Recusals and Challenges of Being an Arbitrator

Introduction

Arbitration is a widely used method of alternative dispute resolution that relies on the neutrality, independence, and integrity of the arbitrator. One of the most critical aspects of maintaining fairness in arbitration is the proper handling of recusals and challenges. These mechanisms ensure that arbitrators remain impartial and that parties retain confidence in the arbitration process.

Understanding Recusal

Recusal refers to the voluntary withdrawal of an arbitrator from a case due to a potential conflict of interest, bias, or any circumstance that may affect impartiality.

Grounds for Recusal

An arbitrator should consider recusal under the following circumstances:

- Personal or financial interest in the outcome of the dispute
- Prior involvement with one of the parties
- Existing professional or personal relationships with parties, counsel, or witnesses
- Access to confidential information that could influence decision-making
- Any situation that creates a reasonable appearance of bias

Duty to Disclose

Arbitrators have a continuing obligation to disclose any facts or circumstances that could give rise to doubts about their impartiality. Disclosure should be made:

- At the time of appointment
- Throughout the arbitration proceedings if new circumstances arise

Failure to disclose relevant information can lead to challenges, removal, or even invalidation of the arbitral award.

Challenges to Arbitrators

A challenge occurs when a party formally objects to the appointment or continued participation of an arbitrator.

Grounds for Challenge

Common grounds include:

- Lack of independence or impartiality
- Failure to disclose conflicts of interest
- Lack of qualifications agreed upon by the parties
- Misconduct or procedural unfairness

Challenge Procedure

While procedures vary depending on institutional rules or governing law, a typical process includes:

1. Submission of a written challenge by the objecting party
2. Opportunity for the arbitrator to respond
3. Review and decision by an appointing authority, arbitral institution, or court

Timing of Challenges

Challenges must generally be raised promptly after the relevant facts become known. Delayed objections may be deemed waived.

Ethical Responsibilities of Arbitrators

Arbitrators are bound by ethical standards that emphasize:

- Independence and impartiality
- Transparency through disclosure
- Competence and diligence
- Confidentiality

Adherence to these principles reduces the likelihood of recusals and challenges.

Practical Challenges Faced by Arbitrators

Balancing Disclosure and Privacy

Arbitrators must strike a balance between full transparency and respecting confidentiality or professional obligations.

Managing Repeat Appointments

Frequent appointments by the same party or counsel may create perceived bias, even if none exists.

Cultural and Legal Differences

In international arbitration, differing legal traditions and expectations regarding impartiality can complicate decisions on recusal and challenges.

Strategic Challenges by Parties

Parties may use challenges tactically to delay proceedings or gain advantage. Arbitrators and institutions must guard against abuse of the process.

Consequences of Improper Conduct

Failure to properly address conflicts or challenges can result in:

- Removal of the arbitrator
- Damage to professional reputation
- Setting aside or non-enforcement of the arbitral award
- Increased costs and delays in proceedings

Best Practices for Arbitrators

- Conduct thorough conflict checks before accepting appointments
- Make broad and timely disclosures
- Maintain detailed records of decisions and communications
- Seek guidance from institutional rules or ethical guidelines when in doubt
- Act promptly when potential conflicts arise

Case Law Examples

Commonwealth Coatings Corp. v. Continental Casualty Co. (U.S. Supreme Court, 1968)

This landmark case emphasized the importance of disclosure. The Court vacated an arbitral award because the arbitrator failed to disclose a significant business relationship with one of the parties. The ruling established that even the appearance of bias can undermine the validity of arbitration.

AT&T Corp. v. Saudi Cable Co. (7th Cir., 1999)

The court highlighted that not all undisclosed relationships warrant vacatur. It distinguished between trivial and substantial connections, reinforcing that challenges must be based on material facts that create a reasonable impression of partiality.

Halliburton Co. v. Chubb Bermuda Insurance Ltd (UK Supreme Court, 2020)

This case addressed repeat appointments and disclosure obligations. The Court held that arbitrators must disclose circumstances that might reasonably give rise to doubts about impartiality, including multiple appointments in related cases. However, non-disclosure alone does not automatically justify removal unless it gives rise to justifiable doubts.

IBA Guidelines on Conflicts of Interest (Soft Law Reference)

While not a court decision, these guidelines are frequently cited in arbitral decisions and national courts. They provide practical standards for determining when disclosure, recusal, or challenge is appropriate, including the well-known Red, Orange, and Green lists.

Additional International Case Law

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID, 2003)

In this ICSID case, issues of arbitrator independence and prior relationships were examined. The decision reinforced the importance of objective standards when assessing impartiality and the perception of bias in international arbitration.

Vivendi Universal S.A. v. Argentine Republic (ICSID, Annulment Committee, 2002)

This case highlighted procedural fairness and the integrity of arbitral proceedings. While not strictly a challenge case, it underscored that failure to adhere to fundamental procedural standards can lead to annulment.

Hrvatska Elektroprivreda d.d. v. Republic of Slovenia (ICSID, 2008)

The tribunal addressed conflicts arising from counsel changes during proceedings. The decision emphasized that late changes in representation could justify exclusion or other measures to preserve the integrity of the arbitration process.

Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela (ICSID, 2013)

This case is frequently cited in challenges to arbitrators. The arbitrator was disqualified due to his law firm’s relationship with one of the parties, reinforcing the appearance of bias standard.

Burlington Resources Inc. v. Republic of Ecuador (ICSID, 2013)

The decision involved a challenge based on alleged lack of independence and emphasized that challenges must be supported by clear and objective evidence.

ICSID Annulment Decisions on Arbitrator Bias

Eiser Infrastructure Ltd. v. Kingdom of Spain (ICSID, 2020)

The ad hoc Committee annulled the award because an arbitrator failed to disclose a long-standing relationship with the claimant's expert. The Committee found a manifest appearance of bias, improper constitution of the tribunal, and a serious departure from a fundamental rule of procedure.[1]

Suez, Sociedad General de Aguas de Barcelona & Vivendi v. Argentine Republic (ICSID, 2017)

The annulment committee rejected the bias challenge but clarified that proving lack of independence requires clear and objective evidence, not speculation.[2]

Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic (ICSID, 2010)

The committee reaffirmed that arbitrator independence is a fundamental procedural requirement and that annulment requires a manifest breach under the ICSID Convention.[3]

EDF International S.A. v. Argentine Republic (ICSID)

The tribunal emphasized that allegations of bias must be supported by concrete and compelling evidence rather than inference.[4]

Footnotes

[1] Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Decision on Annulment (11 June 2020).

[2] Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Annulment (5 May 2017).

[3] Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment (10 August 2010).

[4] EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23.

Conclusion

Recusals and challenges are essential safeguards in arbitration that uphold the integrity and legitimacy of the process. Arbitrators must remain vigilant, transparent, and ethically grounded to ensure fairness and maintain trust among parties. By understanding and properly managing these issues, arbitrators can effectively navigate the complexities of their role and contribute to a credible dispute resolution system.