Content:

No. XIII.2.3 - Grounds for challenge of an arbitrator

(a) An arbitrator may be challenged only if circumstances exist that, from the perspective of a reasonable third person having knowledge of the relevant facts, give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.

(b) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.

(c) Justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.

(d) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(e) The parties are free to agree on a procedure for challenging an arbitrator, subject to mandatory court control of the challenge as provided for by the arbitration law in force at the seat of the arbitration.

Commentary:

1 Because arbitrators exercise genuine judicial functions the concepts of ‘impartiality’ and ‘independence’ of international arbitrators are of paramount importance to ensuring and safeguarding the integrity of the international arbitral process. It is generally accepted that a lack of impartiality and independence on the part of an arbitrator is a ground for setting aside the award and refusing enforcement because the composition of the tribunal was not in accordance with the provisions of the arbitration law at the seat of the arbitration and the award thus violates international public policy. Together with the basic procedural rights of the parties to be heard and to be treated equally laid down in Art. 18 UNCITRAL Model Law, these principles serve to ensure that dispute settlement through arbitration enjoys the same degree of legitimacy and worldwide acceptance as adjudication before domestic courts. In fact, the preservation and safeguarding of these principles is the very reason why arbitration has the same standing as dispute resolution before domestic courts.

2 While it is perfectly legitimate for a party to select an arbitrator who is generally predisposed to it personally or to its legal position, the arbitrator must be and remain impartial and independent meaning that he or she can decide the dispute – without partiality – in favor of the party with the better case. The arbitrator can be favorably disposed towards one of the parties but must have an open mind and must be and remain in a position to decide the dispute against the party that appointed him.

3 The concepts of ‘impartiality’ and ‘independence’ are intentionally formulated rather broadly in order to cover all possible circumstances, which might justify a challenge from a party of the arbitration. Sometimes, a strict distinction between both concepts is advocated. ‘Independence’ is seen to refer to the relationship between the parties and the arbitrators while the arbitrator’s ‘impartiality’ is said to require a judgment that relates more to the arbitrator’s relationship with the substance of the dispute.

4 In reality, the differences in this field are more a matter of how these grounds can be detected than a matter of substance. In general, these concepts must be interpreted so as to cover all biased behavior of the arbitrators during the arbitral proceedings. Section 1 (a) and 24 (1) (a) 1996 UK Arbitration Act therefore make reference only to the tribunal’s or the arbitrator’s ‘impartiality’. It is the indirect or direct dependence of the arbitrator on one of the parties, a potentially important witness or the arbitral institution administering the proceedings, which provides the decisive evidence indicative of the arbitrator’s partiality or impartiality.

5 Always of particular importance are close personal or professional relationships with a co-arbitrator, a party or its...
counsel, and any direct personal or professional interest in the outcome of the case, as well as secret party communications during the proceedings. The nationality of an arbitrator on its own does not provide a ground for challenge.