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How To Remove An Arbitrator

The Frustrations of Conflicts, Bias, and Incompetence

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How To Remove An Arbitrator – The Frustrations of Conflicts, Bias, and Incompetence

Arbitration is having its golden hour. Heralded as the answer to expensive and time-consuming litigation, arbitration is currently the go-to dispute resolution option for most international construction projects and engineering disputes. As to whether arbitration truly delivers in terms of time and cost is an entire subject in its own right. In this discussion, we explore a more discreet issue. A seemingly practical one that we see arising time and again.

At the outset it starts with what can best be described as a sense of frustration, one that we as arbitration counsel and clients tend to red flag initially amongst ourselves. We have all been there at some point or another. Amidst the proceedings, as matters progress and unfold, issues begin to emerge as to the conduct and behavior, perhaps procedurally or professionally, of the arbitrator appointed in a sole capacity or as part of a tribunal.

Many of us have spent countless hours in advance of commencing or responding to arbitration proceedings by undertaking research and due diligence specifically in relation to arbitrator nominations. We work hard to make sure that we get the right person for the job. We discuss those choices and the rationale for them within our respective client and counsel teams. Yet, despite our due diligence, we increasingly see circumstances and incidents arise and build post-nomination where clients and counsel find themselves asking the question as to whether such issues reflect conflicts, bias, or incompetence.

Clients can quickly become dissatisfied or doubtful about the supposed independence, neutrality, or capability of an arbitrator. Counsel will generally work to calm those fears in the first instance but will be thinking about the ramifications if action ultimately needs to be taken. Then the strategic and sensible question forms: do we need to remove the arbitrator?

Priority issues to be explored in these situations are as follows:

- Can we, in fact, remove an arbitrator?
- If so, what is the process when seeking to remove an arbitrator?
- Even if we can, should we remove an arbitrator?

Can we remove an arbitrator?

The answer will depend on the applicable law, the arbitration agreement, and the rules of the applicable arbitral institution that is administering the proceedings. These will either collectively or individually provide an affirmative position with regards to removal.

As a matter of arbitration risk, it is imperative that where any applicable law or even arbitration rules are lacking in this regard that the matter is dealt with expressly when drafting the terms of any arbitration agreement or terms of reference.

There are several common grounds that form the basis for removing an arbitrator:

- Failure to comply with the applicable law;

- Failure to comply with the arbitration agreement;
- Failure of the arbitrator to disclose former or current conflicts;
- Failure of the arbitrator to conduct proceedings efficiently and/ or fairly; and
- Lack of impartiality or independence.

There are also a wide variety of standards and guidance arising out of the spectrum of arbitration rules which can be applied when determining whether any application seeking the removal of an arbitrator should be upheld. These standards and guidance are particularly diverse when it comes to the matter of conflicts including, for example, the IBA Guidelines on Conflicts of Interest in International Arbitration and the American Arbitration Association's four-part test.

What is the process when seeking to remove an arbitrator?

The applicable law, the arbitration agreement, and the arbitration rules will set the procedure to be followed when seeking to remove an arbitrator. They will dictate whether a formal application is required.

As a matter of professional courtesy, and to avoid the time and costs of a formal application, one or more of the parties may ask the arbitrator in question to resign voluntarily. Where the arbitrator refuses then the parties will proceed with a formal application.

The application process commences with a written request to the arbitrator, the tribunal, or the arbitral institution, as applicable and as dictated by the law, the arbitration agreement, and the arbitration rules. The standards and guidance referred to will require detailed research and substantiation to formulate the application. It must set out clearly the grounds for removal. It should also include any supporting evidence. The other party will be given an opportunity to respond to the application. The arbitral institution, dependent on the rules, may also ask the arbitrator in question or their tribunal colleagues to provide their comments.

Most institutional rules will require that any party who wishes to request the removal of an arbitrator following their nomination must do so promptly. However, it is often the case that the conduct and behavior in question does not come to light in the early stages of the arbitration. UNCITRAL Arbitration Rules, by way of example, provide a period of 15 days following notice of appointment or 15 days from which the circumstances upon which the request for removal is based became known to that party. The ICC Arbitration Rules provide for a 30-day period.

Removal applications can have serious ramifications for the parties and the proceedings, so it is important that parties have sufficient time within which to make the decision as to whether to raise a challenge or not.

The arbitrator, the tribunal, or the arbitral institution (as applicable) will release a written decision regarding the challenge to the arbitrator. It will confirm whether it believes the party's application was in fact timely and whether the request for removal is upheld or dismissed. The decision will also confirm whether there will be any award as to costs arising out of the application, which may depend on whether the application has been upheld or dismissed.

In some jurisdictions where the request for removal remains unresolved, the party may apply to its national court for intervention if the applicable law permits. The court of the seat of the arbitration will then make a final determination on the request for removal of the arbitrator, thereby also ensuring that the integrity of the arbitration process remains intact.

Where an application to remove is upheld and the arbitrator is removed, the procedural clock will effectively stop pending nomination of a replacement arbitrator using the same rules and procedure as the original nomination process. Where an application is dismissed and the arbitrator remains in place, the procedural timetable will proceed in all respects.

Should we remove an arbitrator?

This question is perhaps the most difficult in the context of this subject for both clients and counsel alike. It requires serious and careful consideration before proceeding with any application to remove. Some key considerations include the following:

- Firstly, consideration must be given to the time, resources, and costs inherent in the preparation of any application. Depending on the extent of the allegations against the arbitrator in question and the evidence in support of the same, any such application can add a material amount of additional time, resources, and cost. This must be weighed against the merits and likely outcome of the application.

- Achieving a successful outcome in the application to remove does not necessarily guarantee a better replacement, but on balance most clients and counsel would argue that it is likely to be better than continuing with the previous incumbent.

- Replacing an arbitrator will delay the proceedings. Consideration must be given to likely timescales overall and impacts on the procedural timetable. This is also pertinent if the ground for removal in question relates to the efficiency of the arbitrator.

- Query whether using the application for removal process is merely a strategic challenge designed to delay the proceedings. Any arbitrator, tribunal, or institution being asked to review and provide a decision on any request to remove will give serious consideration to this aspect. An adverse decision in this regard may entail an award of costs to the party resisting removal.

- If the application is dismissed, the parties will be left with that arbitrator still in play. That, in and of itself, may mean that making such an application is neither prudent nor in the best interests of the parties or the arbitration process. The result at best could simply be a grumpy arbitrator, or at worst a vengeful one. On a wider scale, it could result in an entire tribunal drawing a negative inference against the applicant party, which could have ramifications for the outcome of the arbitration and the award.

Applicable laws, arbitration agreements, and arbitration rules generally support the ability of any party to make an application challenging an arbitrator and requesting their removal. The application process itself is not a difficult one. However, any such application must be given serious and strategic consideration by both clients and counsel before being filed, particularly given that such applications often fail. Most sensible counsel see it as part of their professional and ethical duty to remove conflicted, biased, or incompetent arbitrators. Most clients want to increase their chances of a better outcome or award. But, given the level of risk, we cannot ignore the fact that a situation which started with a sense of frustration, albeit serious in nature, can result in a more protracted arbitration environment.