Rules, the SIAC Court, and under the 2010 Rules, a Committee of the SIAC Board of Directors, will determine the challenge (*Rule 13.1 SIAC Rules 2010 and 2013; Rule 16.1, SIAC Rules 2016*). The decision is final and is not subject to appeal (*Rule 13.5; SIAC Rules 2010 and 2013; Rule 16.4, SIAC Rules 2016*). Under the 2016 Rules the decision on challenge is reasoned unless the parties decide otherwise (*Rule 16.4*).

SCC Rules (2010 and 2017)

Timing and form

A party wishing to challenge an arbitrator must submit a written statement to the Secretariat setting out the reasons for the challenge. The written statement must be sent within **15 days** from when the circumstances giving rise to the challenge became known to the party. If a party does not make a challenge within that time, it is deemed to have waived the right to challenge (*article 15(2), SCC Rules 2010*; *article 19(3), SCC Rules 2017*). The Secretariat notifies the other party and the arbitrators of the challenge and gives them an opportunity to make comments (*article 15(3), SCC Rules 2010*; *article 19(4), SCC Rules 2017*).

Who will make the decision?

If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the Board of Directors of the SCC makes the final decision on the challenge (*article 15(4), SCC Rules 2010*; *article 19(5), SCC Rules 2017*). According to the IBA's report on the application of the IBA guidelines, the SCC always consults the IBA guidelines when an arbitrator is challenged and uses them as a tool to measure and assess the circumstances that gave rise to the challenge.

HKIAC Rules (2013 and 2018)

Timing and form

Where the arbitration is taking place under the *HKIAC Rules*, the challenging party must send notice of its challenge to the HKIAC Secretariat, the other parties, the challenged arbitrator and the other members of the tribunal (*article 11(8), HKIAC Rules 2013 and 2018; paragraph 4, Practice Note on the Challenge of an Arbitrator 2014* (HKIAC PN 2014)). The notification must be in writing and state the reasons for the challenge (*article 11(8), HKIAC Rules 2013 and 2018; paragraph 5(a), HKIAC PN 2014*).

The challenge must be made within **15 days** after being notified of the appointment of the challenged arbitrator, or within **15 days** after it became aware, or should reasonably have become aware, of the circumstances giving rise to the challenge (*article 11(7), HKIAC Rules 2013 and 2018; paragraph 4, HKIAC PN 2014*). The challenge must be accompanied by a fee of HK$50,000 (*paragraph 5(b), HKIAC Challenge PN 2014*).

The other parties and the challenged arbitrator have an opportunity to answer the challenge, after which the challenging party may respond to those answers (*paragraphs 10 and 11, HKIAC PN 2014*). All answers and responses must be copied to the other parties and the arbitrators (*paragraph 12, HKIAC PN 2014*). Paragraphs 10 and 11 suggest that the HKIAC will set time limits for answers and responses.

Who will make the decision?

If the challenged arbitrator does not withdraw and the non-challenging party does not agree to the challenge, the HKIAC will determine the challenge (*paragraph 8, HKIAC PN 2014*). It will give its determination of the challenge to the parties, the challenged arbitrator and, where applicable, the other arbitrators, in writing. It will be up to the HKIAC in its sole discretion as to whether to provide reasons for its determination (*paragraph 14, HKIAC PN 2014*).

The HKIAC will determine the challenge on the basis of written submissions and evidence only, unless it decides it is appropriate to hold a hearing (*paragraph 13, HKIAC PN 2014*).

CIETAC Rules (2005, 2012 and 2015)

Timing and form

A party who intends to challenge an arbitrator on the grounds of the facts or circumstances disclosed by the arbitrator in the arbitrator's declaration at the time of appointment must forward the challenge in writing to CIETAC within **ten** days of receiving the declaration or written disclosure (or both) (*article 26(1), CIETAC Rules 2005*; *article 30(1), CIETAC Rules 2012; article 32(1), CIETAC Rules 2015*). If it does not do so, it may not later raise a challenge based on the matters disclosed by the arbitrator at this stage.

Otherwise, a party wishing to challenge an arbitrator must make a written request to CIETAC for the arbitrator's withdrawal, setting out the reasons for the request and providing supporting evidence (*article 26(2), CIETAC Rules 2005*; *article 30(2), CIETAC Rules 2012; article 32(2), CIETAC Rules 2015*). Notice of challenge must be made within **15 days** of receiving notice of formation of the arbitral tribunal, or within **15 days** of becoming aware of the reasons for the challenge, but no later than the last oral hearing in the arbitration (*article 26(3), CIETAC Rules 2005*; *article 30(3), CIETAC Rules 2012; article 32(3), CIETAC Rules 2015*). CIETAC notifies the other parties and the arbitrators of the challenge.

Who will make the decision?

If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the Chairperson of CIETAC makes a final decision on the challenge "with or without stating the reasons" for their decision (*article 26(6), CIETAC Rules 2005*; *article 30(6), CIETAC Rules 2012; article 32(6), CIETAC Rules 2015*). The arbitration continues pending a decision on the challenge, with the challenged arbitrator continuing to fulfil their functions as arbitrator (*article 27, CIETAC Rules 2005*; *article 30(7), CIETAC Rules 2012; article 32(7), CIETAC Rules 2015*).

Procedure under national laws

If the applicable arbitration rules do not specify a procedure for dealing with arbitrator challenges, parties should check whether the law of the seat of arbitration makes any provision.

For example, the default position under English law is that the English courts have the power to remove an arbitrator, if satisfied that the challenging party has first exhausted recourse to any person or institution vested with the power to remove that arbitrator (*section 24(2), AA 1996*). To minimise the risk of delaying tactics, the AA 1996 provides for the arbitration to proceed to an award while the application to the court is pending (*section 24(3)*).

The *UNCITRAL Model Law* provides for challenges to be made within 15 days of becoming aware of the constitution of the tribunal or of circumstances providing grounds for challenge under article 12(2) (*article 13(2)*). Article 13(2) also provides for the tribunal to decide the challenge. A party wishing to appeal against an unsuccessful challenge must do so within 30 days of receiving notice of the decision rejecting the challenge (*article 13(3), UNCITRAL Model Law*).

Under Hong Kong law, in the absence of an agreed procedure, unless the challenged arbitrator withdraws from office, the challenge is made to and decided by the tribunal (*section 26(1), Arbitration Ordinance (Cap 609*)). The party making the challenge must provide written notice with the reasons for the challenge within 15 days after the tribunal is constituted or after becoming aware of circumstances giving rise to a ground for challenge. In the case of an unsuccessful challenge, the challenging party can ask the court to decide on the challenge. The request must be made within 30 days after having received the notice of the decision rejecting the challenge.

Under German law, the default position is that parties must raise their challenge with the tribunal within two weeks of becoming aware of the constitution of the tribunal or of the grounds for challenge (*section 1037(2), ZPO*). Parties may appeal to the court against unsuccessful challenges within one month of being notified of the unsuccessful challenge (although the parties may agree to a different time limit) (*section 1037(3), ZPO*).

Unless the parties have agreed otherwise, Swiss law also provides for parties to request that the court remove an arbitrator (*article 180(3), PILA*).

Consequences of a successful arbitrator challenge under arbitration rules

If the institution, appointing authority or national court upholds the challenge, the arbitrator is removed. The consequences of the removal depends on the applicable arbitration rules (if any) and the arbitration law at the seat of arbitration. In most cases, the removed arbitrator must be replaced. However, there may be issues as to the process for the appointment of a replacement arbitrator and the extent to which any previous hearings should be repeated.

It is worth noting that, in general, rules governing replacement of an arbitrator apply regardless of whether the vacancy has arisen because an arbitrator was removed following a challenge, or simply needs replacing due to resignation, death or any other reason.

LCIA Rules (2014 and 2020)

Article 11.1 of the LCIA Rules 2014 and 2020 gives the LCIA Court complete discretion to decide whether or not to follow the original nominating process when replacing an arbitrator for any reason. It may decide to appoint the replacement arbitrator itself if the party requested to make a re-nomination does not do so within 14 days (or less or more than this, if the LCIA Court so determines) (*article 11.2, LCIA Rules 2014* and *2020*).

ICC Rules (2012, 2017 and 2021)

An arbitrator who has been successfully challenged (or who resigns or dies) will be replaced (*article 15(1), ICC Rules 2012, 2017 and 2021*), and the ICC Court has discretion to decide whether or not to follow the original nominating process (*article 15(4), ICC Rules 2012, 2017 and 2021*).

If the proceedings have closed, the ICC Court may decide that the remaining arbitrators should continue the arbitration, rather than a replacement being appointed. It will take into account the views of the remaining arbitrators and the parties when making its decision on this issue (*article 15(5), ICC Rules 2012, 2017 and 2021*).

If the tribunal is reconstituted, the tribunal decides if and to what extent previous proceedings should be repeated (*article 15(4), ICC Rules 2012, 2017 and 2021*).

AAA Rules

If hearings have commenced when the vacancy on the tribunal arises, the remaining arbitrator(s) may continue with the hearing and determine the dispute, unless the parties agree otherwise (*Rule R-20(b), AAA Commercial Arbitration Rules*). If a substitute arbitrator is appointed, the tribunal decides whether it is necessary to repeat all or any part of the proceedings (*Rule R-20(c), AAA Commercial Arbitration Rules*).

ICDR Procedures

A substitute arbitrator is appointed in accordance with the original appointment process, unless otherwise agreed by the parties (*article 16, ICDR Procedures 2021*). It is for the reconstituted tribunal to decide whether all or part of any previous hearings should be repeated (*article 16(3)*).

UNCITRAL Rules 1976

A substitute arbitrator will be appointed or chosen in accordance with the original appointment process (*article 13*). If the arbitrator being replaced is the sole arbitrator or the chairperson of the tribunal, any previous hearings are repeated. If any other arbitrator is being replaced, the tribunal decides whether previous hearings should be repeated (*article 14*).

UNCITRAL Rules 2010, 2013 and 2021

The general rule is that a substitute arbitrator is appointed or chosen in accordance with the original appointment procedure (*article 14(1)*). However, the appointing authority may (if requested by a party), in exceptional circumstances, decide that a party should be deprived of its right to appoint a substitute arbitrator. If so, after giving the parties and the remaining arbitrators the opportunity to express their views, the appointing authority may appoint the substitute arbitrator or, if the hearings have closed, authorise the other arbitrators to proceed with the arbitration and make any decision or award (*article 14(2)*). The proceedings resume at the stage where the replaced arbitrator ceased to perform their functions, unless the tribunal decides otherwise (*article 15*).

SIAC Rules (2010, 2013 and 2016)

A substitute arbitrator will be appointed in accordance with the original appointment process (*Rule 13.2; SIAC Rules 2010 and 2013; Rule 16.2, SIAC Rules 2016*).

It is up to the tribunal, after consulting the parties, to decide whether hearings that took place before the tribunal was re-constituted should be repeated. However, if the tribunal had already issued an interim or partial award, hearings that related solely to that award will not be repeated and the award will remain in effect (*Rule 15, SIAC Rules 2010 and 2013; Rule 18, SIAC Rules 2016*).

SCC Rules (2010 and 2017)

A new arbitrator is appointed to replace an arbitrator who has been successfully challenged (or an arbitrator who for any other reason cannot perform its duties, such as death or resignation).

If the arbitrator being replaced was appointed by a party, that party appoints the new arbitrator, unless the Board decides otherwise (*article 17(1), SCC Rules 2010*; *article 21(1), SCC Rules 2017*).

If the tribunal consists of three or more arbitrators, the Board may decide that the remaining arbitrators should proceed with the arbitration. The Board's decision on this issue will take into account the stage of the arbitration and other relevant circumstances, as well as any comments from the parties and the arbitrators (*article 17(2), SCC Rules 2010*; *article 21(2), SCC Rules 2017*).

It is for the newly composed tribunal to decide whether, and to what extent, the proceedings are to be repeated (*article 17(3), SCC Rules 2010*; *article 21(3), SCC Rules 2017*).

HKIAC Rules (2013 and 2018)

Under the 2013 and 2018 Rules, a substitute arbitrator shall be appointed pursuant to the rules that were applicable to the appointment of the arbitrator being replaced (*article 12(1)*).

If, at the request of a party, HKIAC 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 designate a substitute arbitrator, HKIAC may, after giving an opportunity to the parties and the remaining arbitrators to express their views, appoint the substitute arbitrator, or authorise the other arbitrators to proceed with the arbitration and make any decision or award.

CIETAC Rules (2005, 2012 and 2015)

The Chairperson of CIETAC decides whether the successfully challenged arbitrator should be replaced (*article 27(1), CIETAC Rules 2005*; *article 31(2), CIETAC Rules 2012; article 33(2), CIETAC Rules 2015*). If so, a substitute arbitrator is appointed within the time specified by CIETAC in accordance with the original appointment process (*article 27(2), CIETAC Rules 2005*; *article 31(3), CIETAC Rules 2012; article 33(3), CIETAC Rules 2015*).

Once the arbitrator has been replaced, the tribunal decides whether the whole or part of the previous proceedings should be repeated (*article 27(3), CIETAC Rules 2005*; *article 31(4), CIETAC Rules 2012; article 33(4), CIETAC Rules 2015*).

Where an arbitrator is part of a three-person tribunal and is unable to participate after the last oral hearing, the remaining arbitrators may, after consulting with the parties and subject to the approval of the Chairperson of CIETAC, continue the

arbitration and make decisions, rulings or the award (*article 28, CIETAC Rules 2005*; *article 32, CIETAC Rules 2012; article 34, CIETAC Rules 2015*).

National laws

Most modern arbitration laws provide for the replacement of arbitrators who have been removed (or who need replacing for any other reason, such as death or incapacity) and in most cases, the substitute arbitrator is to be appointed in accordance with the original appointment process. (See, for example, article 15 of the UNCITRAL Model Law; *section 27(3)* of the AA 1996; Article 179 of the Swiss PILA; and Article 1493 of the French CCP.)

In many cases, the decision as to whether previous hearings should be repeated is left, expressly or impliedly, to the tribunal. For example, section 27(4) of the AA 1996 makes express provision for this, while the UNCITRAL Model Law is silent on the issue.

Costs

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 immediately.

In *C Ltd v D and X [2020] EWHC 1283 (Comm),* the English Commercial Court refused the claimant's application for costs in relation to an application to remove an arbitrator under section 24 of the AA 1996, where the arbitrator had retired before the matter came to court. The case contains interesting commentary on who is deemed to be the successful party when an arbitrator resigns, and the different categories of cases the court will consider in relation to costs where proceedings are resolved without trial (see *Legal update, Court refuses claimant's application for costs relating to withdrawn application to remove arbitrator (English Commercial Court)* and *Blog post, Arbitrator's liability for costs: C Ltd v (1) D (2) X*).

Examples of scenarios which might give rise to a challenge

To set matters in context, this note looks at some of the most common scenarios which might give rise to a challenge to an arbitrator. These are where:

- An arbitrator has an interest in the dispute.
- An arbitrator is in the same barristers' chambers as counsel.
- An arbitrator has a relationship or connection with a party.
- An issue conflict exists.

Arbitrator has an interest in the dispute

An arbitrator may have a financial interest in the dispute if either:

- The arbitrator would profit financially from the outcome of the arbitration.
- The arbitrator owns shares in one of the parties to the arbitration.

Where the arbitrator has a significant financial interest, this will almost certainly give rise to justifiable doubts as to the arbitrator's impartiality and will therefore usually be a ground for removal. This is confirmed by General Standard 2(d) of the IBA guidelines, which states that such justifiable doubts "necessarily" exist in any of the situations described in the non-waivable red list of circumstances, which in turn includes the situation where the arbitrator has a significant financial interest in one of the parties or in the outcome of the case (*paragraph 1.3, Non-waivable red list, IBA guidelines*).

The situation is less clear cut where the arbitrator holds shares, directly or indirectly, in a company which has a connection with a party to the arbitration, including third party funders. In those circumstances, the determining factor may be the size of the shareholding and the type of company in which the shares are held. Generally, the smaller the shareholding, especially where the party concerned is a public company, the less likely it is that a challenge will be upheld.

In *AT&T Corporation v Saudi Cable Co [2000] EWCA Civ 154*, the ICC Court dismissed a challenge by AT&T to the chairman of the tribunal on the ground that he was a non-executive director of, and held shares in, one of AT&T's competitors. AT&T applied to the English court for the removal of the arbitrator. The Court of Appeal upheld the judge's decision dismissing the application, finding (among other things) that any benefit that could indirectly accrue to the company concerned as a result of the outcome of the arbitration would be of minimal benefit to the arbitrator, making it unreasonable to conclude that it could influence him (*at paragraph 43(c)*).

Arbitrator is in same barristers' chambers as counsel

Unlike lawyers who practise as partners in law firms, barristers are self-employed and, although they may be based in chambers with other barristers, they operate independently of each other. This situation has given rise to considerable debate in the arbitration community, and it falls within the IBA guidelines' orange list as a situation which should be disclosed by an arbitrator because, in the eyes of the parties, it may give rise to justifiable doubts as to the arbitrator's impartiality or independence (*paragraph 3.3.2, orange list, Part II, IBA guidelines*). The IBA guidelines attempt to address the relationship between counsel and arbitrators by requiring the parties to identify their counsel, and any relationship with a member of the tribunal, at the earliest opportunity and in the event of any change to the counsel team (*General Standard 7(b, Part I, IBA guidelines)*).

There are several cases in which challenges were raised against arbitrators who were in the same chambers as counsel for one of the parties to the arbitration. These challenges have invariably failed, as courts and institutions have drawn a distinction between law firms and barristers' chambers. For example:

- In *Laker Airways*, the English court rejected a challenge to an arbitrator based on the fact that he was in the same chambers as the barrister instructed by the claimant. In that case, Rix J allowed the English Bar Council to intervene in the proceedings as an interested party, because the issue was of public importance. The challenge was made under *section 24* of the AA 1996, which sets an objective test for challenges to arbitrators (see also *England and Wales*).

- The Paris Court of Appeal in *Kuwait Foreign Trading Contract & Investment Co v. Icori Estero SpA (1992) Rev Arb 568* also rejected a challenge to an arbitration award made on grounds that the president of the tribunal was not independent, because he came from the same chambers as one of the counsel in the arbitration.

In both cases, the court emphasised the fact that barristers practise individually, even though they may be members of the same set of chambers.

In one decision concerning such a challenge, the LCIA Court found that both the claimant and claimant's counsel (who were both non-English) were sufficiently familiar with the organisation of barristers in England and therefore concluded that the grounds for challenge under the LCIA Rules were not satisfied. However, although the ICC Rules have the same grounds of challenge, the ICC Court has upheld a challenge against an arbitrator on the ground that he was from the same chambers as an advocate appointed late in the proceedings. Some commentators suggest that this was an unusual case and does not necessarily mean that such challenges are likely to succeed.

For a separate discussion of this situation, see *Blog post, When an arbitrator and party representative are from the same set – conflict in Chambers?*.

Member of arbitrator's law firm acted as arbitrator in similar dispute

It is accepted that the impartiality and independence of an arbitrators who practice as members of, or partners in, law firms, can be affected by the activities of other members of that firm. It is impermissible, for example, for one member of a law firm to act as arbitrator in a dispute where members of the same firm act as counsel. It is likely also to be problematic for an arbitrator to accept appointment in circumstances where members of their law firm advise one of the parties in another dispute.

However, *Deutsche Lufthansa AG v Bolivarian Republic of Venezuela (PCA Case No 2022-03), Decision on Challenge to Dr Wolfgang Peter* (an UNCITRAL arbitration) raised a different issue. Venezuela challenged the claimant's appointed arbitrator on the basis that another member of their law firm had sat as arbitrator in a previous case, arising from a similar factual background and, although under a different investment treaty, raising similar questions of fact and law. The Secretary-General of the PCA allowed the challenge. Noting that the earlier case was the only arbitration with that close a factual and legal overlap and, therefore, that the arbitrator's law firm colleague was the only presiding arbitrator to rule on these issues, the Secretary General considered the circumstances would give rise to justifiable doubts as to the arbitrator's impartiality from the perspective of a reasonable and informed third party. The arbitrator might be influenced by their colleague's decision in the earlier case and, in order to reach a different conclusion on points of fact or law, the arbitrator may be required to call into question their colleague's earlier decisions. (See further, *Legal update, Challenge to arbitrator accepted due to activities as arbitrator of another member of law firm (PCA)*).

Arbitrator has a relationship or connection with a party

If an arbitrator has a relationship or other connection, personal or business, with one of the parties, this may give rise to justifiable doubts as to the arbitrator's independence and impartiality. It is a question of degree depending on the facts of each case. The following scenarios are considered below:

- An arbitrator or arbitrator's law firm has previously acted for a party.

- An arbitrator has previously been involved in the case.
- An arbitrator or arbitrator's law firm has previously acted as counsel against one of the parties in an unrelated arbitration.
- Another relationship (social or professional) between an arbitrator and party or counsel.

Arbitrator or arbitrator's law firm is acting, or has previously acted, for a party

If the arbitrator is a legal representative of a party to the arbitration, this will almost certainly justify the arbitrator's removal from the tribunal (*General Standard 2(d), Part I, IBA guidelines and paragraph 1.1, non-waivable red list, IBA guidelines*). However, the fact that the arbitrator's law firm acts, or has previously acted, for a party will not automatically sustain a challenge. As recognised by General Standard 6(a) of the IBA guidelines, it is necessary to balance the interests of a party to appoint the arbitrator of its choice, and the importance of maintaining confidence in the impartiality and independence of international arbitration. Whether the arbitrator should be barred from acting in this situation depends on the nature and extent of the arbitrator's law firm's involvement with the party and the relevance of the law firm's activities. For an example of a case in which the fact that the arbitrator's law firm had provided legal advice to a party did not amount to apparent bias (as a matter of English law), even though bias would be assumed to exist under the IBA guidelines, see *W Ltd v M SDN BHD [2016] EWHC 422 (Comm)*, discussed in *Legal update, "Weaknesses" in IBA Guidelines on Conflicts of Interest (English Commercial Court)*.

The following are examples of challenges decided under the LCIA and ICC Rules:

- In a decision dated 29 May 1996, in a case in which the LCIA was acting as appointing authority in an arbitration under the UNCITRAL Rules, the LCIA Court sustained a challenge to an arbitrator on the ground that his law firm had represented a bank involved in an asset transfer, which was part of the subject matter of the arbitration.
- By contrast, in a decision dated 23 October 1997, an LCIA division considered a challenge based on the fact that the claimant-appointed arbitrator was previously engaged by the claimant's counsel as an expert witness in unrelated proceedings. The LCIA division rejected the challenge, finding that the fact that an arbitrator may have worked with either party's counsel in the past could not give rise to serious doubts as to the arbitrator's impartiality.
- Similarly, in a decision dated 24 December 2003, the LCIA Court rejected a challenge to an arbitrator who had, four years earlier, assisted one of the parties on a project which was said to be a substantial matter for his law firm. The arbitrator was not the lead partner on the matter and had moved to another firm shortly afterwards. In rejecting the challenge, the LCIA Court noted that the arbitrator's association with the party was brief and no lasting personal relationship had developed from it.
- The ICC Court upheld a challenge to an arbitrator who, early in the proceedings, learned that his firm of over 700 lawyers had been retained to handle an unrelated matter for the respondent. The challenge was accepted even though the arbitrator himself was not involved and Chinese (or ethical) walls had been put in place.
- The ICC Court rejected a challenge against an arbitrator whose law firm had represented a party in a non-ICC case against a subsidiary of the claimant. The representation had taken place over a two-year period and had

ended about five years before the arbitrator's appointment had been confirmed. Further, the arbitrator had not been personally involved in the non-ICC arbitration and knew nothing about the case.

- The US District Court for the Southern District of New York rejected a motion to vacate an award for evident partiality, under the FAA, which was based on an argument that the arbitrator's law firm had previously acted on transactions involving one of the claimant companies or its affiliates. Applying the Second Circuit's "reasonable person" standard (see *Grounds for challenge under national laws: United States*), the court found that there was no material evidence refuting the arbitrator's sworn assertion that he was completely unaware of the conflicts complained of when he made the award. Deficiencies in his firm's conflict-checking system did not amount to "evident partiality" (*Ometto v. ASA Bioenergy Holdings AG*, No. 2013 WL 174259, *4 (S.D.N.Y 2013), aff'd, 549 F. App'x 41 (2d Cir. 2014)).

- However, in *Thomas Kinkade Co. v. White*, 2013 WL 1296238 (6th Cir. 2013), the US Court of Appeals for the Sixth Circuit vacated an award for evident partiality where partners of the chairman of the tribunal were retained by the defendants and their appointed arbitrator in respect of two unrelated matters. The court held that the facts showed that the arbitrator not only had a motive to favour the defendants, but also did actually appear to favour them on several occasions (see *Legal update, Sixth Circuit upholds finding of evident partiality to vacate arbitration award*). In *TCR Sports Broad. Holding, LLP v. WN Partner, LLC,* 59 N.Y.S.3d 672, 680 (1st Dep't 2017), a New York state appellate court upheld the annulment of an award due to relationships between the arbitrators and the law firm for one of the parties.

The above examples suggest that a challenge will stand a greater chance of success where any of the following circumstances apply:

- The arbitrator's firm is currently being retained by a party or an entity related to the party.

- The arbitrator's firm has previously given advice on a matter which is related to the subject matter of the arbitration.

- The arbitrator has given legal advice to the party or related entity and the arbitrator or their firm obtains significant financial income from that advice.

A distinction is drawn between an arbitrator who:

- Has acted, or is acting, as legal representative for a party.

- Was previously an expert witness for a party in an unrelated case.

Arbitrator has previously been involved in the case

The arbitrator may have been involved in the case before appointment. For example, by providing advice or an expert opinion to a party. This situation is categorised as one requiring disclosure by an arbitrator in the IBA's waivable red list (*paragraphs 2.1.1-2.1.2, red list, Part II, IBA guidelines*). It is likely that a challenge on this ground would be upheld, unless the arbitrator's involvement was minimal or insignificant and, objectively, could not possibly affect the arbitrator's independence or impartiality.

A slightly different scenario would be where an arbitrator represents a party who, although not currently party to the arbitration, may become involved in the future. This was the situation in *Vito G. Gallo v Government of Canada (UNCITRAL, Decision on the Challenge to J Christopher Thomas QC, 14 October 2009)*, a North American Free Trade Agreement (NAFTA) arbitration. The arbitrator appointed by the respondent disclosed that he had been retained to provide advisory services to Mexico, another state party to NAFTA, which had a right to participate in the arbitration under the terms of NAFTA. The Deputy Secretary-General of ICSID (ICSID being the appointing authority) rejected the challenge on the basis that Mexico had not yet intervened. However, he required the arbitrator to choose between remaining as arbitrator in this case or continuing to advise Mexico. Otherwise, there would be the perception of a potential conflict of interest which would hang over the arbitration. (See also *Legal update, Decision on challenge to arbitrator in NAFTA arbitration under UNCITRAL Rules*.)

Arbitrator has acted as counsel against one of the parties in unrelated arbitration

In *ICS Inspection and Control Services Ltd v Republic of Argentina (UNCITRAL), Decision on Challenge to Mr Stanimir A Alexandrov, 17 December 2009)*, the Permanent Court of Arbitration upheld a challenge raised against an arbitrator on the ground that he and his law firm were representing the claimant in an ongoing investment arbitration against Argentina. This fell within paragraphs 3.4.1 and 3.1.2 of the IBA guidelines (*orange list, IBA guidelines*).

Other relationship (social or professional) between arbitrator and party or counsel

Examples of situations where challenges have been made include:

- **Arbitrator is a friend of partner in firm representing party.** In *William C. Vick Construction Co. v North Carolina Farm Bureau Fed.*, 472 S.E.2d 346, 348 (N.C. App. 1996), the Court of Appeals of North Carolina vacated an award in a case where an arbitrator was a close personal friend of a partner in the firm representing one of the parties.

- **Academic relationship between arbitrator and lawyer in firm representing party.** The ICC Court rejected a challenge to an arbitrator who had been challenged for not disclosing an academic relationship with a lawyer from the firm to which the respondent's counsel belonged. The lawyer had been one of several students whose doctoral theses the arbitrator had supervised.

- **Arbitrator is a former partner in the law firm representing one of the parties**. In one case, the SCC sustained a challenge to an arbitrator who, before the commencement of the arbitration, was a partner of the firm representing the claimant. The challenge was successful notwithstanding the fact that the arbitrator never actively represented the claimant in any matter and had left the firm several years before the arbitration began.

- **Arbitrator is retained in unrelated proceedings by law firm representing one of the parties to the arbitration**. The guiding principle is that the existence of a relationship will not, of itself, sustain a challenge. The challenging party must be able to point to evidence that the relationship might, objectively, adversely affect the arbitrator's independence or impartiality. In *A and others v B and another (2011) EWHC 2345 (Comm)*, the English Commercial Court held that the mere fact that the arbitrator acted as counsel for one of the firms acting in the arbitration (whether in the past or in parallel with the arbitration), did not mean that there was a real possibility of apparent bias (in the context of an application to remove the arbitrator, under *section 24* of the AA 1996, and to set aside the award for serious irregularity, under *section 68*). The court had to consider the facts as they appeared at the hearing, not at the time of the disclosure or non-disclosure. Applying that test, there was no real possibility of

apparent or unconscious bias, on the material before the court (see *Legal update, No unconscious bias where arbitrator instructed by party's solicitors in unrelated litigation (Commercial Court)*).

- **Arbitrator is, or has been, involved in dispute with party.** This situation is relatively rare, but one example (in a litigation context) is provided by *Emerald Supplies Ltd v British Airways [2015] EWHC 2201 (Ch)*, in which an English High Court judge recused himself after having raised issues with the defendant (British Airways (BA)), and its legal advisers, over the non-delivery of his luggage following a flight he had taken with BA. For further discussion, see *Legal update, High Court judge recuses himself in litigation against BA*.

Issue conflict

Several scenarios may give rise to an issue conflict:

- The arbitrator is acting as counsel in a different arbitration in which the same, or a similar, point of law is in issue.
- The arbitrator has been a member of a tribunal in another case involving one of the parties to the current arbitration in which there were similar issues.
- The arbitrator has previously made comments on the issues raised in the arbitration, or on the arbitration itself (for example, in a publication).
- Arbitrator as witness.

The challenge is usually based on the suggestion that an arbitrator who has previously taken a particular position on a certain issue cannot be impartial when deciding that issue in the arbitration in question.

Arbitrator acting as counsel in arbitration raising the same or similar points of law

In *Telekom Malaysia v Republic of Ghana* (an UNCITRAL arbitration), Ghana challenged the claimant's appointment of an arbitrator who was also acting as counsel for an investor in a case involving similar points of law. The other members of the tribunal and the Secretariat of the Permanent Court of Arbitration both rejected the challenge. However, the Dutch court considered that the roles of arbitrator and counsel were incompatible and, to avoid the appearance of bias, required the arbitrator to resign as counsel in the other arbitration as a condition of remaining as arbitrator. (See *Telekom Malaysia v Republic of Ghana Case No. HA/RK 2004, 667 (Hague District Court)* and Peterson, *Dutch court finds arbitrator in conflict due to role of counsel to another investor*, Investment Law and Policy Weekly Bulletin, 17 December 2004.)

In *RSE Holdings AG v Republic of Latvia (PCA Case No AA861), Decision on the Challenge to Ms Amy Frey* (an UNCITRAL arbitration under the Energy Charter Treaty (ECT), the Secretary-General of the PCA allowed a challenge to the arbitrator appointed by the claimant because there were justifiable doubts as to their impartiality. The arbitrator had acted, or was acting, as counsel in a significant number of other ECT arbitrations, primarily advising investors. The number of cases as counsel generated a "serious risk that overlapping questions of interpretation and application of the ECT" will arise. (See further, *Legal update, Challenge to arbitrator in ECT case accepted on basis of justifiable doubts as to impartiality (PCA)*).

Arbitrator on tribunal in another arbitration involving one of the parties

In *Halliburton*, the UK Supreme Court rejected an appeal to remove an arbitrator under *section 24(1)(a)* of the AA 1996 in circumstances where the arbitrator had accepted multiple appointments in overlapping cases. The court found that the arbitrator's failure to disclose those other appointments breached a legal duty of disclosure, but that a fair-minded and informed observer would not infer from that a real possibility of unconscious bias on the part of the arbitrator. The decision provides a summary of the law, and guidance on the duty to disclose in the context of multiple appointments. Acceptance by an arbitrator of appointments in multiple references concerning overlapping subject matter with only one common party might have to be disclosed, depending on relevant customs and practice. For further discussion see *Blog post, Halliburton v Chubb: UK Supreme Court clarifies position on arbitrators' duties of impartiality and disclosure in London-seated arbitrations* and *Video and audio: Halliburton v Chubb: an arbitrator's duty to disclose and the test for apparent bias*.

Arbitrator has previously commented on the issues

The IBA guidelines suggest that there will not normally be a problem if an arbitrator has previously published a general opinion about a particular legal issue which also arises in the arbitration, as this falls within the green list of matters which do not need to be disclosed (*paragraph 4.1.1, green list, IBA guidelines*).

In practice, a challenge based on issue conflict is more likely to arise in the context of investment treaty arbitration than mainstream international commercial arbitration. This is because:

- The range of issues in investment treaty arbitration is comparatively small, increasing the likelihood that a given arbitrator will, for example, have sat in an arbitration involving similar issues.
- There is a relatively small "pool" of arbitrators with experience in investment treaty arbitration, increasing the likelihood of an arbitrator already having decided a case involving one of the parties or similar issues, or of having acted as counsel in a previous arbitration for or against one of the parties.
- It is relatively rare for awards to be published in commercial arbitration, so it will usually be difficult to establish common issues between two arbitrations.

See *Practice note, Challenges to arbitrators in ICSID arbitration* for further discussion.

Arbitrator as witness

In *Freeman & Sons v Chester Rural District Council [1911] 1KB 711,* the court found that where the arbitrator was likely to be a witness in the case, there was a real possibility or danger that the tribunal would be biased. The Master of the Rolls found that the dispute would have to be settled following cross-examination of the arbitrator and "it is obviously impossible to allow the arbitrator to be cross-examined by one of the parties to the arbitration".

Agreed choice of arbitrator. The court adopts a different approach to cases where the choice of arbitrator has been agreed by the parties (category one) and those cases where an arbitrator is not nominated by agreement (category two). Freedom

of contract and holding parties to their bargain are features of the first category, but the test for apparent or unconscious bias is the same for both categories *(see AT & T Corp & another v Saudi Cable Co [2000] CLC 1309).*

In *Bristol Corporation v John Aird [1913] AC 241,* a construction dispute, the House of Lords considered a category one case. The decision is the highest authority for the proposition that an arbitrator cannot be "a judge and witness", where the arbitrator would have to give evidence on an important point and therefore, give evidence as his own witness. The court found that an arbitrator in category one would be disqualified where there was:

"a bona fide dispute involving substantial sums and a probable conflict of evidence on matters as to which the arbitrator himself will in the normal course be the principal witness on one side."

However, the court found that that does not detract from a more general proposition that parties should be held to their contract:

"There may be something in the arbitrator which makes him an unfit person to be judge in the matter. It may be his personal conduct; it may be the position in which his actions have placed him. The court is bound to consider all these things; but in considering them it ought to hold that nothing known at the time of the contract, nothing fairly to be expected from the position of the engineer when he becomes arbitrator, can be alleged as a ground why it should not keep the parties to the bargain, because those things must be supposed to have been in their contemplation at the time when they entered into the contract."

In *B v J [2020] EWHC 1373 (Ch),* the English court refused an application to remove an arbitrator under section 24 of the AA 1996, where he had previously acted as the family accountant in a dispute involving various members of the family. The judge concluded that there were no grounds for concluding that the arbitrator would be biased or that there was doubt as to his impartiality in the arbitration. While in the majority of cases an arbitrator would be prohibited from being a witness in the action they were asked to adjudicate on, that was not an absolute rule. To remove an arbitrator by court order when the identity of the arbitrator is named in the contract constituted a clear intrusion into the freedom of contract. For further details see *Legal update, Court refuses application to remove family accountant as arbitrator under section 24 Arbitration Act 1996 (English Commercial Court)*.

A further case illustrating the importance placed by the English court on a choice of arbitrator agreed by the parties, is *Eckersley v Mersey Docks and Harbour Board [1894] 2 QB 667*. In that case, involving a construction dispute, the arbitration clause named the engineer as arbitrator. It was argued that an inference of bias should be drawn because the engineer's son had hoped to succeed his father as engineer to the defendant board, in circumstances where the engineer's son's conduct was an issue in the arbitration. The court concluded that:

It is not a sufficient reason to say that he might be biased, if the Court should be of opinion that there is no ground for supposing that he would be biased…."

The court concluded that where the parties choose their own tribunal, they are accepting the arbitrator's "own competency, care and caution" and that the arbitrator is to adjudicate on matters in which he has an interest.

Tactical issues: to challenge or not to challenge

Even if a party considers that there are grounds to challenge an arbitrator, it is important to assess the potential impact of a challenge on the arbitration. When deciding whether to make a challenge, consider the following:

- The effect of an unsuccessful challenge. Consider how this will affect dealings with the challenged arbitrator.

- The relationship with the remaining members of the tribunal, whether or not the challenge is successful. In an ICSID arbitration, the other arbitrators will have had to decide the challenge and this may be an issue if they are divided.

- Whether the challenge is being made in a timely manner (for details on the time limits for challenges under the major international arbitration rules, see *Procedure for challenging an arbitrator*). If the relevant time limit is missed, a party risks waiving the right to make a challenge.

- The costs that will be involved in a challenge, especially if the challenge is unsuccessful and a review by the court is sought.

- The delay a challenge will cause to the arbitration. Under some arbitral rules (for example, in ICSID arbitration), the proceedings are suspended until the challenge is determined.

- If the challenge is successful, the replacement arbitrator may also lack independence and impartiality. The party making the appointment may use the opportunity to cause further delay by seeking to appoint another arbitrator who is unacceptable to the party which made the original challenge.

Where a party makes a challenge, the other party must decide whether to resist the application. In making its decision, it must consider factors such as cost and delay. If both parties agree that the arbitrator should be disqualified, he or she must step down.

