

# Challenging an Arbitrator's Appointment:

*A study of the position in Qatar and in ICC  
Arbitration*

**Harriet Jenkins**

*K&L Gates, Doha*

**[Harriet.Jenkins@klgates.com](mailto:Harriet.Jenkins@klgates.com); +974 6645 7100**

**[www.klgates.com/harriet-c-jenkins](http://www.klgates.com/harriet-c-jenkins)**

## OVERVIEW

- What is the standard of an arbitrator's independence (& impartiality)
- How do you challenge?
- Why should you challenge?
- What not to do...
- What if we lose?



***The Arbitrator's Standard***

## THE STANDARD:

- International Bar Association 2004 Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines)
- International Chamber of Commerce 2012 Rules (ICC Rules)
- Qatar International Center for Conciliation and Arbitration 2012 Rules (QICCA Rules)

# THE STANDARD: IBA GUIDELINES (1)

- General Standard 2 - Conflicts of Interest

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

*(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard.*

## THE STANDARD: IBA GUIDELINES (2)

### General Standard 2 - Conflicts of Interest (cont.)

(c) Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that **the arbitrator may be influenced by factors other than the merits of the case as presented by the parties** in reaching his or her decision.

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

# THE STANDARD: IBA GUIDELINES (3)

- General Standard 3 – Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.

(b) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset or resigned.

(c) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

# THE STANDARD: IBA GUIDELINES (4)

- **Part II – Practical Application of the General Standards**
  - **Non-Waivable Red List:**
    - Most **obvious conflicts** which amount to the arbitrator appearing to be a judge in his own cause and which cannot ever be cured by the parties' waiver.
  - **Waivable Red List:**
    - Sets out the situations which do (as opposed to may) give rise to justifiable doubts as to an arbitrator's independence and impartiality, but which **can be waived by the parties expressly I.e. a positive waiver is required.**
    - **Serious conflicts.** Eg. Arbitrator has had a previous involvement in the dispute or a close family member of the arbitrator has a significant financial interest in the matter.
  - **Orange List:**
    - Matters which **ought to be disclosed** by the arbitrator. Situations which, in the eyes of the parties, may give rise to **justifiable doubts**.
    - Eg. Where an arbitrator has acted against one of the parties in an unrelated matter.
    - Disclosure of such matters gives the parties the opportunity to object. No presumption that the arbitrator will be disqualified if an objection is raised. If no objection raised **within 30 days** after receipt of disclosure, a deemed waiver is presumed.
  - **Green List:**
    - Matters which give rise to **no appearance of, nor any actual, conflict** of interest from the objective point of view. Eg. Positional conflict of arbitrator



# THE STANDARD: ICC RULES

## ■ Article 11

- (1) Every arbitrator **must be and remain impartial and independent** of the parties involved in the arbitration.
- (2) Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat **any facts or circumstances** which might be of such a nature as to call into question the arbitrator's **independence** in the eyes of the parties, as well as **any circumstances** that could give rise to **reasonable doubts** as to the arbitrator's **impartiality**. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
- (3) An arbitrator shall immediately **disclose** in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.
- (4) The **decisions of the [ICC] Court** as to the appointment, confirmation, challenge or replacement of an arbitrator **shall be final**, and the reasons for such decisions shall not be communicated...

# THE STANDARD: QICCA RULES

- Article 12: Neutrality and Independence of the Arbitrator

*12.1 When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose **any circumstances likely to give rise to justifiable doubts** as to his neutrality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, **shall without delay disclose any such circumstances**. Any doubts as to the duty to disclose a fact, circumstance or a relationship shall be interpreted in favour of disclosure.*



***The Arbitrator's Disclosure Statement***



# ARBITRATOR'S STATEMENT - ICC RULES(1)

## Arbitrator Statement of Acceptance, Availability, Impartiality & Independence:

### ***“INDEPENDENCE AND IMPARTIALITY***

*In deciding which box to tick, you should take into account, having regard to Article 11(2) of the Rules, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure.*

*Any disclosure should be complete and specific, identifying inter alia relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.”*

# ARBITRATOR'S STATEMENT - ICC RULES(2)

## THE ARBITRATOR'S STATEMENT

### **“NOTHING TO DECLARE**

*- I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any parties and no circumstances that could give rise to reasonable doubts as to my impartiality.*

**or**

### **ACCEPTANCE WITH DISCLOSURE**

*- I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.”*

# ARBITRATOR'S STATEMENT - QICCA RULES(1)

## Arbitrator Statement of Acceptance, Availability & Independence:

### ***“INDEPENDENCE***

*(Whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure.*

*Any disclosure should be complete and specific, identifying inter alia relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information)”*

# ARBITRATOR'S STATEMENT - QICCA RULES(2)

## THE ARBITRATOR'S STATEMENT

### **“NOTHING TO DECLARE**

*- I am independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any parties.*

**or**

### **ACCEPTANCE WITH DISCLOSURE**

*- I am independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties, I draw attention to the matters on the attached sheet.”*

# ARBITRATOR STATEMENT – SUMMARY(1)

- What situations should the arbitrator disclose?
  - Very wide range of situations:
    - *any past or present relationship,*
    - *direct or indirect*
    - *whether financial, professional or of any other kind.*
  - 'relationship with a party's lawyer or other representative':
    - IBA Guidelines, para. 3.3.2. Orange List "*The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers*" is a situation which may give rise to reasonable doubts as to the arbitrator's impartiality or independence
    - Increasing number of successful ICC challenges where arbitrator is a barrister from the same chambers as either a party's legal counsel or another arbitrator - no longer content with independence of barristers and use of Chinese Walls to avoid conflicts



## ARBITRATOR STATEMENT – SUMMARY(2)

- How far does an arbitrator need to go to discharge its disclosure duty?
  - Disclosure must be complete and specific, and identify:
    - *Relevant dates (both start and end dates); and*
    - *financial arrangements; and*
    - *Details of companies and individuals; and*
    - *all other relevant information.*”
  - Must make ‘due enquiry’
  - Any doubt – disclose.
  - If a party’s legal firm has a relationship with its nominated arbitrator – nominee should be prompted to disclose past engagements
  - Ongoing obligation – must provide supplementary disclosure

The background of the slide is a vibrant blue with a bokeh effect, featuring numerous out-of-focus light spots in various shades of blue and white, creating a shimmering, textured appearance.

***Challenge of the Arbitrator:  
ICC Arbitration***

# ICC ARBITRATION: ROUTE TO CHALLENGE (1)

## ■ Pre-Appointment:

- Art.11(2-3) ICC Rules - lack of impartiality or independence (circumstances of fact) and/or failure to disclose; and
- Art.14(1-2) ICC Rules - failure to disclose
- General Conditions 2(b-c) & 3, IBA Guidelines
- Part II IBA Guidelines – situation listed?

## ■ Post-Appointment:

- Art.11(1&3)ICC Rules – continuing obligation to disclose
- Article 14 ICC Rules – challenge of an arbitrator
- IBA guidelines and Part II lists – is this situation envisaged?
- Article 15 ICC Rules – replacement of an arbitrator
- Art.11(4) ICC Rules –ICC International Court of Arbitration has final decision on challenges filed against arbitrators

# ICC ARBITRATION: ROUTE TO CHALLENGE (2)

## ▪ Article 14: Challenge of Arbitrators

- (1) *A challenge of an arbitrator, whether for an alleged lack of **impartiality or independence**, or **otherwise**, shall be made by the submission to the Secretariat of a **written statement** specifying the **facts and circumstances** on which the challenge is based.*
- (2) *For a challenge to be admissible, it must be submitted by a party either **within 30 days from** receipt by that party of the **notification** of the appointment or **confirmation** of the arbitrator, or within 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 subsequent to the receipt of such notification.*
- (3) *The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.*

# ICC ARBITRATION: ROUTE TO CHALLENGE (3)

## ▪ Article 15: Replacement of Arbitrators

- (1) *An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.*
- (2) *An arbitrator shall also be replaced on the Court's own initiative when it decides that the arbitrator is prevented de jure or de facto from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.*
- (3) *When, on the basis of information that has come to its attention, the Court considers applying Article 15(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the arbitral tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.*

## ICC ARBITRATION: ROUTE TO CHALLENGE (4)

- Article 15: Replacement of Arbitrators (continued)

(4) When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.

(4) Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.



***Challenge of the Arbitrator:  
Qatar***



# QICCA ARBITRATION: ROUTE TO CHALLENGE (1)

- **Article 12.1**

*“...An arbitrator, from the time of his appointment and throughout the arbitral proceedings, **shall without delay disclose any such circumstances [likely to give rise to justifiable doubts].**”*

- **Article 14.1: Challenge of the Arbitrator**

*“Any arbitrator may be challenged if circumstances exist that give rise to **justifiable doubts** as to the arbitrator’s impartiality or independence since the start of arbitration and during the proceedings.*

- **“justifiable doubt”**

- No guidance notes to the QICCA
- IBA Guidelines on Conflicts of Interests **General Standard 2 and 3**. Justifiable doubts will exist, for example, if:
  - There is an identity of interest between a party and the arbitrator
  - The arbitrator is a legal representative of a legal entity in the arbitration
  - The arbitrator has a significant financial or interest in the matter at stake



# QATAR LAW

## ▪ Article 194 CCPC

- (1) *The acceptance of the appointment of an arbitrator shall be in writing, unless he is appointed by the court. After having accepted his appointment, an arbitrator may not withdraw without good reason, otherwise he may be held liable for compensation.*
- (2) *Arbitrators may not be removed except with the approval of all the parties to the dispute or upon an order from the court. They may only be recused from arbitration due to reasons that occur or emerge after the conclusion of the arbitration document. **Recusal shall be requested based on the same procedures and reasons followed as for recusal of a judge or if he is considered not competent to issue a decision.***
- (3) *A recusal application shall be submitted to the court having initially the competent jurisdiction to hear the dispute **within five days from the date of notification of the opponent of the arbitrator's appointment.***
- (4) *The judgment issued by the court pertaining to the recusal application may be appealed pursuant to the relevant provisions of Article 205.*

# QATAR LAW

## ▪ Article 98 CCPC

*The judge shall not be competent to consider the lawsuit and shall not be allowed to hear the same, even if he is not recused by any of the parties, in the following cases...*

- (1) If he is a **relative** or an in-law of one of the parties up to the fourth degree;
- (2) If he or his spouse has **outstanding litigation** with one of the parties or with his spouse;
- (3) If he is a personal **agent, guardian, trustee or presumptive heir** of one of the parties, or is related by blood or kinship up to the fourth degree with the guardian of one of the parties, his guardian, or with a **director, manager or partner of a litigant company** and such director, manager and partner has a **personal interest** in the lawsuit;
- (4) If his spouse, relative, in-law, agent, guardian, or trustee has an **interest in the lawsuit**;
- (5) If he **delivered a legal opinion, pleaded on behalf of** one of the parties in the lawsuit, or **wrote about it** even before joining the judiciary or if he **previously heard it** as a judge or **acted as an expert or arbitrator** or **gave evidence** therein;
- (6) If a blood or kinship **relationship** up to the fourth degree exists between him and one of the **judges** sitting with him on the bench or with one of the **parties' representatives or attorneys**

## ▪ Article 99 CCPC

*Any action or judgment by a judge in the aforementioned cases shall be **void**, even if the parties agreed to the same.*



***To Challenge or Not To Challenge?***



# DO YOU HAVE GROUNDS TO CHALLENGE?

- Has there been a failure to disclose?
  - ICC Art.11(3); QICCA Art.12.1 – continuing obligation
  - Challenge veracity/completeness of disclosure statement
  - What is uncovered by your own desktop research?
- Lack of impartiality and (ICC)/or Independence?
  - ICC Art.11(1-2); QICCA Art.12.1 & 14.1; Art.98 CCPC
  - ‘Reasonable (ICC) / Justifiable (QICCA) doubts’ = Knowledge of:
    - the project?
    - prior proceedings – client/legal privilege?
    - a party’s resources, practices, commitments elsewhere?
    - Inherent bias if previously retained?
  - Objective test: Is there a material prospect of the arbitrator being in a position where in light of his previous experience & involvement with one of the parties, he may be inadvertently “influenced by factors other than the merits of the case as presented by the parties...” (IBA General Condition 2(c))

## WHY / WHEN SHOULD YOU CHALLENGE?

- Reflect carefully before making any challenge to arbitrator's independence / impartiality – opportunistic challenges can backfire if the Arbitrator remains in post and continues to adjudicate on the dispute
- **What if it's a close call?**
  - ...probably not – risk to ongoing position & credibility in proceedings. Will make no friends being awkward.
- **Where disclosure of information is unforthcoming...**
- **Where there is a risk of prejudice...**
  - Consider and weigh up all aspects – question of fact and degree. Do the Rules or IBA Guidelines envisage this situation? Is your concern genuine, reasonable / justifiable?

## WHAT NOT TO DO

- Avoid tactical or speculative challenges
  - Low prospect of winning such a challenge
  - High risk of damaging credibility with the tribunal on the substantive case
  - Risk of own conduct being criticised by the relevant arbitral institution (or by the court if the speculative /tactical challenge is pursued all the way)
- Avoid delay once relevant facts become known
  - If have a genuine concern, do not delay.
  - Delay can be fatal to challenge - a party can lose its right to object: Art. 11 ICC Rules *“for the challenge to be admissible it must...”*

# WHAT IF WE LOSE THE CHALLENGE?

- Do nothing...?
  - Your objection is ‘on the record’
  - Could undermine the arbitrator’s credibility in a panel situation – the other arbitrators will see your suspicions on file and may isolate the arbitrator
- Qatar –Qatar:
  - Apply to the court to challenge the nomination - Art. 194 CCPC
  - Art.99 CCPC: Award void and unenforceable?
- ICC:
  - Art.11(4) *“the decisions of the [ICC] Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final”*

Thank you!

شكرا



K&L GATES