Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.36, 2015

Challenge of Arbitrator under ICSID

PROF. GREG.C. NWAKOBY FCIArb* & DR. CHARLES EMENOGHA ADUAKA*[1]

ABSTRACT
Disqualification of an arbitrator is a very important issue not only to ICSID but in all arbitration practice. The reason for this concern is understandable as the effectiveness and confidence in arbitration like in litigation revolve round the arbitrator and the managers of the proceedings as in litigation. Where the arbitrators are lacking in quality, competence, and sincerity, obviously parties will lose confidence in it and the end result will be the collapse of the system. This explains why efforts must at all times be made to ensure that men of integrity, character and quality are appointed to preside in arbitration. This calls for caution on the appointing authorities and the parties'. ICSID has in its Articles 14, 57, and 58 made provisions for the challenge of an arbitrator(s). The challenge of an arbitrator under ICSID can be achieved through the two principal ways. The first is by direct challenge of an arbitrator and in which case the party is expected to file an application and then secure the replacement of the arbitrator before the making of the final award. The second is to impeach the award of the arbitrator after the making of the final award. It is to review the grounds, time, purpose, and procedure for the challenge of an arbitrator under ICSID that we have embarked on this mission. Unfortunately, there are no Arbitration Law report in Nigeria on proceedings and decisions on challenged proceedings under ICSID. However, LCIA and ICSID have published some reports on the same and these shall be referred to in deserving situations.

1. Arbitrators Declaration

Rule 5(2) of ICSID requires that as soon as the secretary General has been informed by a party or the Chairman of the Administration Council of the appointment of an arbitrator, he shall seek an acceptance from the appointee and if an arbitrator fails to accept his appointment within 15 days, the Secretary General shall promptly notify the parties, and if appropriate the chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the procedure adopted for the previous appointment. The implication of Rule 5(2) is that an arbitrator who fails to signify his acceptance of the appointment within 15 days or the extended period by the parties is unwilling to serve as an arbitrator. In order to ensure speed, no particular or specific method or procedure is specified for the acceptance. It then means that the acceptance may be orally, by telephone or cable in any way satisfactory to the Secretary General.

Rule 6(2) made provisions for declaration which is a form of disclosure to be impartial, independence, and to keep confidential all information coming to the arbitrator in course of the performance of his duties. Rule 6(2) provides thus,

> *Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form: To the best of my knowledge there is no reason why I should not serve on the Arbitration Tribunal constituted by the International Centre for settlement of Investment Disputes with respect to a dispute between …shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by Tribunal. I shall judge fairly as between the parties, according to the applicable law, and*

[1] **Prof. Greg C. Nwakoby-** Professor of Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria and Fellow Chartered Institute of Arbitrators of Nigeria.
Dr. Charles Emenogha Aduaka, Senior Lecture, Faculty of Law, Enugu State University of Science and Technology, Enugu, Nigeria.

shall not accept any instruction or compensation with regard

to the proceeding from any source except as provided in the

Convention on the Settlement of Investment Disputes and in

Regulations and Rules made pursuant thereto.

If any arbitrator fails to file the requested declaration within the period given, that is, by the end of the first session of the tribunal, he shall be deemed to have resigned within the meaning of Rule 8(2) and will have to be replaced in accordance with the provisions of Rule 11. The declaration in Rule 6(2) is a form of undertaking and disclosure by the arbitrators. It is a document of good faith, independence, impartiality, and honesty.

The duties imposed by the Convention can be distilled from the declaration in Rule 6(2). The duties include among others,

a. Duty of confidentiality
b. Duty to judge fairly
c. Duty not to accept any instruction or compensation from any other source as provided by ICSID
d. Duty of impartiality and independence.

It is on the basis of these duties imposed by the Rule that an arbitrator may be challenged or disqualified where he goes contrary to any of them. So far, only ICSID has this requirement of filing of declaration by an arbitrator before assuming his responsibility to arbitrate for the parties. What is required in most legislation is a duty of disclosure which runs from the date of appointment of the arbitrator until he makes his final award. The disclosure as in other legislation becomes mandatory where circumstances exist which may give room for doubt as to impartiality or independence. The essence of disclosure is to ensure efficiency and confidentiality in arbitration practice. The duty to act fairly and justly strengthens the arbitration practice and the confidence of the parties on the same. The ICSID Convention provision is preferred to the one in most other legislation. The arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004 merely provided that the prospective arbitrator must disclose all the facts which may disqualify him or give justifiable doubts as to his impartiality or independence. The Act did not state the extent of disclosure required. In fact Section 8(1&2) of the Act provides,

(1) Any person who knows of any circumstances likely to give any justifiable doubts as to his impartiality or independence

shall, when approached in connection with an appointment

as arbitrator, forthwith disclose such circumstances to the

parties.

(2) The duty to disclose imposed under subsection (1) of this section shall, continue after a person has been appointed as an

arbitrator and subsist throughout the arbitral proceedings,

unless the arbitrator had previously disclosed the circumstances

to the parties.[1]

The section did not provide for filling of any form or declaration by the arbitrator upon his appointment and disclosure is not mandatory unless there are circumstances of justifiable doubts as to impartiality or independence. The section of the Act referred to did not give any insight as to what justifiable circumstances giving rise to justifiable doubts as to impartiality or independence entails. This opening in the Act may give loophole to parties who are reluctant to arbitrate an opportunity to use the section as an "engine" or tactic of delay from the onset. The provision of section 8(3) is not very helpful save and except that it disclosed that an arbitrator without the agreed qualifications by the parties may be challenged. However, as to grounds for

[1] Section 8(1&2) of Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004.

justifiable doubts with respect to impartiality and independence, nothing was said of any of them. It is to this extent that we suggested that the content of the IBA draft of justifiable doubts as to impartiality or independence shall be incorporated into the Act in its future amendment.

2. Grounds for Disqualification

A party desirous of disqualifying an arbiter under ICSID has a duty to file his application to the panel. Under Article 57 of the Convention, a party may propose the disqualification of an arbitrator on account of any fact indicating a **manifest** lack of the qualities required by Article 14(1) of the Convention or on the ground that he was ineligible for appointment under Section 2 of Chapter IV as could be seen in Article 38, 39 and 40(1). We shall now set out to discuss each of the disqualifying factors as in the Articles of the Convention referred.

Article 14 of ICSID provides that the persons designated to serve on the panel shall be persons of high moral character and recognized competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgement. Competence in the field of law shall be of particular importance in the case of persons in the panel of arbitrators. The essence of Article 14 and the spirit of the law are to ensure that persons appointed to arbitrate are experts in the area of the subject matter. It is also to ensure that the person so appointed is knowledgeable in the area of the applicable law to the arbitration. Appointment of experts as arbitrators is one of the major advantages of arbitration over litigation. In litigation, a judge trained in law alone sits on all matters whether commercial, financial, industrial, medical, pharmaceutical, engineering, matrimonial etc. In arbitration, the appointed arbitrator must be an expert in the area of the subject matter and the laws involved.

By the provisions of Article 14 of ICSID, the arbitrators have the task to judge fairly in accordance with the provisions of the applicable or governing law. Where the arbitrators failed to act fairly in accordance with provisions of the applicable law, the arbitral award will be annulled. This is because the breach of or a serious departure from a fundamental rule of the procedure and failure to state the reasons of the award are among the grounds for annulment of arbitral award under ICSID.[1] This implies that an arbitrator may be challenged in situations where his knowledge of the applicable law is obviously doubtful.

Arbitrators have duty of confidentiality imposed on them. This explains why arbitration is handled in “camera”, that is, privately outside the public watchful eyes where inquisitive journalists tend to report everything. Arbitral proceedings and awards are not published to the public without the consent of the parties. The breach of this duty constitutes a ground for challenge of the arbitrator’s mandate. Arbitrator is obliged to keep confidential all information in arbitration proceedings including business secrets of the parties, testimonies of witnesses and parties, and the content of the award.[2] The arbitrators are required to disclose and notify the ICSID Secretary General of any relationship with either the parties or the subject matter that might cause a party to question the arbitrator’s reliability for independent judgement or impartiality. An arbitrator will be disqualified if one of the parties in the arbitration is a client to his chambers or any of the partners in his law office.[3] It must be stated as held in *URB ASER SA & Con Cio de Agusas Bilbao BizKaia, Bilbao BisKaia UR Pafrtizuergoa v the Argentine Republic*[4] that mere expression of academic opinion in any publication published before the case was referred to arbitrators and which may be material in the present case will not disqualify an arbitrator. For such opinion expressed in previous publication by an arbitrator to disqualify him, it must be shown that such opinion or position is supported by factor related to and supporting a party to the arbitration, by a direct or indirect interest of the arbitrator in the outcome of the dispute or by a relationship with any other individual involved such as a witness or fellow arbitrator.

Article 57 provides that a party may propose to the commission or Tribunal the disqualification of its members for reason of **“manifest”** lack of the qualities required by Article 14(1). The word **“manifest”** as used here means that the alleged fact must be conspicuous, obvious or evident. The implication of the provisions of the law as stated herein is that the applicant bears the evidential burden of proof to gather sufficient and credible evidence to argue that the arbitrator obviously and manifestly lacks the quality of being a person who may be relied upon to exercise independent judgement. What is required in proving the element of “manifest lack of qualities required in Article57 is objective evidence and this implies that mere belief will not suffice to disqualify any arbitrator. In *SGS v Islamic Republic of Pakistan*[5], the court held that, “the party challenging an arbitrator

[1] Article 52(1) of ICSID
[2] *Cemex Caracas Investments B.V & Anor v. Bolivavian Republic of Venezuela* ICSID Case No. ARB/08/15 cited in Wang Peng, “Challenge & Disqualification of Arbitrators under ICSID,” Xi an Jiaotong University School of Law.
[3] ICSID Case No. ARB/97/3
[4] ICSID Case No. ARB/97/3
[5] ICSID Case No. ARB/01/13.

must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgement in the particular case where the challenged is made."

From the decision of the tribunal, it is to be believed and accepted that mere appearance of partiality is not a sufficient ground for disqualification of the arbitrator. The party alleging partiality, bias, or lack of independence must prove not only the facts indicating and showing the lack of independence but also that the lack of independence and partiality are manifest or highly probable, and not just possible.

In *compania de Aguas del AconquijaSA & Vivendi Universal v. Argentine Republic*,[1] the tribunal adopted a similar reasoning as above by stating that challenge of an arbitrator must be on established facts and not mere speculation or inference. According to the tribunal,

> *Indeed, the application of a subjective, self-judging standard instead of an objective would enable any party in arbitration who becomes discontent with the process for any reason to end it at any time at its sole discretion simply by claiming that an arbitrator is not independent or impartial , a result that would undermine and indeed destroy the system of investor-State arbitration that was so carefully established by the States that have agreed to the Convention.*

3. Time for Challenge.

A party proposing to challenge an arbitrator has to comply with the procedure set out in the CISID Convention and must act within time. Unfortunately both ICSID Convention and its Rules failed to specify a definite deadline for the disqualification proposal beyond which the proposal will fail. Article 9 of ICSID Rules made a general provision as to time for application for disqualification. Rule 9 of ICSID provides that "a party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, in any event before the proceedings is declared closed, file it proposal with the secretary General stating its reasons thereof." From the forgoing, the requirement is that the applicant for disqualification must file his proposal promptly before the proceeding is declared closed. Rule 38 of the Convention provides that the proceeding is declared closed when the presentation of the case by the parties is completed. The only exception to this provision is as provided in Rule 38(2), that is, where the Tribunal before the award is rendered, re-opened the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

The term promptness as used in Rule 9 of ICSID must relate to the time when the disqualifying factor came to the knowledge of the applicant. This is because the applicant is not expected to present a proposal when he knew nothing about the disqualifying factor particularly as the burden of proof is on him. It is very unfortunate for ICSID to have used the term promptly without definite specification. What is promptness in this regard? For the Oxford English Dictionary, it means, readily, quickly, directly at once, without a moment delay.[2] For Christoph Schrener,[3] "promptly" with respect to challenge to disqualify an arbitrator, means, that the proposal to disqualify must be made as soon as the party concerned learns of the ground for a possible disqualification. The remedy of an applicant who failed to apply promptly is to request for an annulment of the award pursuant to Article 52 of the Convention (Rule 50).

It is obvious from the provision of Rule 9 that no quantifiable deadline for presentation of proposal of disqualification is fixed hence it is on the case to case basis that a tribunal invited to decided a matter must rest their decision as to whether a proposal for disqualification was filed within time or not. Other International Arbitration bodies, Conventions, and rules have time specified within the body of their Convention regulating time within which to apply for disqualification of arbitrator. For instance, Article 11 of the UNCITAL Rules provides 15 days after the appointment of challenged arbitrator, part 1 of Article 4(a) of the Guidelines of IBA on conflicts of interest provides 30 days, and Article 11 of the Rules of arbitration of the International Court of Arbitration of the International Chambers of Commerce specify 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is

[1] ICSID Case No. ARB/97/3.
[2] *Oxford English Dictionary,* Oxford Clarendon Press New York Oxford University Press, 1989, 620.
[3] C.H. Schreuer, *The ICSID Convention: A Commentary,* Cambridge University Press, 2001, 1198 cited in Wanga Peng , "Challenge & Disqualification of Arbitrators under ICSID" Xi an Jiaotong University School of Law.

subsequent to the receipt of such notification.[1] Section 9 of the Nigerian Act provided for 15 days. The section provides,

> *Where no procedure is determined under subsection (1) of this section, a party who intends to challenge an arbitrator shall, within fifteen days of becoming aware of the constitution of the tribunal or becoming aware of any circumstances referred to in section 8 of this Act, send to the arbitral tribunal a written statement of the reasons for the challenge.*[2]

In ICSID, compliance with **"promptness"** in presentation of proposal for disqualification is quit strict. It is proposed that the tribunal in considering promptness should consider all the surrounding circumstances and the reasons for delay including also the time as fixed in other legislation.

The consequence of not applying promptly is waiver of right to the proposed challenge or disqualification.[3] Rule 27 of the Convention provides thus:

> *A party which knows or should have known that a provision of the Administration and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention to have waived its right to object.*

The provision of Rule 27 seems rather too strict as it failed to give room for extension of time within which to apply when one is out of time. In most other legislation, the arbitral tribunal has the right to extent time within which an act could be taken pursuant to the Act in deserving circumstances. Section 36 of the Nigerian Act provides that "notwithstanding the provisions of this Act, the arbitral tribunal may, if it considers it necessary, extent the time specified for the performance of any act under this Act."The essence of this provision is obvious as it gives the parties and the arbitral tribunal the opportunity to consider all preliminary issues before the making of a final award particularly the issue of impeachment and challenge of an arbitrator since the final award may still be annulled if the reason for the challenge succeeds as an attack on the final award.

However, the reason for the need to act and present proposal for disqualification promptly must not be overemphasized. This is to avoid delay in arbitration practice under ICSID and also to eradicate situation where a party may use it as an engine of frustration. This is because the challenge may be a tactic to delay, to destabilize the other side, or to sabotage proceedings. It is to avoid all these situations that ICSID imposed the duty of promptness on the applicant.

Who determines the challenge? Where the proposal is presented to the secretary General, he shall forthwith remit same to the members of the Tribunal and, if the proposal relates to a sole arbitrator or to a majority of the members, to the Chairman of the Administrative Council. The arbitrator to whom the proposal relates to is expected to furnish explanation to the tribunal without delay. In accordance with Article 58 of the Convention, a decision on disqualification is normally taken by the other members of the tribunal. Where a sole arbitrator is involved, the matter is referred to the Chairman of the Administrative Council. Rule 9(4) provides that the proposal is decided in the absence of arbitrator concerned. The decision on disqualification must be made by a simple majority vote of the other members and in the case of equal division, the decision on the matter shall be referred to the Chairman of the Administrative Council who shall decide the matter within 30 days after he has received the proposal. From available data, there has been very low success in proposal for disqualification of arbitrator under ICSID. According to Magarete Moses, from early 1980's through 2011, there have been 42 challenges. In nine of them, the arbitrator resigned voluntarily. Three challenges did not go forward, and only

[1] Wang Peng *Ibid*
[2] Section 9(2) of Cap A18 Arbitration and Conciliation Act of Nigeria, 2004.
[3] Rule 27 of ICSID

one challenge succeeded.[1] According to Karel Daele, ICSID system of arbitrator challenge simply does not work.[2]

4. Purpose of Challenge

The purpose of challenge is to ensure that arbitrators are free from taint. Arbitration practice will be a very hopeless one if worthless men and women of low integrity and character are allowed to handle and manage the process. It is the critical to arbitration that parties have confidence in the fairness of the process. The essence of challenge is to give the parties opportunity to attack and impeach an arbitrator who may be lacking in independence and impartiality. However, there may be situations where parties may use the challenge system as a tactic or engine to delay the arbitral process.

Arbitral challenges are of paramount importance to maintaining the integrity of the arbitral process. For the system to function effectively well there is need for the parties to believe in the fair-mindedness and independence of the tribunal.[3] Where the challenge succeeds, the concerned arbitrator is removed and a replacement is made in accordance with the procedure pursuant to which the former was appointed. The purpose of the challenge therefore is to ensure that only men and women of character, integrity, honesty, and quality act as arbitrator(s) in the determination of disputes. It is also to ensure that the confidence expected in the process is not eroded or compromised.

Conclusion

The essence of challenge and disqualification of arbitrator under ICSID is to ensure effectiveness and confidence in the arbitral system. It is to ensure fairness, independence and impartiality in the arbitral process. ICSID has copious provisions for challenging and disqualifying an arbitrator. For the challenge to succeed, the party requesting or making the proposal has to act "promptly". Unfortunately, the Convention failed to define the meaning of promptly. However, the Tribunal deciding the matter has to decide based on the facts presented before it. The burden of proof of the facts of the disqualification is not an easy one as the proof must not be based on mere proposition but on credible, convincing, concrete and strong evidence of lack of independence, impartiality, manifest lack of the qualities as an arbitrator, lack of character and recognized competence in the field of laws, commerce, etc.

The evidential burden imposed on the applicant is rather very heavy and this may account for the low level of success rate of disqualification and challenge of arbitrators under ICSID. The essence of the heavy burden of proof is to ensure that parties do not use the challenge or disqualification process as tactic or engine of delay in ICSID arbitral process. Some scholars had argued that the reason for the low success rate in ICSID is the arbitrators' reluctance to disqualify a fellow arbitrator. Though it is true that the arbitral world is a small world and arbitrators tend to know each other, it is most unreasonable to that because arbitrators know each other, then they will be partial in determination of challenge against their fellow arbitrator in a situation where the reason for the challenge is obvious and clear. Arbitrators are strong minded people who will stop at nothing to protect the integrity of the process. They are men and women of integrity who will not allow men of "straw and low culture" to destroy their system.

It is better and more understandable to state that the reasons required for the challenge to succeed and the standard of proof required are heavy and somewhat strict. This may account for the low success rate on challenge and disqualification of arbitrators under ICSID. An arbitrator appointed under ICSID can only be disqualified on prove of any fact indicating manifest lack of the qualities required to serve as an ICSID arbitrator. The lack of those qualities as set forth in Article 14 of the ICSID Convention are not easy to prove talk more of proving the manifest appearance of lack of the qualities. Some of the challenges also failed on the issue of time as an applicant must file his application promptly. What is promptly is one to be considered and determined by the arbitrators based on the surrounding factors and circumstances.

[1] Margaret Moses, "Reasoned Decisions in Arbitrator Challenges," Loyola University Chicago School of Law, Public Law and Legal Theory Research Paper No. 2012 -011. 1
[2] Karel Daele, "Challenge and Disqualification of Arbitrators in International Arbitration," cited in Margaret Moses (*supra*)
[3] Margaret Moses (*supra*)

The IISTE is a pioneer in the Open-Access hosting service and academic event management. The aim of the firm is Accelerating Global Knowledge Sharing.

More information about the firm can be found on the homepage:
http://www.iiste.org

CALL FOR JOURNAL PAPERS

There are more than 30 peer-reviewed academic journals hosted under the hosting platform.

Prospective authors of journals can find the submission instruction on the following page: http://www.iiste.org/journals/ All the journals articles are available online to the readers all over the world without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. Paper version of the journals is also available upon request of readers and authors.

MORE RESOURCES

Book publication information: http://www.iiste.org/book/

Academic conference: http://www.iiste.org/conference/upcoming-conferences-call-for-paper/

IISTE Knowledge Sharing Partners

EBSCO, Index Copernicus, Ulrich's Periodicals Directory, JournalTOCS, PKP Open Archives Harvester, Bielefeld Academic Search Engine, Elektronische Zeitschriftenbibliothek EZB, Open J-Gate, OCLC WorldCat, Universe Digtial Library , NewJour, Google Scholar