As most practitioners are aware, challenges to an arbitrator’s independence or impartiality are not everyday events, and successful challenges are rare. So why would a party wish to challenge arbitrator independence or impartiality? Normally, it will be for one of two reasons. The first, and obvious, reason will be a genuine desire by that party to protect its rights in the face of a concern over the independence or impartiality of the arbitrator. The second, possible, reason is that the challenge is made as an opportunistic exercise – seizing on some minor doubt as to an arbitrator’s independence or impartiality – and carried out for tactical reasons, most probably to create delay.

But, whatever the motivation, the party challenging the arbitrator’s independence or impartiality should know at the outset that the hurdle to success is set high. While arbitral rules and laws routinely provide for a mechanism to challenge arbitrators on the basis of a lack of independence or impartiality, such challenges on these grounds are, at least in the English courts, not often sustained. This is, hopefully, because where there is an obvious doubt as to independence or impartiality, the arbitrator has seen the light and resigned. If that is correct, it must mean that those cases which come to court represent either situations where the party has a genuine concern as to the independence or impartiality of the arbitrator but the issue is not clear cut, and so the party is looking to the court for assistance, or instances where the challenge is tactical, in which case it stands only a slim chance of success. Against this background, this article examines:

Arbitrators must be independent and/or impartial

The requirement that an arbitrator be independent and/or impartial is a fundamental one which goes to the heart of the proper adjudication of disputes. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights) provides that, “In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly …” (emphasis added). Article 6 is incorporated into English law by the Human Rights Act 1998.

It is well known that certain features of the arbitration process do not, of themselves, comply with Article 6 of the European Convention on Human Rights. However, an English court has held that arbitration is still a consensual process which is compatible with human rights (see Paul Stretford v The Football Association Ltd & Anr [2007] EWCA Civ 238).

The sources

The requirement of independence is expressed in a number of ways. Some sources talk of both independence and impartiality, others use one of the terms only. The relevant sources include:

- National statutes.
- Applicable arbitral rules.
- Published guides such as the International Bar Association’s Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines).
- Case law.
These are the sources any potential challenger will consult when framing his challenge under the applicable rules and law.

**Statute**

The UNCITRAL Model Law provides in Article 12(2) that "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence" (emphasis added).

The UNCITRAL Model Law therefore regards independence and impartiality as two separate requirements, where justifiable doubts as to either of which can give rise to a challenge. The IBA, in its publication *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, identifies a number of jurisdictions which have adopted Article 12(2) in its entirety, including Australia, Canada, Germany, The Netherlands and Singapore.

By contrast, in England the UNCITRAL Model Law has not been adopted in its entirety. Specifically, the Arbitration Act 1996 (Arbitration Act) differs in this instance from the UNCITRAL Model Law in that it does not contain a separate requirement for independence over and above impartiality (emphasis added):

- Section 1(a) of the Arbitration Act establishes that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense";
- Section 33(1) imposes on the tribunal the general duty to act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and
- Section 24(1) entitles a party to apply to court for the removal of an arbitrator on grounds which closely follow those of the UNCITRAL Model Law, including "(a) that circumstances exist that give rise to justifiable doubts as to his impartiality ... and that substantial injustice has been or will be caused to the applicant." (This latter requirement is apparently satisfied in any case where there are justifiable doubts: see TTMi v ASM [2005] EWHC 2238).

The Arbitration Act therefore appears to accept, in theory, that lack of independence, unless it gives rise to justifiable doubts about impartiality, is not relevant. However, in reality, the absence of a separate requirement of independence in the Arbitration Act is probably of little consequence, as the arbitral rules commonly adopted by commercial parties to govern their arbitrations often use both terms.

**Arbitral rules**

The common arbitral rules express the requirements for independence and/or impartiality in a number of different ways.

The UNCITRAL Rules are to much the same effect as the UNCITRAL Model Law:

- Article 10(1) provides that "Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence." (emphasis added); and
- Article 15 provides that “Subject to these rules the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

The International Chamber of Commerce (ICC) Rules, by Article 7(1), require that an arbitrator be and remain independent of the parties involved in the arbitration. Further, one of the duties on the tribunal is Article 15(2): “In all cases the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.” Article 11(1) then allows challenges to an arbitrator for “lack of independence or otherwise”. Again, the requirement is independence, although the addition of the words “or otherwise” suggests that there may be wider grounds on which the ICC Court can remove an arbitrator.

The London Court of International Arbitration (LCIA) Rules adopt both of the concepts. In Article 5(2), the requirement is that the arbitrator must “be and remain at all times impartial and independent of the parties and none shall act in the arbitration as advocates for any party” (emphasis added); this additional express requirement of independence appears to go further than the Arbitration Act requirement of impartiality only. Further, Article 14.1 imposes on the arbitrators a duty at all times: “(i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent.”

**Other sources**

In addition to statute and the arbitral rules referred to above, national laws apply various tests to determine whether the requirements of independence and/or
impartiality have, in fact, been met. Any prospective challenge will therefore have to take account of the position under the law of the place of the arbitration.

In the Background Information on the IBA Guidelines, the IBA provides a brief summary of the differing approaches adopted in national jurisdictions to determine whether there is impartiality and/or lack of independence, as the case may be. A variety of tests is identified in addition to that of Article 12(2) of the UNCITRAL Model Law or by way of further refinement of the statutory tests. This includes the English common law position as set out in Porter v Magill ([2001] UKHL 67) (“whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”), as well as tests requiring circumstances that may “diminish confidence in the arbitrator’s impartiality” in Sweden and “evident partiality” in the US.

The IBA Guidelines were published in 2004, in an attempt to provide some guidance to the international arbitration community in response to what was perceived as a growing problem of conflicts of interest on the part of arbitrators (and an increasing number of challenges). Despite not having the status of either law or arbitral rules, the hope was that the IBA Guidelines would find general acceptance in the international arbitration community. A practitioner wishing to challenge the independence or impartiality of an arbitrator should have early reference to the IBA Guidelines, as part of his assessment of the merits of any potential challenge.

The IBA Guidelines set out a number of General Standards and then provide specific practical guidance in the form of lists of example situations which do, or may, give rise to a conflict of interest. Among other things, the General Standards identify, unsurprisingly, that there should be an absence of actual bias and that arbitrators should decline appointment if there are justifiable doubts as to the arbitrator’s impartiality or independence. The IBA Guidelines go on to make clear that the justifiable doubts test is an objective one and give some explanation of how that test might be applied. Justifiable doubts will exist, for example, if:

- There is an identity of interest between a party and the arbitrator;
- The arbitrator is a legal representative of a legal entity in the arbitration; or
- The arbitrator has a significant financial or interest in the matter at stake.

The Non-Waivable Red List sets out the most obvious conflicts which amount to the arbitrator appearing to be a judge in his own cause and which cannot ever be cured by the parties’ waiver.

The Waivable Red List then goes on to set out situations which do (as opposed to may) give rise to justifiable doubts as to an arbitrator’s independence and impartiality, but which can be waived by parties expressly. Undoubtedly, the examples on the Waivable Red List are serious conflicts. The situations listed include, for example, where the arbitrator has had a previous involvement in the dispute or a close family member of the arbitrator has a significant financial interest in the matter. However, these are matters which the parties can, should they both agree, put to one side by their express waiver.

The Orange List sets out matters which ought to be disclosed by the arbitrator because they are situations which, in the eyes of the parties, may give rise to justifiable doubts (for example, situations where the arbitrator has acted against one of the parties in an unrelated matter). Accordingly, disclosure of such matters gives the parties the opportunity to object, should they so wish, although there is no presumption that the arbitrator will be disqualified on such an objection being taken. However, unlike the Waivable Red List where positive waiver is required, a deemed waiver is presumed if no objection has been made within 30 days after receipt of disclosure of a matter on the Orange List.

The Green List consists of matters which give rise to no appearance of, nor any actual, conflict of interest from the objective point of view. It includes matters such as a positional conflict (that is, an arbitrator having previously expressed a general view on an issue which also arises in the present arbitration) and the arbitrator’s law firm (but not the arbitrator) having acted against one of the parties in an unrelated matter.

The arbitral context

Practitioners need to remember that parties choose arbitration over litigation for a reason. Party autonomy is one of the defining features of arbitration, with two of arbitration’s often quoted advantages being the flexibility of arbitral procedure as compared to court procedure and arbitration’s potential to be better acquainted with the specialist nature of the subject matter being arbitrated. However, the latter can give rise to difficulties which would be unlikely to arise where the dispute was being dealt with by a judge in a national court.
In specialist fields, where hands-on and up-to-date knowledge is perceived as an advantage, the parties may want the arbitrator to have a certain familiarity with the subject matter or area of the dispute, something which a judge could lack. However, possession of this specialist knowledge could well increase the risk that the arbitrator either has his own firm views on a subject, or has done business, or been involved in disputes, with one of the parties or their legal advisers. This was recognized in Rustal Trading Ltd v Gill & Duffus SA [2000] 1 Lloyd’s Rep 14, where it was emphasised that:

“...it can fairly be assumed that one of the reasons why the parties have agreed to trade arbitration is that they wish to have their dispute decided by people who are themselves active traders and so have direct knowledge of how the trade works. However, if the arbitrators are themselves to be active traders there is every likelihood that at least one member of the tribunal will at some time have had commercial dealings with one or both of the parties to the dispute... [T]here are many ...features of commercial arbitration which find no parallel in the more formal procedures in Courts... They are known to and accepted by the parties and many people number them among the advantages of arbitration... In the case of a trade tribunal the fact that an arbitrator has previously had commercial dealings with one or both parties has never been regarded as sufficient of itself to raise a doubt about his ability to act impartially.”

**Mounting the challenge**

In light of the statutes, rules and guidelines (see above, The sources), it is reasonable for a party starting out on an arbitration under the major arbitral rules to expect an impartial hearing of his case by an independent tribunal. However, arbitrators are human and fallible. On occasion, an arbitrator may have a conflict, even if there is no suggestion of actual bias, but not perceive that he does. For example, the arbitrator may have forgotten some previous connection, perhaps only fleeting, with one of the parties or a witness, which, if revealed, could cause the other party concern that he might not receive the impartial hearing to which he was entitled.

If a party is concerned about an arbitrator’s independence or impartiality, there are the following three obvious avenues of challenge available to him (there is also the possibility that the other party will agree the challenge, in which case arbitral rules can provide for the arbitrator to be removed (for example, Article 10.4, LCIA)).

**Application to the arbitrator**

It is possible to overlook the first avenue of challenge – an application to the arbitrator – but, in practice, this is often the most effective. The possibility of the challenge being accepted by the arbitrator himself is acknowledged in the LCIA Rules (Article 10.4) and in the UNCITRAL Rules (Articles 11.3 and 12.1). Accordingly, by carefully taking the arbitrator through the facts and available materials, either on a paper application or at a hearing, a party can often persuade the arbitrator that, on reflection, there is an issue which can be seen to affect his independence and that he ought to step down.

However, advocates need to take care to avoid such discussions with the arbitrator becoming personalised as, if the challenge ultimately fails, the arbitrator will remain in post and continue to adjudicate on the dispute. In particular, advocates need to ensure they pitch their challenge carefully: is this an allegation of actual bias (obviously an extremely serious matter) or merely the raising of justifiable doubts over a conflict? Clearly, it is easier to allege the latter which, if made out, will be sufficient for the challenge to succeed. If so, there will, in most cases, be no need to take on the higher burden of alleging actual bias.

**Independent assessment**

If the application to the arbitrator himself does not succeed, then arbitral rules provide for some mechanism for independent assessment of the challenge. In the case of the ICC and LCIA, the relevant bodies are the ICC Court (Article 11) and the LCIA Court (Article 10) respectively. In relation to UNCITRAL, although an UNCITRAL arbitration is not institutional arbitration, the UNCITRAL Rules still provide that the relevant “appointing authority” will determine any challenge if necessary (Article 12).

**National courts**

Finally, and once other rights to challenge have been exhausted, national courts can play a role. Article 13(3) of the UNCITRAL Model Law provides for the possibility of a challenge to the national courts: “If a challenge under any procedure agreed upon by the parties... is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court ...to decide on the challenge...”. In England, section 24 of the Arbitration Act provides the grounds for removal of an arbitrator and sub-section 24(1)(a) permits it where there are “justifiable doubts” and “substantial injustice.
has been or will be caused to the applicant” (see above, The sources) (case law suggests this will be the case if such justifiable doubts exist).

However, the power of the court is a reserve one: subsection 24(2) is clear that "If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person." Accordingly, it is necessary to exhaust any available application under the relevant rules before applying to the court.

What not to do

Tactical or speculative challenges should, on the whole, be discouraged. In relation to any particular arbitration, the risk is not so much that the challenge is dismissed (which must be the likely outcome for a challenge with low prospects of success), but rather the risk that the party’s credibility is damaged so that, going forward, its substantive case is viewed (on an independent and impartial basis) with some scepticism by the tribunal. There is also the risk that the challenging party’s conduct will be criticised either by the relevant arbitral institution or, more likely perhaps, by the court if the party pursues a tactical or speculative challenge all the way.

It is also crucial for the challenging party not to delay once the relevant facts become known, since both the arbitral rules and statutes make it clear that delay can be fatal to challenge. The basic position is that a party must mount its challenge within a certain number of days of either the formation of the tribunal or, if later, the date on which it becomes aware of the facts which form the basis for the challenge (see, for example, Article 11, ICC Rules, Article 10, LCIA Rules, and Articles 9-12, UNCITRAL Rules).

A party can also lose its right to object: see, for example, the lead-in words to Article 11 of the ICC Rules – “For a challenge to be admissible, it must…” – or section 73 of the Arbitration Act in England. Under the Arbitration Act, it is unclear whether a full application to the court under section 24 has to be made as soon as the circumstances giving rise to the justifiable doubts are known (that is, if the arbitrator refuses to step down and any arbitral institute also refuses the application) or whether merely objecting, but proceeding with the rest of the arbitration under protest, will suffice, therefore giving rise to a possible challenge to the relevant award under section 68 of the Arbitration Act, on the basis that there is a serious irregularity. The TTMI case (see above, The sources) suggests a full challenge must be made, but the decision is open to doubt.

Conclusions

A party should reflect carefully before mounting any challenge to an arbitrator’s independence or impartiality: successful challenges are rare as the hurdle is set high and an opportunistic challenge could backfire as, if it fails, the arbitrator will remain in post and continue to adjudicate on the dispute. However, where a party has genuine concerns as to an arbitrator’s independence or impartiality, he should not delay, as both arbitral rules and statutes make it clear that delay can be fatal, even to a meritorious challenge.

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