

## A Study on Challenge and Dismissal of Arbitrator Under Iranian Law and International Conventions

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### Abstract

Arbitration centers are private organizations formed within Bar Associations and Chambers of Commerce. In much the same way that under certain conditions, judge can be challenged, one of the means to guarantee the impartiality of the arbitration is the disqualification or challenge of arbitrator. It should be noted that disqualification or challenge of arbitrator aims to ensure the competence of arbitrator; however, unfortunately, from time to time it is used for the prolongation of the proceedings or disruption of proceedings; on the other hand it must be remembered that challenge of arbitrator even, if it's not abusive, has impacts on proceedings, so, in parallel with the increasing number of arbitrations in the late 1970s and early 1980s, organizations and institutions including the International Bar Association were formed for the purpose of setting the guidelines and code of conduct for arbitrators. The ICC, in response to the acceleration of claims against competence of arbitrators, required them to make signed statement in writing at the time of acceptance of the arbitration indicating their impartiality and independence and lack of common interests with the parties to the dispute. Such a written guarantee has shown to reduce challenge of arbitrator statistics.

**Keywords:** judge, arbitration, international arbitration, challenge of arbitrator

### 1. Introduction

Recourse to independent and impartial judge is true of arbitration as well. In fact, the mere fact that the parties agree to resolve their differences through a private mechanism doesn't exclude them from universally accepted support as a fundamental human right. Since arbitration is a judgment, although the private type, it is important that the end result, be the product of an impartial process and claims of the parties be heard properly. Not only procedure must be fair, but also both parties and especially the losing side must feel it's fair, therefore, upon acceptance or appointment, arbitrator do his job with reasonable until resolution is reach. However, arbitrator may be challenged before the end of the arbitration, in which case his job shall be done by team of parties or arbitrator himself. Specific reasons, such as established lack of independence and impartiality of the arbitrator or reasonable doubt in this regard and the arbitrator being prohibited or incapable of performing the task, loss of mutually agreed terms, lack of reasonable effort and diligence in carrying out arbitration or acting contrary to the law governing the arbitration shall end arbitration. It is also possible that arbitrator resign for reasons such as illness or other personal reasons. In any case, the main conditions and causes and challenge of arbitrator and his dismissal are determined by laws and the rules governing the arbitration. In these circumstances there should be possible for the parties to dismiss the judge from his office, and also in this case, and if he resigned from the office, the parties may repair the situation. In any case, at the end of mission of the arbitrator (mandatory or voluntary), arbitration should not be sterilized unenforceable and, for this reason, respect and protection of arbitration proceeding, most arbitration regulations and rules have provided for procedural methods for the challenge or removal or replacement of arbitrator<sup>1</sup>. Protest against the arbitrator or challenge of arbitrator by one party or the arbitrator dismissal by mutual consent is different from the one done by the arbitration organization or national court. Typically, the arbitrator dismissal usually occurs much less frequently than the challenge of arbitrator, which is often aimed at stoppage or slow down or to escape of protesting party from arbitration. In the arbitration, it is possible that one of the parties challenge the arbitrator appointed by the other party<sup>2</sup>. Arbitration rules typically provide for such challenges on the basis of defined

<sup>1</sup> For example, 1965 Treaty of Washington (ICSID), the fifth chapter, articles 56-58 cover protest against the arbitrator and loss of conditions and replacement of the arbitrator.

<sup>2</sup> Request for challenge may be fined by either party and in cases like arbitration under the LCIA, it is done by interpretation of arbitrators.

arguments and proof; for example, they provide that if certain circumstances exist that create reasonable doubt about the impartiality or independence of arbitrator, they may be challenged and urged to disclose the same. In general, the methods of resolving measures can be divided into two main groups: one is judicial proceedings in courts which by its very nature is contentious procedure; the second is based on the mutual consent of the parties. The second group consists of conciliation arbitration, referring to the experts, mediation and fact finding, with the common feature of all of them being agreement and consent of the parties involved, which in fact constitutes the basis of the authority and legitimacy of the relevant investigating authority. This feature is one of the most important differences between amicable procedures and the judicial processes.

## **2. Concepts and Theoretical Foundations**

### *2.1 Mediation & conciliation*

Mediation of disputes occurs in a friendly and cooperative and consultation and with a view to resolving the dispute and mediation suggests a suitable solution with regard to the conflict and opinions and after evaluating possible solutions and the rights and interests of both parties<sup>3</sup>. Canadian lawyers consider conciliation as a method to resolve a dispute in which the parties are not in the same room and in which mediator contacts each party separately and uses the so-called "shuttle mediation" while in mediation the parties negotiate face to face with each other<sup>4</sup>.

### *2.2 Arbitration*

Arbitration is the most commonly used ADR method and the nearest judicial and official methods of dispute resolution<sup>5</sup>. "Arbitration is a technique aimed at resolving an issue related to relations between two or more persons by one or more other person in the name of the arbitrator or arbitrators, who gain their powers through a private contract, and based on such contract, they make judgment, without government having entrusted such task to them."<sup>6</sup>

#### *2.2.1 Independence of Arbitrator:*

Independence of arbitrator means that the arbitrator or arbitrators have no link (or relative by marriage) and common interest and conflict of interest with any of the parties. In assessing the independence of arbitrators in arbitration, objective criteria are used.

#### *2.2.2 Impartiality of arbitrator:*

Impartiality relates to the arbitrator's mental status. The impartiality refers to the mental condition of arbitrator, which leads him to be biased negatively or positively to one of parties of dispute. Unlike the case of independence of arbitrator, subjective criteria are used here. Importance of arbitration in resolving disputes has formed today, in addition to natural persons, union of capitals, corporations and large enterprises (legal entities), which sometimes extend the scope of their activities regardless of the nationality to the territory of several countries and even globally, and contributed to number and complexity of disputes. Besides trade is no longer traditional and commercial relations have formed in order to facilitate and speed up competition<sup>7</sup>. With increasing conflicts, settlement of them through the state judicial system, i.e., the state courts and judges chosen by the state, not only imposes costs on states but also results in congestion and accumulation of cases in the courts, which leads to discontent of parties to disputes because of the consequences that will follow. Also because of the special nature of relations, particularly in trade disputes, and commercial disputes, the parties to the disputes are reluctant to refer to state courts to resolve their disputes because they want their dispute to be resolved quickly and if possible at a lower cost and by judges who specialize in a matter of dispute and through secret and non-public settlement<sup>8</sup>. Sometimes labor relations and future relationships require parties to resolve conflict in a

<sup>3</sup> *vam houtte, hans, op.cit.,p 385.*

<sup>4</sup> *Jarrosson charles, Lantion darbitrage, Tomecxviii,paris,1987.p179.*

<sup>5</sup> <http://www.nadv.co.uk/background/what.Php>

<sup>6</sup> *Rene David, the concept and role of arbitration in international business, translated by Dr. Seyed Hussain Safai, first edition, 1996, p 82*

<sup>7</sup> *Moezy Amir, Ahmad, international arbitration in commercial disputes, Tehran, Dadgostar, 2008*

<sup>8</sup> *vam Houitte, Hans, the Law of international trade, second edition, London,2002,p385.*

friendly and cooperative environment and by mutual understanding (such as disputes between neighbors, spouses, workers and employers, especially between merchants) and diversity and flexibility of non-judicial means of dispute settlement makes it possible for such parties while resolving such dispute in the courts damages working relationships and leaves the parties in a state of conflict. The above factors and numerous other privileges have caused people to increasingly tend to resolve their differences through ways other than official and state practices of conflict resolution and measures are taken to promote and identify non-judicial means of dispute settlement and make the most of such methods by the parties. Various institutions and organizations engaged in ADR have been established and domestic laws have been modified in order to facilitate more use of ADR or appropriate legislation is passed in this regard, and at the international level, conventions and model rules have been approved for the integration of domestic laws in the field of ADR and facilitate the implementation of decision issued<sup>9</sup>, which reveals the importance or non-judicial dispute resolution through alternative methods of dispute settlement.

### 2.2.3 Various types of arbitration

Referring of dispute to arbitration (like other ADR procedures) is done on the basis of mutual consent<sup>10</sup> and the authority of the arbitrator in fact comes from mutually agreed contract<sup>11</sup>. The arbitration proceedings and the execution of the arbitral award is primarily based on consensus and the will of the parties and the law governing the arbitration agreement is the law governing the nature of the dispute and the law governing the procedure is in the first place, the law on which the parties have agreed<sup>12</sup>. Unlike traditional arbitration that was rather common among people<sup>13</sup> who lived together or were supposed to maintain good relations, although maintaining friendly relations is considered in new arbitration, in most cases the main objective the parties seek from the inclusion of reference to the arbitration clause in the contract is denying the jurisdiction of courts of Justice. Now the effort is made to ensure that in cases of referring of dispute to arbitration, jurisdiction of the courts is limited as much as possible and arbitration laws of different countries have taken steps in this direction<sup>14</sup>. Arbitration is divided into ad hoc arbitration or institutional arbitration. And the role of various institutions specializing in arbitration and having rules specific to arbitration proceedings becomes increasingly more prominent<sup>15</sup>. In terms of the powers of the arbitrator in arbitration, arbitration is divided into arbitration based on law and arbitration ex aequo et bono or in general composition amiable. However, it is principal basis is that arbitrator decides in accordance with law and he can just violate law and decide ex aequo et bono or in form of composition amiable only if the parties have expressly given such a power to him<sup>16</sup>.

### 2.3 Purpose of the right to challenge of arbitrator:

The aim of bring a dispute to judge or arbitrator is to resolve the dispute so that the rights of the parties would be ensured. In this respect there is no difference between the trial court and arbitration; basically, judgments and arbitration are two institutions for settling disputes between parties to a claim in an impartial and fair manner. Although the judiciary and arbitration seems to be different in appearance and it is said that the judicial authority derives its authority from the law while the authority of the arbitration comes from mutual agreement, that is, the judgment has a forced nature while arbitration in the nature of administration, it can be said that since the arbitration is agreed under the rule of law and its validity is so essentially based law and on the other hand, the law also relies on the principle of the administration of the nation and it is from it that it derives its authority, so judgment and arbitration do not differ in terms of validity and jurisdiction and in judgment and the judiciary, authority is directly derived from the law while in arbitration, with arbitration authority's jurisdiction is indirectly (by way of agreement) derived from the law. Thus, as Judiciary and arbitration are both based the will of the people, they should respect the rights of people and one of these is the right to bring suit to an impartial authority. According to the above, recourse to an independent and impartial authority is one of human rights and paragraph 1 of Article 14 of the Universal Declaration of Human Rights and the International Covenant on Civil and

<sup>9</sup> David tene, *larbitrage dams le commerce* <http://www.org/adr.html> . International,3ed, paris, 1982,p.199

<sup>10</sup> Safaei, S.H., *a few words about innovation and inadequacy of International Commercial Arbitration Law*, Faculty of Law and Political Science Journal, No. 40, Summer 1998, p. 22.

<sup>11</sup> Redfern alan and Hunter martin , *Law and practice of international commercial arbitration*, second edition, London . 1991, p58

<sup>12</sup> Rene David, *the concept and role of arbitration in international business*, p 81.

<sup>13</sup> <http://www.nadr.Co.uk/background/what.php>

<sup>14</sup> houtte, hansvan, *op-cit.*,p.393

<sup>15</sup> Seyed Hussain Safaei, *ibid*, p. 24.

<sup>16</sup> david, reme, *opcit.*,p 21.

Political Rights refer to it. It should be noted that the Universal Declaration of Human Rights, as its title suggests, is declaratory and it should not be imagined that the said rights have been established after the declaration of human rights only and didn't exist before then. Thus, impartiality and independence of investigating authority are essential and as human rights violation of which is not allowed<sup>17</sup>.

#### 2.4 The right to challenge in arbitration

For good performance of arbitration, the parties must ensure that their differences will be addressed at a neutral authority, and for this purpose, procedures and practices are required within the arbitration system or at the court for the conclusion of the challenge of judge or arbitrator in a particular case<sup>18</sup>. In some countries, the challenge is deemed related to public order, and lack of attention to this is held as reasons for non-recognition and enforcement of arbitral award. Since the arbitration of arbitrators who are not eligible has been dismissed by resorting to challenge of the arbitration process, or at least, resorting to challenge leads to resolution of doubt and distrust of raiser of challenge with regard to the arbitrator. Finally, if arbitrators trusted by parties render the decision, in enforcement stage, decision is more readily enforceable but if decision is rendered by arbitrator or arbitrators who are not trusted, it will not be so. In the challenge, the mission of challenge is primarily providing a sound hearing and ultimately facilitating enforcement of arbitral award and helping commerce and arbitration.

#### 2.5 Standards and procedures of challenge of arbitrators

As noted above, arbitral tribunal must not only act fairly, but also both parties must feel it. When speaking of the standards the arbitrators must meet, we generally refer to the words "independence" and "neutrality" and "capability and competence". For example, Article 7(1) of the rules of arbitration of the International Chamber of Commerce provides that: Arbitrator must be "independent" from the parties to arbitration and during the arbitration, he should remain independent. And in accordance with paragraph (2) of Article 5 of the arbitration rules of LCIA, the apparent lack of such characteristics can be a reason for objecting to the jurisdiction of arbitrators under Article 57 of the Convention. Since each member state can choose four people to join a permanent branch of arbitrations, the purpose of this feature is equalization of quality of arbitrators, who are proposed by member states. Although the apparent lack of such properties can be ground for challenge of the arbitrators, they are not just abstract concepts that are unenforceable, but are tools in the hands of the parties, to ensure a series of qualitative standards aimed at ensuring functionality at arbitral tribunal to investigate the cases.

##### A. Independence

It was said that independence is an objective thematic standard to evaluate whether the arbitrator has the competence to do his job or not. At the same time as the independent standard is not as dogmatic and predetermined as it seems it is. Generally, it is expected that arbitrators be independent of the parties' lawyers. So if an arbitrator had worked in an attorney's office, in which the lawyer for one of the parties has also been employed, this can be considered the basis for challenge of the latter<sup>19</sup>. Most of the times, persons who may act as a lawyer for one of the parties may be well familiar with each other or be friend of one or more of the arbitrators of arbitral tribunal. But generally, this by itself is not a basis to challenge an arbitrator. However, if these two persons attend an arbitration together either as lawyer or arbitrator, this could be the reason that they appointed each other on a regular basis and therefore can no longer be considered independent<sup>20</sup>.

##### B. Impartiality

As said earlier, the arbitrator's impartiality is related to his mental tendencies to the parties or the dispute. The impartiality involves the interference of arbitrator's state of mind with the arbitration, therefore it is referred to as "subjective" standard.

##### C. Capability & Competence

In addition to the above two factors, there are other objective reasons for the challenge of arbitrators, which

<sup>17</sup> Useful information on arbitration can be found in the US Arbitration Association, including:

- The arbitration journal, a quarterly containing papers and federal and state opinions regarding the arbitration.

<sup>18</sup> Topman, M, Challenge and disqualification of arbitrators: Translated by Dr. Mirfakhraei, the Journal of Law, no. 12.

<sup>19</sup> Mazeaud (H.L.J.)- de Juglat (M.), Lecons de Droit Civil, T. II, 1er Vol., Paris 1978, no 572 et 573

<sup>20</sup> ed P. Nanda, Revisiting Self - Determination As An International Law concept: A Major Challenge in the post cold war era, Adapted version of a presentation at the American Branch of the Int'l Law Associationes Int'l Law Weekend in New York, on November 1 / 1999 / at the panel entitled (the New Dynamics Self- Determination), cited on: (www. Tamilnation. org).

are not related to the relationship of the parties or their interests in subject of dispute. This is the case when the arbitrator is ineligible in terms of conditions agreed by the parties to the arbitration; if an arbitration clause provides that all arbitrators should be engineer but a party appoints a lawyer without any engineering background, in this case, the other party may invoke it as a reason for objection to such appointment. The appointment of the arbitrator that has violated the terms of the contract not only leads the challenge of arbitrator, but it can also lead to the annulment of the decision or its non-performance, and the reason for this is that arbitral tribunal has not been formed in accordance with the wishes of the parties<sup>21</sup>. On the other hand, if the parties have not determined a person with particular features or certain conditions, the appointment of arbitrators will be valid even if arbitrators selected lack skills and conditions, which seems unnecessary but very useful to investigate the matter. For example, in addition to the arbitrator's capability of reading and writing the language of the arbitration, it is also useful for him to be able to understand it, but his inability to do so doesn't justify challenge necessarily. The balance must be established in this case between the right of a party to select his arbitrator and the effectiveness of selection of an arbitrator that possess essential language skills. ICSID's position in this regard is particularly interesting; the Convention mentions in Article 14 that characteristics and requirements for persons appointed by as arbitrators by member governments to participate in the ICSID branch are: people with high moral virtues and competent in the legal, commercial, industrial or financial areas and capable of making decisions independently. With regard to persons in arbitration branches, competence in legal areas is very important<sup>22</sup>.

Also, the right to an independent and impartial court is not only emphasized on the documents relating to arbitration but also can be found in transactions human rights. For example, the provisions of Article 10 of the Universal Declaration of Human Rights reads: Everyone has the right to participate in decisions relating to their rights and obligations or in case of any criminal charge against him, to fully fair and public hearing in independent and impartial court. The right to an independent and impartial judge is not limited to the judges of courts of justice and in arbitration also the parties have the right to the arbitrator or arbitrators who shall be independent and impartial in resolution of their dispute and because the parties have agreed that the issue be settled through a private mechanism – arbitration – it does not mean that the parties have waived the right that is a globally recognized fundamental human right<sup>23</sup>. It is not merely of some importance but is of fundamental importance that justice should not only be done, but should man if style and undoubtedly be seen to be done lord He wart, laid.

## 2.6 Arbitration rules of the International Chamber of Commerce (ICC)

The principle of independence of the arbitration clause and the arbitration authority competence to decide on its competence even in case of the invalidity of the original contract has been accepted in paragraph 4 of article 6 of the rules of arbitration of ICC<sup>24</sup>. According to the article: "except in cases where the parties have agreed otherwise, the mere claim that the original contract is void or invalid or does not exist doesn't cause cessation of the competence of arbitration authority, provided that the arbitration authority establishes validity of the agreement. Competence of arbitration authority to decide on the rights of the parties and taking the proceedings to deal with the claim and objections of the parties shall remain valid even if the original contract is void or does not exist."<sup>25</sup>

### 2.6.1 International arbitration procedure

International arbitration law and procedure have accepted the independence of arbitration clause and in books on international arbitration, including the famous book of Messrs Kerry, Park and Paulson about the arbitration of International Chamber of Commerce (ICC), extensive discussion of this is provided<sup>26</sup>. There are many opinions on international arbitration that have accepted the arbitration independence clause.

<sup>21</sup> Mirzaei, A.R., *Rules of arbitration from the perspective of comparative law*, Tehran, Jangal-Javdaneh, 2008.

<sup>22</sup> Christopher Koch, Alireza Ebrahim Gol (Translator), *Standards of challenge of arbitrators*.

<sup>23</sup> Christopher Koch. *Standard and proceed user For Disqualifying Arbitrators*. *Journal Of international Arbitration*, Kluwer, 2003, 20 (u), P. 325.

<sup>24</sup> He isnot merely of some importance but is of fundamental importance that justice should not only be done, but should man if style and undoubtedly be seen to be done lord He wart, laid.

<sup>25</sup> Mohebi, M, *Arbitration of the International Chamber of Commerce*, The Iranian Committee Press, ICC. 2001.

<sup>26</sup> Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, ICC Publication, 1990.

### 2.6.2 Early withdrawal and failing to render timely decision

As soon as someone accepts arbitration in the dispute, an implicit commitment is created that arbitration proceedings shall be held until a decision is rendered in a fair way. If the arbitration is not completed by that person, or if the latter fails to participate in the meetings of the board of arbitrators, or if the latter withdraws from his position before the completion of arbitration or if he refuses to participate in arbitration hearings, it shall not only constitute a breach of a contractual obligation by him, but also as a judicial practice, it may certainly not be considered eligible for arbitration immunity; such act is tantamount to a refusal to enforce the right, as a result of which the parties are deprived of the possibility to protest the decision<sup>27</sup>. From view of the courts, this is among guarantees that justify judicial and arbitral immunity; therefore, if the arbitrator fails to justify his acts by logical reasons, he shall be held responsible for damages caused by his misconduct because otherwise any arbitrator – especially one appointed by the parties – could obstruct the continuation of hearing easily and as soon as he feels that the outcome of proceeding would not be in favor of his favorite party. In this case, arbitrator shall be liable, who did not intend to continue arbitration process and other participating arbitrators in arbitration board will be held liable only if they have failed to appoint an arbitrator in place of the refusing arbitrator. The arbitrator in the role of a decision maker is obliged to perform his duties timely. This duty is well known in state and federal laws and regulations of arbitration organizations and legislation relating to the professional liability of arbitrators is specified in them. The said laws, however, are silent about the results of non-fulfillment of this duty and only in some of the decision issued by the court, reference is made to this specific issue<sup>28</sup>.

### 2.7 Extension of arbitral immunity to organizations and institutions

In the same way that judicial immunity is not limited to judge, and extends to the people and institutions involved in the legal dispute, the question of whether immunity of arbitrators extends to enforcement agencies or those engaged in arbitration has been discussed in several cases in the United States. Among the measures that may lead to the potential liability of these institutions is refusal of examining cases related to appointment and challenge of arbitrators or choosing a venue for arbitration. The aggrieved party's motives for prosecuting these organizations (whether or not associated with a lawsuit against the arbitrator) can be derived from two causes; either the arbitrator lacks sufficient ability to pay all damages in the event that the court be held liable for losses incurred or his lack of responsibility is established, he shall basically have no obligation to repair the damage, but, unlike the arbitrators, these organizations are at risk and hold more responsibility, because of the exorbitant fees that they receive and the fact that they enjoy wider financial resources and in addition, in the case of having insurance coverage, they provide broader coverage for losses<sup>29</sup>.

## 3. Results

The purpose of ADR, according to the rules of dispute settlement of the ICC is to facilitate reconciliation and by negotiation with the help of an independent person. The common method is mediation in accordance with the rules of ADR but the provisions include the best efforts as well. Also, the evaluation by impartial assessor and various combinations of these and other methods are used. With this approach, ICC Attempt to establish "International Chamber of Commerce arbitral tribunal" in 1923 and it also developed arbitration rules. And thus was born in the same year the arbitration chamber<sup>30</sup> and according to the original essence of amicable ways to resolve disputes, it was concluded that "natural justice" to resolve disputes and international commercial disputes is indeed, the arbitration procedure, and preparation of the document of "Arbitration Agreement", which is traditionally a feature of the Chamber of Commerce arbitration system and its history goes back to the traditional practice of French Law, in which initiation of arbitration requires ratification of the original arbitration agreement<sup>31</sup>. Overall, in the case arbitrations, when the determination of arbitrators by the parties is impossible, because they cannot reach the necessary agreement or because one of the parties involved in the obstruction of appointment of arbitrators, when the parties cannot reach an agreement on various issues, existence of alternative mechanisms is vital and will ensure the parties that despite the lack of cooperation of a

<sup>27</sup> . Lee C. Buchheit, *How to Negotiate Eurocurrency Loan Agreements*, 2d ed .

<sup>28</sup> Mirzaei, A.R., *Rules of arbitration from the perspective of comparative law*, Tehran, Jangal-Javdaneh, 2008.

<sup>29</sup> QAhraei, M.J., *Paper titled Challenge and disqualification of judges in international commercial arbitration*, *Journal of Law*, no. 22, 1990.

<sup>30</sup> Mohebi, M, *Arbitration of the International Chamber of Commerce*, The Iranian Committee Press, ICC. 2001.

<sup>31</sup> Calvo Goller, Karin, 2012, "The 2012 ICC Rules of Arbitration –An Accelerated Procedure and Substantial Changes", *Journal of International Arbitration* 29,no.3, p. 323-344.

party<sup>32</sup>, arbitration can be formed and appointing authorities play an important role in this regard<sup>33</sup>. Overall, in the case arbitrations, intervention of appointing authority or the court in the arbitration has a supportive role<sup>34</sup>. Also, all points noted primarily for arbitration agreements should be included in every arbitration agreements, there is the possibility that in certain cases, certain conditions to be included in agreements<sup>35</sup>.

#### 4. Procedures and Mechanisms for Challenge of Arbitrator

Now the turn comes to determining of the mechanism the challenge of an arbitrator. In institutional arbitration, rules of arbitration will be included in organization's procedure for challenge. In the case arbitration, the parties may agree on a set of rules such as the UNCITRAL rules of arbitration that include mechanism for the challenge of arbitrator. However, if they are not agreed on such rules, or an arbitrator is not willing to withdraw from the tribunal after the challenge, the resulting impasse may be resolved by the courts of the seat of arbitration. British courts use two criteria to assess the impartiality. The first is criterion of "actual bias". It is difficult to prove actual bias and it isn't invoked in practice. Another criterion is "apparent bias". Also, if facts or circumstances of the case are in such a way that there is justified doubt about the impartiality of the arbitrator or judge, there is an apparent bias. This criterion is formulated within the framework of a "serious threat of bias". If a lawyer has released his opinion that some political event can never be considered as "force majeure", he may be biased in arbitration in establishing whether a particular event in the dispute pending before the tribunal can be considered as force majeure<sup>36</sup>.

##### 4.1 Initiation of challenge

###### 1. Notice: Exchange of information

However, the party intends to challenge the arbitrator must notify the same to all parties concerned. Challenge request must be in writing and shall include the facts and circumstances on which it relies (2-11 rules of UNCITRAL). Many rules provide that if all parties agree to the challenge, challenged arbitrator should resign. Under those conditions, resignation shall not constitute acceptance of the grounds of challenge. However, due to loss of confidence of the parties, the arbitrator can no longer operate in this position (Article 38 of rules of arbitration; AAA). For arbitration institution to be able to make a decision on the challenge, it must be aware of the views of all parties.

###### 2. Time limits

Many institutional rules as well as UNCITRAL arbitration rules provide that request for challenge should be submitted within a specified time of the appointment of the arbitrator or within a certain period after the notice of the cause of challenge. In most cases, this is 15 days after the appointment of arbitrator or knowledge of the cause of challenge. The rules of arbitration have appointed a 30-day deadline. Also, most of the rules provide that each party may raise the challenge of arbitrator for reasons found after his appointment only reason (Article 18 of rules of arbitration of (AAA) on disputes arising from investment under the ICSID Convention, Convention, ICSID rules of arbitration does not refer to a deadline, but provides that a challenge request must be raised immediately and in any case before the end of proceedings (Article 19 of rules of ICSID).

###### 3. The time of challenge and shift of the burden of proof

The burden of proving that there are facts that create sufficient doubts about the independence or impartiality of the arbitrator is on the party that has raised challenge. However, extend of legitimate doubts about the independence of the arbitrator varies depending on how arbitration process has progressed. Appointing authorities apply lower standards probably when deciding whether to accept a challenge of an arbitrator if the objection or challenge is raised before any significant progress in the arbitration. Arbitration institutions pursue two main objectives: as the appointing authority, they try to form the best possible court for processing of the differences of parties. In this stage of the arbitration, though the focus of the tribunal at establishment and

<sup>32</sup> DM Liu, J.; A Mistlis, L.; M Carol, S. (2012); *Comparative international commercial arbitration* (trans. M. Habibi Mohandeh, 1<sup>st</sup> ed.), Qom: Mofid University, p. 254.

<sup>33</sup> Olumi Yazdi, H.R.; Azadi, Y., *Arbitral award and its role in international commercial arbitration*, private law researches journal, 3(11) 121-148, summer 2015.

<sup>34</sup> Mafi, H.; Parsafar, J. (2012), "the involvement of the courts in the arbitral proceedings in Iranian law", *Journal of Judicial legal opinions*, 17(57) 105-130.

<sup>35</sup> Moezy Amir, A. (2013), *International commercial arbitration* (1<sup>st</sup> ed.), Tehran, Dadgostar, p. 193.

<sup>36</sup> Koch, Ebrahim Gol, 170, 2007.

hearing is on avoiding the disruption and disorder in the process of arbitration. As for challenge, this means that possibly the burden of proof of challenge requires a higher standard proportional to progress of arbitration. This fact is reflected in one of the UNCITRAL judgments on the challenge of arbitrator where the appointing authorities appointed by the Secretary-General approved by the international arbitral tribunal stated: The next issue is related to the time of challenge of an arbitrator. Whether or not the standard of neutral handling variable depending on time of proceeding? In theory, the standard that is applied to impartially and the reason that it is necessary to prove its absence should not vary subject to its being raised at the beginning or end of an investigation.

4. The competence of challenge of arbitrator

Since the institutional decisions about the challenge are rather in administrative than judicial nature, challenge proceedings are not contentious. This means that although the challenged arbitrator and other persons involved in the arbitration will have the opportunity to comment on the challenge, neither the arbitrator nor the party that has raised the challenge attend the institution to defend their position. Accordingly paragraph 5 of Article 24 of the 1996 British Arbitration Law accepts possibility of appeal by arbitrator and hearing his counterclaim in the tribunal.

#### 4.2 Causes of challenge:

The causes of challenge are grounds based on which the arbitrator can be challenged. In other words, it causes are such situations the existence of one or more of them allows parties to arbitration to challenge the arbitrator. Similarly, challenge can be divided to direct or indirect types. However, challenge *stricto sensu* is direct challenge or pre-award challenge while indirect challenge that refers to the act of awarding of the arbitrator related to causes that entitle to one or more of the parties to the arbitration to challenge the arbitrator, which may be based on any of the principles mentioned in the previous section, and given the basis of the right to challenge, such grounds are vast and varied and numerous, some of which certainly would lead to success of challenge and arbitrator's removal while others do not have such an effect.

1. Direct causes of challenge:

Among all the rules of arbitration, UNCITRAL Model Law is of particular importance and paragraph 2 UNCITRAL Model Law on international commercial arbitration provides: Arbitrator can be challenged only if the circumstances lead to justifiable doubts about the impartiality and independence of the latter or he possesses attributes not agreed by the parties!

It can be inferred from above provision that justified doubts about the impartiality and independence of arbitrator which are based on the circumstances, that is, the objective facts that cause subject doubts, and the absence of a mutually agreed terms and descriptions are grounds for challenge<sup>37</sup>. Paragraph 1 of Article 12 of the law of international commercial arbitration of Iran, which is derived from the UNCITRAL Model Law, provides the grounds set in the model law as grounds for challenge and any no difference between the two is observed in this respect. Also, in ICC arbitration system, Article 11 of the new rules stipulates that the challenge of arbitrator, whether because of lack of independence or competence, can explain by a written report the facts and circumstances that are the basis for challenge to the Secretariat. In comparison of the above provisions, it should be noted that the conditions in independence has been recognized as a basis for challenge if they lead to justified doubts. In addition to the lack of independence and impartiality, the UNCITRAL Model Law provides that if the arbitrator lacks qualifications and conditions intended by the parties to arbitration, which are expressed in the arbitration agreement or in another way, challenge will be possible. In this respect, international commercial arbitration law is like the UNCITRAL Model Law. UNCITRAL Model Law and the Law on international commercial arbitration has used the best working for the challenge, because in these two laws, the necessity of independence and impartiality, and agreed attributes have received particular attention and freedom of arbitration agreement is valued as the major trend in international commercial arbitration. ICSID system has expressed challenge of arbitrator in specific terms.

2. Procedure of institutional challenge:

Arbitration organizations have in their arbitration rules some challenge regulations specific to their own and these regulations apply in an arbitration if not inconsistent with the law applicable to the arbitration law or the law of the seat of arbitration. In the laws of different countries, decision on the challenge may be within jurisdiction of the courts only. The challenge of arbitrator procedure, organization has no application in such

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<sup>37</sup> *UNCITRAL Model Law on International Commercial Arbitration, audio magazine 4 of documents*



country or a decision on the challenge within jurisdiction of arbitration organization; in these countries, the arbitration organization decides on challenge without the intervention of a court or conclusion about the challenge may be made by the arbitration organization but there may be appeals to be made against such decision in national courts.

As mentioned, in the formalities of challenge of arbitrator, the parties' agreement has essential role and although normally the parties make no agreement directly in this regard, due to choice of certain institutional arbitration rules, this procedure might have been specified indirectly. The common practice in institutional arbitration rules is that the bill or request for challenge in which the reasons are mentioned is sent to the organization and that organization obtains the opinion of other party and the relevant arbitrator or arbitration tribunal in this regard. The rules of arbitration vary as to what is the first destination of the bill or request, but generally they provide that the request must be in writing and the reasons and circumstances of challenge shall be indicated and it must be sent to all the other parties and arbitration institution<sup>38</sup>. At the arbitration, if the person making decision on the challenge deems challenge to be valid, arbitrator will be removed, otherwise, the challenge will be rejected. Law on arbitration will determine if this is final or objectionable. The right to object the competence of arbitrator and the right to challenge him may not be exempt from statute of limitation.

3. The general procedure for challenge:

Practice or standards of challenge will depend on the will and agreements of the parties. The most common form of them are independence and impartiality of the arbitrator, and in the arbitration rules, one or two of them are provided for<sup>39</sup>. Formalities and procedures of challenge should be sought first in the law on arbitration that is included in the law of place of arbitration. The rules of arbitration may include rules for challenge as well. Typically, these rules acknowledge in the first place terms mutually agreed by the parties for the challenge of arbitrator. In absence of agreement of the parties, rules on how to challenge as established by law must be observed. The arbitration organizations have their own procedures for the challenge of arbitrators who are appointed by or under the supervision of them, which are in some cases not consistent with national laws. Competent authority for dealing with challenge is the arbitrator in the first place; however, it appears that arbitrator who is the challenged is not competent to deal with challenge of himself because he is accused and thus has ceased to be competent to decide his competence. But it should be noted that the arbitration authority has competence to decide his competence as well based on the doctrine of competence of arbitration authority; this rule is based on maximum separation of arbitration authorities from the courts of the country that is the seat of arbitration. In case of the challenge of arbitrator, if the arbitrator resigns, and/or the other party accepts challenge of arbitrator, arbitrator shall be prohibited from making a decision about his eligibility.

Today, many national rules of arbitration are derived from UNCITRAL arbitration law, under this law, challenge takes place on two separate occasions: first, the Court will consider challenge of arbitrator and if the challenge is dismissed, in second place, the challenging party shall be able within 30 days after receiving the dismissal to refer to a national court or any authority designated under national arbitration law for the decision on the challenge.

#### 4.3 Challenge and removal of arbitrator:

After decision is rendered, or arbitration mission ends actually, instead of challenge of the arbitrator, object to decision and request for overturning of decision should be used and as procedures of court have provided for challenge of the judge, if the parties to arbitration consider the conditions that have been set for the arbitrator or his impartiality and independence as dubious or invalid, the arbitration procedures have also provided for ways for challenge or objection of the nature of the arbitrator and to remove him and replace him. Also, each of the parties under certain circumstances has the right to request removal of arbitrator and his replacement, if the arbitrator fails to perform its duties properly or be barred from doing it or fails in doing it and have undue delay or show that from a certain point of view he is not able to take care of the arbitration.

<sup>38</sup> Article 11(2) of the ICC Arbitration Rules, Article 2 (8) of the rules of the US Association. In UNCITRAL arbitration rules, Article 11(1) & (2), requests should be sent directly to the parties and all members of the arbitral tribunal.

<sup>39</sup> Swiss International Arbitration Act, Article 180 refers only to the lack of autonomy of arbitrator. Although it is said that under Swiss law, arbitrator can be challenged for lack of impartiality.

#### 4.4 Replacement for the arbitrator:

If the arbitrator is challenged and the challenge is successful or in the event of voluntary resignation of arbitrator or in other cases where the mission of arbitrator ends before the award, a new arbitrator shall be appointed and replace arbitrator. Typically substitute arbitrator will be appointed by agreement of the parties or by rules or the procedure the former the arbitrator has designated.

#### 4.5 Challenge of arbitrator under Iranian law and international conventions

As said, the arbitrator fulfills a judicial duty. His mission judgment. That is, the acknowledgment of the validity of the truth of one of the two conflicting claims raised before him; for this reason, arbitral award has been likened to the judicial court's decision. Arbitration is characterized by creation of justice authority, which is characterized by its private nature. The legal system allows arbitrators to fulfill the task that is principally specific to the government, but the government does not interfere in the assignment of this task<sup>40</sup>.

Under Iranian law and international regulations, no definition of arbitrator is provided<sup>41</sup>. In Iran's international trade law approved in 1997, Article one on definition of terms used in the law, paragraph D reads: arbitrator is either the sole arbitrator or arbitral board. In the International Chamber of Commerce Arbitration Rules 122, which has been effective since January 1998, no definition of judgment cannot be seen. In chapter seven of the Civil Procedure Code approved by Parliament on 9 April 2000, Articles 454 to 501 cover arbitration. The law makes no explicit reference to technique, independence and impartiality of arbitrator and disclosure of his past, present and future relationships with the parties to arbitration. It should be noted that the legislator in this regard does not use the term "challenge" and instead uses rejection of arbitrator.

Arbitrator, particularly international arbitrator, is exempt from in some respects from the requirements imposed state judges because of independence with respect to any place of arbitration. However, the arbitrator is denied the administrative and judicial measures and needed the latter, and as soon as his authority requires force, he shall ask judicial system for help, and arbitral award lacks any executive authority unless public authorities make it enforceable<sup>42</sup>. If parties to a claim want their differences to be settled by arbitration, and the arbitrator can be of their choice and it is quite obvious that the arbitrator must be able to make parties trust him<sup>43</sup>. He must disclose to parties all such events, conditions and circumstances as may affect his decision.

According to Article 472, after the appointment of arbitrator, the parties have no right to dismiss him, except with mutual consent, according to Article 13, paragraph one, the parties may agree on procedure of challenge of arbitrator; in the absence of such an agreement, the party that has challenged the arbitrator shall within fifteen days from the notification of the arbitration, notify arbitrator of any information of the circumstances referred to in paragraph 1 of Article 13 of the arbitral bill. The arbitrator makes decision on challenge unless the arbitrator resigns with respect to the challenge, or the other party accepts the challenge; also, according to paragraph one of Article 12 of the Arbitration Act, challenge is possible if there are circumstances that led to justifiable doubts about the impartiality and independence, or arbitrator lacks attributes that are agreed. Each party may challenge arbitrator merely by virtue of act of which the latter has been informed after the appointment of arbitrator, and the second paragraph provides that person appointed as arbitrator must disclose any circumstances which cast justified doubt on his impartiality and independence. The arbitrator informs the parties of such a situation without delay after appointment to arbitrator. Basically, the provisions of the UNCITRAL Rules constitute Procedure Iran-United States Claims Arbitral Tribunal. The final provisions of the Iran-United States Claims Tribunal fall within three modes: relevant article is exactly accepting, the latter is adapted, or note(s) is added to it.

According to regulations of Arbitral Tribunal, in case of Iran-United States claims, specific and general challenges are provided for. Specific challenge means that arbitrator is prohibited from arbitration only in specific cases, with such cases being referred to other branches or arbitrators while general challenge is done by the two states. The difference between the two challenges lies in their type and in the general type, the arbitrator is dismissed from his position in the Tribunal. According to Article 12, paragraph 1, of the rules of the Tribunal, when the challenged arbitrator or counterparty

<sup>40</sup> Dr. Kalantarian, *ibid*, p. 335

<sup>41</sup> Jafari Langroodi, M.J., *Encyclopedia of Law*, Amir Kabir Publishing, Tehran, 1997, Vol. 3, p. 437.

<sup>42</sup> Fails. Nariman, *Reports, in the Arbitral process and the independence of Arbitress*, ICC Publication, No 472, June 1991, p. 48.

<sup>43</sup> Kalantarian, M., *Arbitration (Study of the most important arbitration systems of the world)*, Office of International Legal Services of the Islamic Republic of Iran Publications, First Edition, Winter 1995, p. 333.

is not agreed, the matter shall be referred to appointer for decision<sup>44</sup>.

## 5. Conclusion

The parties to arbitration may determine formality of proceedings or assign determination thereof to arbitral board; therefore, the law that arbitral board choose may even be a law other than the law of the place of arbitration, which issue is rather raised in international arbitrations. So what is primarily important is the governing law agreed by the parties, so it doesn't matter where the arbitration is held or its award is given. It should be noted that arbitrator cannot ignore mandatory statute of place of arbitration even when he proceeds with the formalities of arbitration upon will of either party according to the law of a country other than the place of arbitration.

The review and comparison of the rules of Commercial Arbitration, the similarities and differences can be concluded, including Article 12 of the International Commercial Arbitration Act of Iran specifying the grounds for challenge, according to which, circumstances that justified doubts about the independence and impartiality are valid grounds of challenge and factors of capacity, nationality and misconduct are also valid grounds. But in paragraph one of Article of 12 of the UNCITRAL Model Law on Arbitration, merely violation of neutrality and independence are grounds of challenge while each alone is challengeable. The International Commercial Arbitration Act of Iran is preferred over UNCITRAL Model Law on Arbitration.

The Arbitrators Association of America and ICSID Convention have endorsed the importance of arbitrator being competent in the field of trade and industry.

International Commercial Arbitration Act of Iran holds that arbitration is considered international when one of the parties at the time of conclusion of the arbitration agreement is not Iranian national. The provisions of the UNCITRAL constitute the Arbitration Rules of Procedure of Arbitration between Iran and the United States; these regulations also provide that deadline for challenge is 15 days from the date of notification, and if a member resigned his post, it will survive in other cases and if qualification of a member of the branch is contested and the same is confirmed, then the arbitral tribunal will order the case to be transferred to another branch, and if a case is referred to the General Court to hear a case specifically referred to the same, in case of objection to a member and approval of the same, such member shall resign and will be replaced by someone else in his place, and one who shall be appointed as arbitrator may only be removed by resignation or challenge according to regulations governing the Tribunal. In UNCITRAL Model Law and international trade law, a reference is made to the ongoing duty of arbitration to disclose arbitrator's ties and interests with the parties while the Civil Procedure Code of Iran does not mention it. Iran's Procedure Code and International Commercial Arbitration Law consider common nationality as affecting the independence and impartiality; on the contrary, the model law holds that nationality does not affect the impartiality and independence. It should also be noted that decision-making procedures in the challenge are derived from the specific arbitrations and institutions in different forms. Study of Iranian and the Civil Procedure Code and International Convention shows that an arbitration clause is not separated from the main contract, so the arbitral board is unable to establish its own competence and only state courts have such competence. However, according to the doctrine of independence of arbitration clause, the agreement made to refer the dispute to arbitration under an arbitration clause is itself a separate agreement apart from the rest of the parts of the agreement between the parties; so it may still exist even after the termination of such agreement. It two important principles of law are authority of the arbitral board to determine whether an arbitration clause should be independence of the main contract.

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