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

Article 9

If the other party or parties do not agree to the challenge or the challenged arbitrator does not withdraw, the administrator in its sole discretion shall make the decision on the challenge.

I. Introduction

9.01 Article 9, which addresses the ICDR's power to decide on a challenge, completes the sequence of Articles 7 and 8 regarding the challenge of arbitrators, and must be read in context with those provisions.

9.02 If the parties do not agree on the merits of the challenge and if the arbitrator does not voluntarily withdraw, it is for the administrator, in his or her sole discretion, to decide the challenge. After the ICDR reviews the parties' submissions and arbitrator's comments, the administrator ordinarily resolves the challenge quickly. If the challenge is rejected, the arbitration will proceed. If the challenge is granted, the arbitrator will be replaced pursuant to Article 10. Typically, the ICDR's decision is final and the parties lack any additional recourse or grounds for objection—absent the possibility of judicial review in some jurisdictions, as discussed below. In 2009, the ICDR heard 49 challenges, of which, it accepted 18.[1]

[1] In 2008, the ICDR heard 27 challenges, of which it sustained 13; in 2007, it sustained 16 challenges out of a total of 37. The average time that it took the ICDR to decide a challenge was between one and three days.

II. Textual commentary

A. No reasoned decisions on challenges

9.03 Even though the outcome of a challenge before the ICDR can dramatically affect the proceeding, the ICDR's decision usually does not contain reasons. The traditional view has held that institutional rules do not require reasoned, written decisions on arbitrator challenges to be distributed to the parties because such decisions would delay the challenge process, provide grounds for future litigation, and plant seeds for future challenges.[2] Also, it was frequently argued that disseminating the reasons for sustaining or denying a challenge would violate the parties' and arbitrators' expectations of confidentiality. Even so, there appears to be a disconnect between the calls for increased transparency in arbitral decision-making and the dearth of guidance on how administrators decide challenges. Although scholars and, indeed, parties have clamoured for transparency to understand how administrators apply standards for partiality to the facts,[3] no institutional rules, in fact, require that the deciding institution must submit its reasons for sustaining a challenge to the parties.[4] The ICC Rules go one step further than the ICDR Rules in explicitly specifying that the decisions will be final and that no rationale will be communicated to the parties.[5]

9.04 Even so, the growing trend is for institutions to make their reasoning more accessible. While the LCIA Rules provide that the LCIA 'shall not be required to give reasons',[6] nevertheless, it has recently decided to publish sanitized versions of challenge decisions. The LCIA explained its decision:[7]

> The publication in appropriate form of the growing wealth of LCIA learning and guidance on independence and impartiality not only responds to mounting calls for greater transparency, but is also likely to make a unique contribution to filling the void in guidance.

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[2] Whitesell, Remarks made at *International Commercial Arbitration in Latin America: The ICC Perspective*, 4–6 November 2007 (Miami); G Nicholas and C Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish', 23(1) Arb Intl 1, 6 (2007).

[3] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,560; CG Buys, 'The Tension between Confidentiality and Transparency in International Arbitration', 14 Am Rev Intl Arb 13 (2003).

[4] This is the case for the ICC Rules, Art 7(4), CIETAC Rules, Art 31, LCIA Rules, Art 29(1), and AAA Commercial Rules, s R-17(b).

[5] ICC Rules, Art 7(4) provides '[t]he decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated'.

[6] LCIA Rules, Art 29(1).

[7] *LCIA News*, 'Director General's Review of 2006' (January 2007) available online at <http://www.lcia-arbitration.com>; P Turner and R Mohtashami, *A Guide to the LCIA Arbitration Rules* (Oxford University Press, Oxford, 2009) 48.

The appointing authorities selected by the Permanent Court of Arbitration have also published several challenge decisions.[8]

Providing reasons may enhance the parties' confidence that their objections were taken seriously, and also bring greater clarity and predictability to the challenge process. In relying on such published decisions, however, parties should note that the context of the challenge and the specific circumstances usually drive the analysis and the result. Although some commentators fear that publishing decisions could create confusion, distort key issues in the arbitration, or lead to even more arbitrary results if the principles in published extracts were to be applied to other, factually dissimilar challenge fact-patterns,[9] greater transparency, and guidance are much needed. **9.05**

B. Challenging arbitrators pursuant to national law

Some modern arbitration statutes provide a process to review (immediately) challenge decisions rendered by tribunals or institutions in the national courts,[10] or else for parties to apply to vacate an award based upon the arbitrator's lack of independence and impartiality.[11] In addition, under some national arbitration laws, a party may use an interlocutory request to the national courts to challenge and remove an arbitrator on the basis of bias while the arbitration procedure is ongoing.[12] Under the FAA, there is no basis to challenge an arbitrator through a request for interlocutory relief. The absence of this procedural remedy would appreciably limit the options available to a party seeking to challenge an arbitrator **9.06**

[8] *See eg* Born, op cit, 1,560, citing *Challenge Decision of Appointing Authority Designated by the Secretary-General of the PCA* (15 April 1993), XXII YB Comm Arb 222 (1997).

[9] Whitesell, Remarks made at *International Commercial Arbitration in Latin America: The ICC Perspective*, 4–6 November 2007 (Miami); G Nicholas and C Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish', 23(1) Arb Intl 1, 22–23 (2007) (noting some concerns regarding publishing challenged decisions, including: first, the fact that challenges are of such a fact-specific nature that there is little precedential value in being aware of decisions that have been taken in earlier challenges; second, making more challenge guidance available may increase the number of challenges; third, the publication of decisions may lead to court challenges founded on the alleged inconsistency of a challenged decision with an earlier published decision; and finally, the concern that the publication of challenged decisions is somehow inconsistent with the generally confidential nature of the arbitral process).

[10] *See eg* the three different appeals from an arbitral tribunal's decision under the English Arbitration Act 1996, ss 67 (appeal on the grounds that the tribunal had no substantive jurisdiction), 68 (appeal on the ground of a serious procedural irregularity), and 69 (appeal on point of law).

[11] *See eg* FAA, 9 USC s 10(a)(2) (providing that an award may be vacated if 'there was evident partiality or corruption in the arbitrators').

[12] *See eg* UNCITRAL Model Law, Art 13(1) (permitting interlocutory judicial removal in both ad hoc and institutional arbitrations); Germany ZPO, s 1037 (adopting the UNCITRAL Model Law); Singapore International Arbitration Act, s 3(1); Japanese Arbitration Law, art 19.

if the arbitration were seated in the USA.[13] Instead, the FAA only permits courts to address an arbitrator's independence in relation to a party's application to vacate an award based on partiality *after* the final award has been issued.[14] Indeed, US cases that address independence and impartiality do so in the context of considering a request to vacate an award under s 10(a)(2) of the FAA after the final award is rendered.[15] Thus, in a US-seated arbitration, a party applying to challenge under the procedure set forth in the ICDR's Article 15 would be required to wait until the final award were rendered before it would be able to raise its challenge before US courts.

9.07 In conclusion, the decision to challenge an arbitrator raises significant strategic questions for the parties, including weighing whether the benefits of the possibility of a successful challenge to an arguably impartial or not-independent arbitrator outweigh the drawbacks of:

- introducing a potentially costly delay to the proceedings;
- carrying the burden of proving its assertions of partiality without authoritative guidelines around which to structure its argument; and
- potentially losing the challenge and having the challenged arbitrator know that a particular party considered his or her analysis so partial or affiliations so intertwined with the other party's as to warrant a challenge.

These considerations, of course, interact. Often, therefore, the decision as to whether to bring a challenge against an arbitrator is extremely delicate and requires caution. Once the decision is made to challenge an arbitrator, however, it needs to be pursued with utmost rigour and based on solid grounds.

[13] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,466–70.

[14] The FAA, s 10(a)(2), provides that an award may be vacated if 'there was evident partiality or corruption in the arbitrators, or either of them'. The FAA contains neither a provision governing interlocutory challenges to arbitrators, nor a provision explicitly allowing removal of an arbitrator. Therefore, it has been noted that nearly all US decisions concerning an arbitrator's independence and impartiality have been rendered in the context of actions to vacate or to recognize awards, and not in the context of interlocutory challenges to arbitrators: *see* Born, op cit, 1,467.

[15] The US Court of Appeals for the Second Circuit, located in New York, noted that 'it is well established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of the award': *Aviall, Inc v Ryder Sys Inc*, 110 F3d 892, 895 (2d Cir 1997) (quoting *Michaels v Mariforum Shipping, SA*, 624 F2d 411, 414 n4 (2d Cir 1980); *see also Florasynth, Inc v Pickholz*, 750 F2d 171, 174 (2d Cir 1984); *Alter v Englander*, 901 F Supp 151, 153 (SDNY 1995); *Marc Rich and Co v Transmarine Seaways Corp*, 443 F Supp 386, 387 (SDNY 1978).