8

ARTICLE 8—CHALLENGE OF ARBITRATORS (ARTICLES 8 AND 9)

Article 8

1. A party may challenge any arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party wishing to challenge an arbitrator shall send notice of the challenge to the administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party.

2. The challenge shall state in writing the reasons for the challenge.

3. Upon receipt of such a challenge, the administrator shall notify the other parties of the challenge. When an arbitrator has been challenged by one party, the other party or parties may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator may also withdraw from office in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.

I. Introduction

8.01 Articles 8 and 9 continue the logical progression from Article 7 by setting forth a procedure for challenging arbitrators for lack of impartiality or independence; they should be read together with that provision. Article 8 provides that one may

challenge an arbitrator 'whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence' and provides the structure of the challenge procedure. If there is no agreement by the parties on the challenge, or a voluntary withdrawal by the arbitrator, the ICDR administrator will decide the challenge pursuant to Article 9. The obvious importance of having an impartial and independent arbitration tribunal is therefore underscored by the applicable sanctions: an arbitrator's lack of impartiality or independence constitutes a ground to challenge his or her nomination and to remove him or her even after appointment. Notably, depending on the applicable law, lack of impartiality and independence may also constitute a ground for refusing to recognize or enforce the final award.[1] The notion of an impartial arbitrator is vital to the integrity of the arbitral process and, without it, arbitration as a dispute resolution mechanism would fail.

8.02 Yet challenges have become an increasingly frequent and significant occurrence in international arbitration. This is due, in large part, to the increase in the number of participants in arbitration, which has led, in turn, to complex conflict situations.[2] Leading institutions have reported that challenges to arbitrators increased in recent years,[3] although the percentage of arbitrators removed has remained stable.[4] Some suggest that arbitration has become a more hostile process and that many challenges are tactically motivated.[5]

---

[1] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,552–53; RM Musk and T Ginsbury, 'Becoming an International Arbitrator: Qualifications, Disclosures, Conduct and Removal', in R Rhoades, DM Kolkey, and R Chernick (eds) *Practitioner's Handbook on International Commercial Arbitration and Mediation* (2nd edn, JurisNet, Huntington, NY, 2007) 369; J Lew, L Mistelis, and S Kröll, *Comparative and International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) 303.

[2] G Nicholas and C Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish', 23(1) Arb Intl 1, 2 (2007). The IBA Conflict Guidelines took this trend into account and noted the complication, stating, '[t]he growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine': IBA Conflict Guidelines, Introduction, para 1. Similarly, other commentators have noted that '[t]he consolidation both of commercial enterprise and of law firms which had previously been distinct into larger units increases the risk that arbitrators will have connections with parties or their affiliates of which they are unaware and consequently do not disclose': Lord Mustill and SC Boyd, *Commercial Arbitration* (Companion Volume to 2nd edn, Butterworths, London, 2001) 96.

[3] N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) para 4-91 (noting that most of the main arbitration institutions and some commentators have concluded that the practice of challenges of arbitrators has increased significantly).

[4] In 2003, the ICC Court considered 20 challenges and removed one arbitrator; in 2002, the ICC Court removed five arbitrators out of 17 challenges: ICC Intl Ct Bull, Statistical Reports (1996–2005). This trend continued in the recently released 2009 statistics, in which the ICC Court considered challenges in 34 arbitrations against 57 arbitrators and removed only five arbitrators: 21(2) ICC Ct Bull 9 (2010).

[5] *See Redfern and Hunter*, op cit, para 4-91. *See also* 'Preventing Delay or Disruption of Arbitration', ICCA Congress Series No 5 (1991), 131–59.

8.03 There is no doubt that challenge proceedings can have adverse, and sometimes dramatic, effects on an arbitration. They may increase the duration and cost of arbitrations, in some cases derailing an arbitration for months during the pendency of a challenge. Once an arbitrator is removed, he or she must be replaced in accordance with Article 10 (unless the parties agree otherwise). Some aspects of the arbitration may then need to be repeated.[6] If the arbitrator removal and replacement happens at a late stage in the proceedings, it may lead to significant further delays and expense.

8.04 When they are successful, challenges will also preclude a party from having its choice of arbitrator. As discussed above, choosing one's arbitrator has long been considered among the most valuable, fundamental features of commercial and ad hoc arbitrations.

8.05 For all of these reasons, the substantive standard and the procedure for challenging an arbitrator are vitally important to the arbitral process. Justifiably, practitioners and participants have demanded clarity, consistency, and predictability regarding precisely what constitutes 'justifiable doubts' sufficient for removal under the ICDR Rules and other leading arbitration rules.[7]

8.06 Although the text of Articles 8 and 9 permits a party to challenge an arbitrator after identifying 'justifiable doubts' as to an arbitrator's impartiality or independence, neither the ICDR Rules nor any published guidelines by the AAA elaborate on the underlying standards that the ICDR administrator would use to decide upon a challenge pursuant to Article 9. In keeping with the generally confidential nature of commercial arbitration proceedings, the ICDR rarely publishes decisions regarding challenges.[8] Thus, how the ICDR (or many other institutions) determine contested challenges is difficult to ascertain.

8.07 Notably, the IBA Guidelines on the Resolution of Conflicts in International Arbitrations (the 'IBA Conflict Guidelines'), which were approved on 22 May 2004, have also gone some way towards guiding arbitrators and parties alike on what challenges are more likely to be successful. Of course, these guidelines are not binding on any institution. The existing uncertainties, and the strong push for more transparency in the application of these standards, have led some commentators to call for institutions to provide more specific guidance or to publish the written, reasoned decisions of institutions on arbitrator challenges, redacted to protect

[6] *See* ICDR Rules, Art 11(2), 'Replacement of an Arbitrator'.

[7] Even so, these challenges are sustained in very few cases and the vast majority of cases do not involve an arbitrator challenge. *See* ICC Ct Bull, Statistical Reports 1996–2005.

[8] As discussed below, Art 27(8) of the ICDR Rules permits the administrator to publish or otherwise make publicly available selected awards, decisions, and rulings that have been edited to conceal the names of the parties. In practice, the ICDR rarely publishes decisions, although a few awards are available on certain legal research websites.

confidential information regarding the parties, the arbitrators, and the issues in dispute.[9]

8.08 Finally, it bears emphasis that challenges may still be determined in national courts if the mandatory law at the seat of the arbitration so requires, where choice of law issues may implicate national arbitration statutes,[10] or where an arbitrator is challenged at the recognition and enforcement stage before national courts. Further, national arbitration law at the seat of the arbitration may also provide for a review of the administrator's decision under Article 9 by the local courts. National court decisions and challenge decisions under other institutional rules provide some insight into the standards that govern a challenge, and parties are well advised to study those standards as applicable to their particular case.

II. Textual commentary

A. Challenging an arbitrator (Article 8(1))

Article 8(1)

A party may challenge any arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party wishing to challenge an arbitrator shall send notice of the challenge to the administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party.

1. When to challenge an arbitrator

8.09 A party may challenge an arbitrator at any time whenever circumstances arise that lead a party to have 'justifiable doubts' about the arbitrator's impartiality or independence. Parties are well advised to raise their substantiated challenges as soon as possible after learning of the circumstances giving rise to the challenge. Notably, as discussed in more detail below,[11] a party is deemed under the ICDR Rules to have waived its right to challenge an arbitrator if it knows of a reason to challenge, but does not meet the 15-day deadline for instituting a challenge according to Article 8(1).

[9] GB Born, *International Commercial Arbitration* (Kluwer International Arbitration, The Hague, 2009) 1,559–60; G Nicholas and C Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish', 23(1) Arb Intl 1, 7 (2007).

[10] Born, op cit (discussing the option of seeking an interlocutory challenge to an arbitrator in some national courts under national laws).

[11] *See* below at para 8.22 ff.

8.10 Irrespective of any waiver, arbitrators are in practice more likely to be unseated when the challenge is made early in the proceeding, rather than if it were made in the late stages of an arbitration. In practice, challenges in the early stages of arbitrations may result in an arbitrator withdrawing of his or her own accord more often than in the later stages, because the arbitrators will have invested less time in the dispute and may be reluctant to move forward with one party opposing them. Even in contested challenges, anecdotal evidence from leading institutions seems to indicate that challenges are significantly more likely to succeed if a party challenges an individual before the institution confirms the arbitrator's nomination, rather than after the proceedings commence. For example, several ICC surveys show that a higher number of pre-appointment challenges succeed than post-appointment. Challenges under the ICC Rules up to 2000 that were lodged after the commencement of the proceedings, however, have succeeded in only 10 per cent of cases.[12]

8.11 Some scholars and practitioners have argued that institutions should more readily sustain challenges (and thus be more willing to remove arbitrators) at the early stages of the proceedings and be more reluctant to remove an arbitrator for conflicts after the proceedings have gotten under way. The argument is rooted in the twin goals of efficiency and reducing costs, because parties may be forced to repeat significant portions of the hearings if an arbitrator is removed after significant procedural or merits decisions have been taken. For example, the drafters of the 1976 UNCITRAL Rules 'wanted to ensure that challenges were made at the earliest possible stage . . . due to the high costs of challenges made once proceedings are well under way'.[13]

8.12 Whilst efficiency and cost are important considerations, that argument is ultimately not convincing, and not supported by the ICDR Rules. Article 8 specifically allows for a challenge 'within 15 days after the circumstances giving rise to the challenge become known to that party', yet makes no reference at all to the stage of the arbitration at the time that the challenge is raised. What matters therefore, in terms of timeliness, is not whether the arbitration has advanced, but whether an aggrieved party has raised the challenge as soon as (and no later than 15 days after) discovering a disqualifying circumstance. In some cases, this may well be far into the arbitration.

8.13 However, given an institution's motivation to save the parties time and cost, it may be difficult to show for a party that it did in fact not know of the disqualifying circumstance earlier—or even that it could not or should not have known of the circumstance earlier. Although Article 8 does, on its face, not suggest that a

[12] W Craig, W Park, and J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications, New York, 2000) para 13-01.

[13] D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 241. The recently released 2010 UNCITRAL Rules maintain this policy of encouraging immediate challenges in Art 13.

challenge must be raised within 15 days after a party *ought to have known* of a disqualifying circumstance, it is unsatisfactory to allow a party to turn, perhaps deliberately, a blind eye to suspicious circumstances and to seek affirmative knowledge at a tactically opportune moment in the future. In practice, this raises difficult questions, which the administrator has to resolve within the discretion vested upon it by virtue of Article 9.

2. The substantive standard for challenging an arbitrator

8.14 Reflecting solely on the text of the relevant articles, the standard for *removing* an arbitrator is different from the standard for which *disclosure* is required: an arbitrator will be removed under Article 8 if circumstances *exist* that give rise to justifiable doubts as to the arbitrator's impartiality or independence, whereas the arbitrator must disclose all circumstances that are *likely* to give rise to justifiable doubts. Thus, disclosure is required if there is a *likelihood* of disqualifying circumstances, whereas disqualification itself depends on the *actual existence* of justifiable doubts as to the arbitrator's impartiality. This subtle, but perhaps critical, distinction triggers additional questions, such as whether the appearance of partiality alone will sustain a challenge, how to establish partiality (presumably a subjective state), and whether different standards of impartiality apply at different stages of the proceedings. Articles 8 and 9 of the ICDR Rules do not directly answer these questions.

8.15 In practice, the ICDR administrator will be primarily guided by the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes and, in particular in cases that have their seat in the US, by US case law. Whilst the IBA Conflict Guidelines provide an important 'internationalized' framework for determining conflicts in international arbitration,[14] which some arbitration institutions, such as the SCC and the WIPO, will take into consideration when deciding challenges,[15] the ICDR 'does not use [the IBA Conflict Guidelines] as a 'template', but only 'applies the standard of independence' in accordance with the IBA Conflict Guidelines.[16]

8.16 National court decisions on arbitrator conflicts under other institutional arbitration rules have highlighted several key factors that may affect the analysis. For example, one US appellate court held that conflicts:

> include an arbitrator's financial interest in the outcome of the arbitration, an arbitrator's ruling on a grievance that directly concerned his own lucrative employment for a considerable period of time, a family relationship that made the arbitrator's

[14] *See* above para 7.12.

[15] G Nicholas and C Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish', 23(1) Arb Intl 1, 2 (2007).

[16] Ibid.

impartiality suspect, the arbitrator's former employment by one of the parties, and the arbitrator's employment by a firm represented by one of the parties' law firms.[17]

Similarly, another US court listed four factors that are relevant to an arbitrator's bias:

(1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceedings;
(2) the directness of the relationship between the arbitrator and the party he is alleged to favor, keeping in mind that the relationship must be 'substantial', rather than 'trivial' . . .
(3) the relationship's connection to the arbitration; and
(4) the proximity in time between the relationship and the arbitration proceeding.[18]

From these and other decisions, practitioners and arbitrators can glean several recurrent scenarios that pose problems under conflict rules, as follows. **8.17**

(1) An arbitrator clearly cannot decide a case in which he or she is a party.[19]
(2) Similarly, it is well established that an arbitrator must not have a financial interest in the outcome.[20]
(3) A party may not directly and presently employ an arbitrator, because such a relationship results in the arbitrator essentially deciding his or her own case.[21]
(4) An arbitrator who was previously involved in the case is presumed to be biased.[22]
(5) Familial ties between an arbitrator and a party may result in a finding of a conflict.[23]

[17] *Toyota of Berkeley v Auto Salesman's Union Local 1095*, 834 F2d 751, 756 (9th Cir 1987) (citations omitted).

[18] *Hobet Mining, Inc v Intl Union, United Mine Workers*, 877 F Supp 1011, 1020 (SD W Va 1994) (considering a challenge under the FAA for 'evident partiality' and applying the AAA Code of Ethics to the arbitrator's lack of disclosure).

[19] *See Cross and Brown Co v Nelson*, 167 NYS2d 573, 576 (NY App Div 1957) (invalidating an agreement where the board of directors of a corporate entity was designated to decide disputes where that entity was a party); IBA Guidelines, Explanation to General Standard 2(d) (noting that 'this situation cannot be waived by the parties').

[20] *See eg Middlesex Mutual Ins Co v Levine*, 675 F2d 1197 (11th Cir 1982); *Hyman v Pottberg's Ex'rs*, 101 F2d 262 (2d Cir 1939).

[21] *See* IBA Conflict Guidelines, Explanation to General Standard 2(d) and Non-waivable Red List 1.1., 1.2; *Donegal Ins Co v Longo*, 610 A2d 466 (Pa Super Ct 1992) (holding that arbitrator's current representation of a party in an unrelated matter violated due process).

[22] *Commonwealth Coatings Corp v Continental Cas Co*, 393 US 145 (1968) (holding that a conflict existed where the presiding arbitrator had been a consultant to one of the parties on several occasions).

[23] *Pacific and Arctic Ry and Navigation Co v United Transp Union*, 952 F2d 1144, 1148–49 (9th Cir 1991) (vacating award where presiding arbitrator was a friend of the president of one of the parties and dined with the president—at the party's expense—before the hearing). But *see Hobet Mining, Inc v Intl Union, United Mining Workers*, 877 FSupp 1011 (SD W Va 1994) (analysing the proximity of the

(6) Non-trivial business relationships between an arbitrator and a party may result in a finding of a conflict.[24]
(7) Conflicts related to prior representation by or of a law firm of a party or an affiliate of a party often surface.[25]
(8) Finally, as discussed above, *ex parte* communications may also result in a disqualification based on presumed bias after the exchange.

Underlying these fact scenarios is the theme that the precise circumstances can have a drastic impact on how a court or an institutional administrator may decide a challenge.

8.18 Furthermore, these examples highlight another issue: is the 'appearance' of partiality—as opposed to actual partiality—sufficient to sustain a challenge or warrant the *vacatur* of the award? One English court called for the consideration of whether there 'is any real danger of bias on the part of the decision maker'.[26] There does not appear to be a clear answer under US law. Several US courts have rejected the notion that the appearance of bias alone justifies a challenge,[27] but there is at least one Federal court that has vacated an award based on the appearance of bias alone.[28] In many civil law jurisdictions, the appearance of bias is sufficient.[29]

relationship and its potential impact on the dispute, and ultimate holding that the arbitrator was not disqualified even though his brother was an executive in a related corporation).

[24] *Petroleum Cargo Carriers Ltd v Unitas, Inc* 220 NYS2d 724 (NY Sup Ct 1961) (vacating award where arbitrator's firm received US$350,000 in commissions from the party), affd 224 NYS2d 654 (NY App Div 1962).

[25] *Al-Harbi v Citibank NA*, 85 F3d 680, 682 (DC Cir 1996) (refusing to vacate award where arbitrator was a former partner of a firm representing one party); *Fertilizer Corp of India v IDI Management Inc*, 517 F Supp 948 (SD Ohio 1981) (party-appointed arbitrator had served as counsel for the party on several occasions).

[26] *AT&T Corp v Saudi Cable Co* [2000] 2 Lloyd's Rep 127 (English Court of Appeal). One commentator has concluded that the 'real danger' standard is similar to a rejection of the mere appearance of bias in the US courts: GB Born, *International Commercial Arbitration* (Kluwer International Arbitration, The Hague, 2009) 1,480.

[27] *Sheet Metal Workers Intl Ass'n Local 420 v Kinney Air Conditioning Co*, 756 F2d 742, 745–46 (9th Cir 1985) (holding that the appearance of impropriety, standing alone, does not establish bias and that the burden of proving specific facts indicating improper motives rests on the party challenging the arbitral award); *Morelite Constr Corp v N Y C Dist Council Carpenters Benefit Funds*, 748 F2d 79, 83–84 (2d Cir 1984) (holding that evident partiality existed where a reasonable person would have to conclude that the arbitrator was partial); *Hunt v Mobil Oil Corp*, 654 F Supp 1487, 1497–98 (SDNY 1987) (' "Evident partiality" means more than a mere appearance of bias'); *Apperson v Fleet Carrier Corp*, 879 F2d 1344, 1358 (6th Cir 1989) (considering whether the appearance of bias suffices under s 10(b) of the FAA); *Applied Indus Materials Corp v Ovalar Makine Ticaret Ve Sanayai AS*, No 05CV10540, 2006 WL 1816383, *9 (SDNY 28 June 2006) (suggesting that the appearance of impropriety alone is enough to justify a challenge), affd 492 F3d 132 (2d Cir 2007).

[28] *Crow Constr Co v Jeffrey M Brown Assoc Inc*, 264 FSupp2d 217 (ED Pa 2003).

[29] Under French law, an arbitrator will be considered biased if a party can show that there is reason to suspect that an arbitrator will prefer one party over another. Actual bias need not be proven by either party. See *Judgment of 28 November 2003* (Paris Cour d'Appel) (2003) Rev Arb 445. Under Swiss Law, an arbitrator can be removed on the grounds of bias 'if there are circumstances which are capable of raising distrust in the impartiality of a judge': Judgment of 9 February 1998 16 ASA

8.19 Under the ICDR Rules, an appearance of impartiality appears to be sufficient to justify disqualification. After all, Article 8 does not require a showing that an arbitrator is actually biased, but merely demands the existence of circumstances that justify doubts as to the arbitrator's impartiality.

8.20 In addition to the debate surrounding the appearance of partiality, it is inherently difficult to prove partiality. As discussed above, partiality, or 'bias', is a subjective state of mind. In the words of one US judge: 'Bias is always difficult, and indeed often impossible, to "prove". Unless an arbitrator publicly announces his partiality, or is overheard in a moment of private admission, it is difficult to imagine how "proof" would be obtained.'[30] In practice, a party must rely on, and base its challenge upon, its own inferences from the arbitrator's observable conduct, discussions, and relationships, [31] which typically evidence a lack of independence—which, in turn, allows the inference of justifiable doubts as to the arbitrator's impartiality.

8.21 Although bias is the focus in challenge proceedings, other grounds for removal exist in practice, such as incapacity, failure to conduct or participate in the arbitral proceedings, and failure to satisfy the qualifications required by the parties' arbitration agreement, to name a few.[32] Some of these other grounds for removal arguably may be found to exist in the ICDR Rules under the broad discretion granted to the remaining arbitrators on the tribunal by Article 11 to continue the proceedings in the absence of the third arbitrator, or to 'determine not to continue the arbitration without the participation of the third arbitrator', and thus require the administrator to declare the office vacant so that another arbitrator may be appointed according to Article 6.

Bull 634, 644. Similarly, s 8 of the Swedish Arbitration Act states that an arbitrator may be discharged 'if there exists any circumstance which may diminish confidence in the arbitrator's impartiality'.

[30] *Morelite Constr*, 748 F2d, 84.

[31] GB Born, *International Commercial Arbitration* (Kluwer International Arbitration, The Hague, 2009) 1,481.

[32] *Report of the UNCITRAL on the Summary of Discussion of the Preliminary Draft*, Eighth Session, UN Doc A/10017, para 73, VIY.B. UNCITRAL 24, 32 (1975) (noting a hierarchy of grounds for removal); E Gaillard and J Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 586 (noting that a challenge can be based on an alleged absence of the special, technical, linguistic, or legal skills required of an arbitrator in a particular dispute); W Craig, W Park, and J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications, New York, 2000) para 13-05 (noting that other grounds for challenge include nationality, direct interest in the subject matter of the arbitration, previously expressed opinion, and due process violations); JDM Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) 302:

> The grounds which justify a challenge differ depending on the rules and laws applicable. Since most of them recognise the lack of 'qualifications agreed to by the parties' as a reason for challenge the whole process is de facto submitted to party autonomy. As the parties are free to agree on whatever qualifications they want they can agree on what reasons justify a challenge.

3. The procedure to challenge an arbitrator

8.22 To minimize the disruption of a challenge to ongoing proceedings and to prevent parties from obstructive tactics, the parties must file a challenge no later than 15 days either after being notified by the ICDR of the appointment or after learning of the disqualifying circumstance. All leading institutional rules require the challenging party to submit its challenge within a similarly short time period.[33]

8.23 A party is deemed to have waived its right to a challenge under Article 8 if it waits longer than 15 days to bring its challenge, and such a belated challenge will not be accepted by the administrator. The rationale for the requirement that a party file a timely challenge or face waiver is clear: parties cannot be permitted to continue in a proceeding while they conceal grounds for objecting to the arbitrators. One US court described the absurd result that would occur absent a waiver rule as amounting to a '[h]eads I win, tails you lose' approach to challenging arbitrators.[34] The judgment explained that '[w]here a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection.'[35]

8.24 While the position is clear regarding the timing of any challenge under the ICDR Rules (as under other institutional rules), national law at the seat of the arbitration may provide that certain conflicts cannot validly be waived (sometimes because particularly grave conflicts touch on procedural public policy)[36] and, therefore, can be advanced even after the 15-day period has expired. The IBA Conflict Guidelines also explicitly adopt the position that certain conflicts may not be waived. Those Guidelines distinguish between these and other waivable conflicts within the 'Red List', thus permitting waiver only of particular conflicts and only if all parties, once fully informed, agree.[37] In practice, time limits under institutional rules are strictly

---

[33] The ICDR rules align with the revised 2010 UNCITRAL Rules, Art 13, which provides: 'A party that intends to challenge an arbitrator shall send notice of its challenge within fifteen days after it has been notified of the appointment of the challenged arbitrator or within fifteen days after the circumstances mentioned in articles 11 and 12 became known to that party.'

[34] *AAOT Foreign Econ Assn (VO) Technostroyexport v Intl Dev and Trade Serv, Inc*, 139 F3d 980, 982 (2d Cir 1998).

[35] Ibid, quoting *Ilios Shipping and Trading Corp v American Anthracite and Bituminous Coal Corp*, 148 FSupp 698, 700 (SDNY), affd 245 F2d 873 (2d Cir 1957) (*per curiam*).

[36] F Schwarz and H Ortner, 'Procedural *Ordre Public* and the Internationalization of Public Policy in Arbitration', *Austrian Arbitration Yearbook* (2008) 133–220.

[37] *See* IBA Conflict Guidelines, Explanatory Note 4(c):

> In a serious conflict of interest, such as those that are described by way of example in the waivable Red List, the parties may nevertheless wish to use such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. The Working Group believes persons with such a serious conflict of interests may serve as arbitrators only if the parties make fully informed, explicit waivers.

See also GB Born, *International Commercial Arbitration* (Kluwer International Arbitration, The Hague, 2009) 1,511–12 (noting the possibility and acceptability of parties agreeing to partial

enforced in national courts and thus the parties will be deemed to have waived the challenge[38] unless there is a grave public policy reason at stake.

B. A 'reasoned' challenge (Article 8(2))

Article 8(2)

The challenge shall state in writing the reasons for the challenge.

8.25 Article 8(2) requires that a challenge must be written and filed with the administrator, and must contain reasons. Parties are well advised to provide detailed reasons to make their challenge persuasive and to refrain from challenges that are unlikely to succeed. Although Article 8(3) requires a party that challenges the nomination or continued service of an arbitrator to submit reasons to the ICDR administrator, the ICDR does not have to submit reasons when it decides a challenge, as discussed below.

C. Notification of the challenge and voluntary or agreed withdrawal (Article 8(3))

Article 8(3)

Upon receipt of such a challenge, the administrator shall notify the other parties of the challenge. When an arbitrator has been challenged by one party, the other party or parties may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator may also withdraw from office in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.

1. Notification of the challenge

8.26 Article 8(3) provides that, once a challenge is received, the other party is notified. In practice, notification of a challenge is provided to all parties and all arbitrators, including the challenged arbitrator, and all parties are afforded an opportunity to comment—a practice that aligns with the 2010 UNCITRAL Rules, in which the appointing authority chosen by the parties decides upon arbitrator challenges.[39] Although it is processed by the ICDR case manager, the ICDR has confirmed that the challenge is typically decided by an ICDR officer of at least supervisory status. The requirement for notice under the ICDR Rules differs significantly from the

arbitrators in the US, but also noting that certain unwaivable conflicts exist, as outlined in the IBA Conflict Guidelines).

[38] Born, op cit, 1,579.

[39] 2010 UNCITRAL Rules, Art 13(2).

notice requirement in the AAA Commercial Rules. The AAA Commercial Rules do not provide for either a proposed or a sitting arbitrator to have notice of the challenge, and forbid either party from notifying the arbitrator(s) of the challenge.[40] The result is that the AAA does not afford an arbitrator a chance to be heard, or even to comment on a challenge to his or her partiality or independence. Furthermore, if the AAA sustains the challenge, the AAA removes the arbitrator without providing any explanation or reasons.[41] The rationale behind the AAA policy is to prevent potential prejudice that may result from the arbitrator learning of the challenge.

8.27 Although the approach adopted under the AAA Commercial Rules does not reflect international practice, it has some merits. A challenge that does not ultimately result in removal of the arbitrator may produce a hostile environment. A party typically needs to heed the old maxim 'if you shoot at a king, you must kill him'—weighing the potential risk of having an arbitrator on the panel who knows that a party sought to remove him or her against having one's dispute decided by an arbitrator for whom a conflict arose during the course of the tribunal or who is potentially biased.[42]

8.28 After the challenging party presents its arguments for removing the arbitrator, the ICDR administrator must apply the standards outlined under Article 9 to the constellation of facts arising in a particular application for challenge. The ICDR supervisory administrative staff decides challenges, but will consult with others within the ICDR when it is necessary. The ICDR administrator's resulting decision—either to disqualify or to retain an arbitrator—does not contain statements of reasons and is not published.[43]

8.29 Other leading institutions generally adopt the same broad procedures regarding the challenge of an arbitrator for partiality or affiliation with a party, which leave the decision on the merits of the challenge to the discretion of the institution. The ICC Rules, for example, require that challenges to proposed or sitting arbitrators are submitted to, and decided by, the ICC Court.[44] The ICC Court accepts only written submissions regarding a challenge and does not conduct further evidentiary

[40] AAA Commercial Rules, s R-17.

[41] Born, op cit, 1,555 (criticizing the AAA for failing to provide notice and forbidding the parties from notifying any of the arbitrators).

[42] See ibid, n 1,037; 'Organisation of the Defence and Proceedings: Act II, Scene II', 24(1) Arb Intl 37, 50–51 (2008) (transcript of the 17th Annual Workshop of the Institute for Transnational Arbitration, June 2006) (discussing potential prejudice in the context of ICSID arbitrations).

[43] JH Carter, 'The Selection of Arbitrators', in JH Carter and J Fellas (eds) *International Commercial Arbitration in New York* (Oxford University Press, Oxford, 2010) 133.

[44] ICC Rules, Art 11(1) and (3); Y Derains and E Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International, The Hague, 2005) 188 ff.

or oral hearings. The LCIA follows a similar approach.[45] In 2006, the LCIA decided to publish redacted decisions disposing of arbitrator challenges.[46]

2. Agreed or voluntary withdrawal

8.30 When a party brings a challenge and all parties to the arbitration agree that the arbitrator should withdraw, the arbitrator must withdraw. This results from the contractual nature of arbitration, in which the arbitrator's mandate arises from the parties' selection of that arbitrator, or the method of selecting that arbitrator.[47] Where an arbitrator lacks the support and trust of both parties, his or her mandate ends.

8.31 Article 8(3) also provides the challenged arbitrator with the opportunity to voluntarily withdraw before the administrator considers the challenge. If disqualifying circumstances exist, the arbitrator is obliged to withdraw. But even where no objective reasons for disqualification exist, a challenged arbitrator may consider that his or her withdrawal in fact benefits the process, the dynamics of the tribunal, or the acceptance of a final award. To protect an arbitrator in such circumstances, Article 8(3) expressly provides that the voluntary withdrawal (or the withdrawal on the back of the parties' agreement) does not 'imply acceptance of the validity of the grounds for the challenge'.

8.32 However, where no reasons for disqualification exist, an arbitrator may well be under the contractual duty to continue his or her service and to discharge his or her judicial function to the parties, maintaining the appointing party's right to have an arbitrator of its choosing hear its dispute, and avoiding the delay and disruption (in particular at advanced stages of the proceedings) associated with having to appoint a replacement. Because Article 10 requires the administrator to appoint a substitute arbitrator when 'the administrator determines that there are sufficient reasons to accept the resignation of an arbitrator', in principle, an arbitrator is obliged to remain in office in cases in which no 'sufficient reason' for a resignation exists.

[45] *See* LCIA Rules, Art 10; G Nicholas and C Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish', 23(1) Arb Intl 1, 6 (2007).

[46] *See* Nicholas and Partasides, op cit.

[47] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,597–99, 1,611–13 (pointing to the parties' overall control of the procedures and the analogous right to terminate the arbitrator's contract).

This page intentionally left blank