THE INTERNATIONAL COMMERCE & LAW REVIEW Vol. 36 DEC 2007 pp. 111~140
Submitted for publication on 2007. 11. 30
Accepted for publication on 2007. 12. 07

A Comparative Study on the Qualifications and Challenge of Arbitrator in Commercial Arbitration

Lee, Kang Bin*

I. Introduction

Arbitration is a consensual procedure of the settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is final and legally binding on both parties. Also arbitration is probably the best-known form of private dispute resolution, and is a formal, and binding process where the dispute is resolved by the decision of a nominated third party, the arbitrator or arbitrators.

* Professor, Department of International Trade, Sangji University

The initial composition of an arbitral tribunal involves three distinct stages: (1) the appointment of an arbitrator, (2) the disclosure by that arbitrator, to all parties not involved in his appointment, of any circumstances which might give rise to justified doubts as to his impartiality, and (3) objection to that arbitrator by any parties who believe the circumstances disclosed warrant a challenge.[1)]

Any person, including a foreigner, is eligible to be an arbitrator except those specifically disqualified by law. An arbitrator is an individual who can render virtuous judgment in an arbitration. In a commercial arbitration process, no individual with a person interest in the results of the arbitration can serve as an arbitrator, unless the parties waive their right to object to such disqualification.

In general, the arbitration laws and rules stipulate that an arbitrator may be challenged in the following cases; First, a circumstance develops giving rise to justifiable doubts as to his impartiality or independence; secondly, when an arbitrator does not possess the qualifications agreed to by the parties. Such challenge, however, is only for reasons of which he becomes aware after the appointment has been made.

The structure of this paper is as follows: The second and third section describe the qualifications of arbitrator and the disclosure of disqualifications by arbitrator. The fourth and fifth section review the grounds for challenge of arbitrator and the challenge procedure of arbitrator which are provided in the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL Arbitration Rules, national arbitration laws and institutional arbitration rules. The sixth section in conclusion emphasizes the high standards of impartiality of arbitrators, and the education and training for enhancing the qualification of the arbitrator.

As for the research methodology, this paper reviews mainly on the provisions relating to the qualifications and challenge of an arbitrator under

1) David D. Caron, Lee M. Caplan and Matti Pellonpaa, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, 2006, p.167.

the UNCITRAL Model Law and Arbitration Rules, and compare them with those under the national arbitration laws of Korea, England and America , and the arbitration rules of KCAB, ICC, AAA and LCIA.

The previous studies on the qualifications of arbitrator and the challenge of arbitrator in commercial arbitration are as follows: Holtzmann and Nauhaus(1994) commented on the nationality of arbitrator, the disclosure by arbitrator, the challenge grounds of arbitrator, and the challenge procedure under the UNCITRAL Model Law on International Commercial Arbitration.[2] Caron, Caplan and Pellonpaa(2006) commented on the nationality of arbitrator, the disclosure by arbitrator, the challenge grounds of arbitrator, and the challenge procedure of arbitrator under the UNCITRAL Arbitration Rules.[3] Tweeddale and Tweeddale(2007) focused on the removal of arbitrator and independence and impartiality of arbitrator under the UNCITRAL Model Law, ICC International Court of Arbitration Rules of Arbitration and English Arbitration Act.[4] Sun-Ju Jeong(2007) researched on the grounds for challenge of an arbitrator, the exercise of challenge power by the party and the procedure after appointing the substitute arbitrator under the Arbitration Act of Korea.[5] Chul-Gyoo Park(2006) commented on the disclosure by arbitrators under the Revised Uniform Arbitration Act of the United States and the Arbitration Act of Korea.[6]

This paper differs from the previous studies as follows: First, this paper makes a comparative study on the qualifications of an arbitrator and the

---

2) Howard M. Holtzmann and Joseph E. Nauhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration,* Kluwer Law and Taxation Publishers, 1994.

3) David D. Caron, Lee M. Caplan and Matti Pellonpoa, *The UNCITRAL Arbitration Rules: A Commentary,* Oxford University Press, 2006.

4) Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes,* Oxford University Press, 2007.

5) Sun-Ju Jeong, "Challenge of Arbitrators", *Journal of Arbitration Studies,* Vol.17 No.1, Korean Association of Arbitration Studies, March 2007.

6) Chul-Gyoo Park, " Authorities and Duties of Arbitrators under the Korean Arbitration Act and the American Arbitration Act", *Journal of Arbitration Studies,* Vol.16 No.1, Korean Association of Arbitration Studies, March 2006.

challenge of an arbitrator under the various arbitration laws and arbitration rules such as UNCITRAL Model Law on International Commercial Arbitration , Arbitration Act of Korea, English Arbitration Act, Revised Uniform Arbitration Act of the United States, UNCITRAL Arbitration Rules, Arbitration Rules of Korean Commercial Arbitration Board, ICC International Court of Arbitration Rules of Arbitration, AAA International Arbitration Rules, and London Court of International Arbitration Arbitration Rules. Second, this paper suggested that in order to become a international arbitration center, the KCAB should make an effort to include on its panel of arbitrators well-qualified arbitrators from diverse back ground and legal cultures, and provide the regular education and training program for enhancing the qualification of arbitrators.

II. Qualifications of Arbitrator

1. Qualifications of Arbitrator under Arbitration Laws and Rules

There are no provisions for the qualification of arbitrator in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Act of Korea. Also in most jurisdictions national arbitration laws do not put the limitation on the legal qualification of arbitrator.

The Arbitration Rules of Korean Commercial Arbitration Board(KCAB) provides that no person shall serve as an arbitrator if he/she has any legal or financial interest in the outcome of the arbitration, provided that the parties can appoint such person as an arbitrator by mutual agreement in writing notwithstanding that person's knowledge of such facts.[7]

The parties are free to decide the qualifications of the arbitrator. This right derives from the principle of party autonomy and is one of the

7) KCAB Arbitration Rules Article 19.

perceived benefits of arbitration proceedings as opposed to court proceedings. for example, the parties may require the arbitral tribunal consist of members engaged in a certain trade or profession or should be legally qualified or commercially experienced.[8]

Most of national arbitration laws and institutional arbitration rules do not include detailed provisions regulating the qualifications of arbitrators and do not generally impose restricts on the qualifications for arbitrators. For example, an arbitrator need not be a lawyer. Any person including a foreigner is generally eligible to be an arbitrator except those who are disqualified by law.

2. Nationality of Arbitrator

Under the UNCITRAL Model Law and Arbitration Act of Korea no person shall be precluded by reason of his nationality from acting as an arbitrators unless otherwise agreed by the parties.[9]

Article 11(1) of the UNCITRAL Model Law establishes the principle that no person can be precluded by reason of nationality from serving as an arbitrator in a State that has enacted the UNCITRAL Model Law. This is an important factor in establishing truly international arbitration. But even this principle must yield to the will of the parties, who are free to agree that their arbitrators must, or must not, be of certain nationalities. Thus Article 11(1) removes the restrictions in those national laws that prevent foreigners from being arbitrators.[10]

Under the UNCITRAL Arbitration Rules in making the appointment, the appointing authority shall take into account the advisability of appointing as arbitrator of a nationality other than the nationalities of the parties.[11]

---

8) Andrew Tweeddale and Keren Tweeddale, op. cit., p.645.
9) UNCITRAL Model Law Article 11 (1); Arbitration Act of Korea Article12.
10) Howard M. Holtzmann and Joseph E. Neuhaus, op. cit., p.359.
11) UNCITRAL Arbitration Rules Article 6 (4).

The preliminary draft of Article 6(1) of the UNCITRAL Arbitration Rules considered by UNCITRAL provided that the sole arbitrator shall be of a nationality other than the nationality of the parties. The provision was designed to ensure the neutrality of the sole arbitrator. This limitation was deleted because it was viewed as an unnecessary limitation on the autonomy of the parties that might lead to the disqualification of the most competent person.[12)]

Under the KCAB Arbitration Rules in regard to an arbitrator to be appointed by the Secretariat, if the parties are nationals of different countries and/or are domiciled in different countries, the sole arbitrator or the presiding arbitrator shall, upon the request of either party, be appointed from among nationals of countries other than those of the parties. However any such request for appointment of the third country national arbitrator shall be filed with the Secretariat no later than the time for returning the list of candidates.[13)]

Any domestic or foreign person who is fit to render a virtuous judgment in arbitration is eligible to serve as arbitrator, except those who are specifically disqualified by law. if the arbitration is between a Korean party and a foreign party, the chairperson of the tribunal would be appointed from a neutral, third country. A total of 1,023 arbitrators are now included on KCAB's Panel of Arbitrators. There are 126 non-residents of Korea among 31 foreign nationals.[14)]

Under the ICC International Court of Arbitration Rules of Arbitration the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals in confirming or appointing arbitrators.[15)] The sole

12) Report of the UNCITRAL, 8th Session, Summary of Discussion of the Preliminary Draft, UN Doc A/100017, para 44(1075); David D. Caron, Lee M. Caplan and Matti Pellonpaa, op. cit., p.167.

13) KCAB Arbitration Rules Article 22.

14) http://www.kcab.or.kr, 30, Nov., 2007.

15) ICC International Court of Arbitration Rules of Arbitration Article 9 (1).

arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither of the parties objects within the time limit fixed by the Court, the sloe arbitrator or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national.[16]

Under the London Court of International Arbitration Arbitration Rules where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise. The nationality of parties shall be understood to include that of controlling shareholders or interests. A person who is a citizen of two or more states shall be treated as a national of each state; and citizens of the European Union shall be treated as national of its different Member States and shall not be treated as having the same nationality.[17]

Most national arbitration laws and institutional arbitration rules state that no person shall be precluded from serving as an arbitrator because of nationality, unless there is a contrary agreement by the parties. Therefore, non-Korean nationals may serve as arbitrators in an arbitration in Korea, unless otherwise agreed by the parties.

3. Qualification Criteria for Membership on the Roster of Arbitrators ofArbitration Institution

Under the Qualification Criteria for Admittance to the American Arbitration Association(AAA) National Roster of Arbitrators and Mediator the applicants for membership on the AAA National of Arbitrators and Mediators must meet or exceed the following qualifications: (1) Minimum of 10 years senior-level business or professional experience or legal practice,

16) ICC International Court of Arbitration Rules of Arbitration Article 9 (2).
17) London Court of International Arbitration Rules Article 6.

(2) Education degree(s) and/or professional license(s) appropriate to your field of expertise, (3) Honors, awards and citations indicating leadership in your field, (4) Training and experience in arbitration and/or other forms of dispute resolution, (5) Membership in professional association(s), (6) Other relevant experience or accomplishments(e.g. published articles).[18]

The KCAB has the Consolidation Regulation of the Panel of Arbitrators of which the purpose is to regulate the criteria and procedure regarding the drawing up and maintenance of the panel of arbitrators. The KCAB's Regulation should include the training and experience in arbitration and other forms of dispute resolution, which is one of the qualifications for admittance to the AAA National Roster of Arbitrators and Mediator, as the criteria for entrusting an arbitrator.

III. Disclosure of Disqualifications by Arbitrator

1. Disclosure by Arbitrator under Arbitration Laws and Rules

Under the UNCITRAL Model Law and Arbitration Rules 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 impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.[19]

Article 12(1) of the UNCITRAL Model Law places on a prospective arbitrator the obligation to disclose to either the appointing authority and/or the parties any matter likely to give rise to justifiable doubts as to his impartiality or independence.

---

18) http://www.adr.org, 30, Nov., 2007.

19) UNCITRAL Model Law Article12 (1); UNCITRAL Arbitration Rules Article 9.

The Arbitration Act of Korea Article 13 (1) and KCAB Arbitration Rules Article 25 (1) provide the similar to the UNCITRAL Model Law Article 12 (1).

Under the ICC International Court of Arbitration Rules of Arbitration before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be such a nature as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time-limit for any comments from them. An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of similar nature which may arise during the arbitration.[20]

Under Article 7(2) of the ICC Rules of Arbitration a prospective arbitrator is required to sign a statement of independence and disclose to the Secretariat all matters which may affect its independence. The obligation of disclosure of matters affecting the independence of an arbitrator continues throughout the course of the reference.[21]

Under the AAA International Arbitration Rules arbitrators acting under these rules shall be impartial and independent. Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. If, at any stage during the arbitration, new circumstances arise that may give rise to such doubts, and arbitrator shall promptly disclose to such circumstances to the parties and to the administrator. Upon receipt of such information from an arbitrator or a party, the administrator shall communicate it to the other parties and to the tribunal.[22]

Under the LCIA Arbitration Rules before appointment by the LCIA Court, each arbitrator shall furnish to the Registrar a written resume of his past and present professional positions; and he shall sign a declaration to

20) ICC International Court of Arbitration Rules of Arbitration Article 7 (2), (3).
21) Andrew Tweeddale and Keren Tweeddale, op.cit., p.74.
22) AAA International Arbitration Rules Article 7.

the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration. each arbitrator shall thereby also assume a continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other members of the Arbitral Tribunal and to all the parties if such circumstances should arise after the date of such declaration and before the arbitration is concluded.[23]

Most of national arbitration laws and institutional arbitration rules generally require that an arbitrator promptly disclose any circumstance likely to give rise to justified doubts about the arbitrator's impartiality or independence. Especially under the ICC Rules of Arbitration and LCIA Arbitration Rules an prospective arbitrator is required to sign a statement or declaration of independence or impartiality.

2. Duty to Disclose

Article 12(1) of the UNCITRAL Model Law and Article 9 of the UNCITRAL Arbitration Rules address the duty of a prospective arbitrator or an appointed or chosen arbitrator to disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

The duty of disclosure arises in two stages. First, a prospective arbitrator has a duty of disclosure to those who approach him in regards to his possible appointment. Second, the arbitrator, once appointed or chosen, has the same duty of disclosure to the parties he has not already informed. Thus in the case of one party having approached a prospective arbitrator, all other parties must be disclosed to following the appointment or choice of that arbitrator. When an appointing authority has approached the prospective arbitrator, then all parties should later be provided the disclosure.[24]

---

23) LCIA Arbitration Rules Article 5.

24) David D. Caron, Lee M. Caplan and Matti Pellonpaa, op. cit., p.200.

Disclosure at both the pre-and post-appointment stages helps avoid selection of an arbitrator who may be successfully challenged later and thereby avoids interruption of arbitral proceedings. Acceptance of arbitrators in the face of circumstances likely to give rise to justifiable doubts as to impartiality or independence lays the basis for possible estoppel of the accepting party later seeking to challenge the arbitrator on the basis of the same circumstances. A prospective arbitrator has a duty to disclose, to those who approach him, circumstances likely to give rise to justifiable doubts, even when those circumstances arise after he is initially approached but before he is appointed or chosen.

Although there can be many relationships between the arbitrator and the parties, the duty to disclose does not require disclosure of all circumstances which might support a challenge. Rather the duty extends only to those circumstances which more likely than not would support a challenge.[25] For example, if a lawyer has been appointed as arbitrator and his law firm merges with another law firm of which one of the partner acts as lawyer of one of the parties, this circumstance should immediately be disclosed.[26]

The UNCITRAL Model Law expands the obligation of disclosure of matters affecting the impartiality or independence of an arbitrator by using the term 'any circumstances'. However, since it does not provide their specificity, a matter of interpretation regarding the term may arise. A financial or personal interest in the outcome, or an existing or past relationship with any of the parties under Section 12 of the Revised Uniform Arbitration Act of the United States may be interpreted as parts of the circumstances.[27]

Although not express, in my view, the UNCITRAL Model Law and Arbitration Rules place on the arbitrators a continuing duty to disclose

25) David D. Caron, Lee M. Caplan and Matti Pellonpaa, op. cit., pp.201-202.
26) P Sander, The Work of UNCITRAL on Arbitration and Conciliation (2001) 5: David D. Caron, Lee M. Caplan and Matti Pellonpaa, op. cit., p.202.
27) Chul-Gyoo Park, op. cit., p.333-334.

circumstances which arise or become known to them after their appointment. The pre-appointment duty to disclose exists not only at the moment the prospective arbitrator is first approached, but rather up to the point that the arbitrator is or is not chosen or appointed. The circumstances which should be disclosed are those which are likely to give rise to justifiable doubts as to his impartiality or independence, and this constitute a basis for challenge of an arbitrator.

IV. Grounds for Challenge of Arbitrator

1. Grounds for Challenge of Arbitrator under Arbitration Laws and Rules

Under the UNCITRAL Model Law and UNCITRAL Arbitration Rules an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.[28]

The Arbitration Act of Korea Article 13(2) and KCAB International Arbitration Rules Article 13(1) provide the similar to the UNCITRAL Model Law Article 12(2).

The previous Arbitration Act of Korea Article 6 provided that a party may challenge an arbitrator before a court of law on the same grounds applied to judges of the civil court. These disqualifying reasons include the judge's martial or family relationship with a party, financial interest with a party, experience as a legal counsel for a party or as an expert witness,

28) UNCITRAL Model Law Article 12 (2); UNCITRAL Arbitration Rules Article 10.

and the possibility of prejudice or impartiality. However, a party may not challenge an arbitrator on the grounds prescribed under the Civil Procedure Act Article 39(1),[29] which regulates the parties' right to challenge, after he has made a statement before the said arbitrator

Under the ICC International Court of Arbitration Rules of Arbitration a challenge of an arbitrator, whether for an alleged lack of 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.[30]

Under the English Arbitration Act a party to arbitral proceeding may(upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds: (a) that circumstances exist that give rise to justifiable doubts as to his impartiality; (b) that he does not possess the qualifications required by the arbitration agreement; (c) that he is physically or mentally incapable of conducting the proceeding or there are justifiable doubts as to his capacity to do so; (d) that he has refused or failed properly to conduct the proceedings, or to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.[31]

An arbitrator can not be removed under article 24 of the English Arbitration Act for lack of independence. Article 24 of the English Arbitration Act differs slightly from Article 12(2) of the UNCITRAL Model Law, under which an arbitrator can be removed where it can be shown that he lacks impartiality or independence.[32]

Most of national arbitration laws and institutional arbitration rules state

---

29) The previous Civil procedure Act Article 39(1) provided that when there exist any circumstances under which it is difficult to expect a fair trial by a judge, the party may challenge him.

30) ICC International Court of Arbitration Rules of Arbitration Article 11 (1).

31) English Arbitration Act Article 24.

32) Andrew Tweeddale and Keren Tweeddale, op. cit., p.644.

that an arbitrator may be challenged by a party only if there are valid reasons for doubting the arbitrator's impartiality or independence, or if the arbitrator lack the qualifications agreed to by the parties. However, under the English Arbitration Act an arbitrator may not be challenged for lack of independence.

2. Justifiable Doubts as to Impartiality or Independence

The challenge is a device to maintain minimal standards of independence and impartiality in arbitrators. Challenge is an exceptional and serious mechanism; it is a process that has been rarely initiated and even more rarely has resulted in decision. The challenge is a possible response to an appointment at the commencement of an arbitration. It is also a possible response through the arbitration to, for example, failure to perform or new circumstances giving rise to justifiable doubts as to impartiality or independence.[33]

Article 12(2) of the UNCITRAL Model Law sets forth the grounds for challenging an arbitrator. As to the meaning of the first test-justifiable doubts as to impartiality or independence-the legislative history does provide a few guidelines. First, it was noted that the formulation covers many, but probably not all, of the specific reasons currently set forth in national laws. It presumably includes such matters as a financial interest or personal involvement in the subject matter in dispute, or close relationships with one of the parties. Second, the Secretariat suggested that the provision should be interpreted to cover biased or partial behavior during the arbitral proceedings. Article 12(2) of the UNCITRAL Model Law applies the same standard of impartiality and independence to all arbitrators.[34]

The standard for impartiality and independence is objective. The

33) David D. Caron, Lee M. Caplan and Matti Pellonpaa, op. cit., p.187.
34) Howard M. Holtzmann and Joseph E. Neuhaus, op. cit., p.389.

inclusion of the word "justifiable" to define the kind of doubt required to sustain a challenge reflects UNCITRAL's clear intention of establishing an objective standard for impartiality and independence. While a party's subjective concerns about an arbitrator's bias may prompt a challenge, it is the objective reasonableness of these concerns that is ultimately determinative. The test to be applied is that the doubts existing on the part of the party raising the challenge must be "justifiable" on some objective basis.[35]

In many countries the test will be based on an objective measurement as to whether there are justifiable doubts regarding the impartiality of an arbitrator.[36]

It has been stated that the principles of independence and impartiality are now universally accepted in international arbitration. Independence and impartiality are specifically required under the UNCITRAL Model Law and in many other pieces of modern international legislation.[37]

The impartiality and independence of the arbitrator is specifically required under Article 12(2) of the UNCITRAL Model Law. Under Article 12(2) an arbitrator may be challenged where there are "justifiable" doubts as to his impartiality and independence. These obligations apply not only to a sole arbitrator or the chairman of the arbitral tribunal but also party-appointed arbitrators.[38]

Whether those doubts are justifiable is measured objectively. In Country X v. company Q the Secretary-General of the Permanent Court of Arbitration at the Hague concluded that whether a doubt was justifiable had to measured by some objective standard.[39]

---

35) Challenge Decision of 11 January 1995, para 30, reprinted in (1997) XXII YCA 227, 234: David D. Caron, Lee M. Caplan and Matti Pellonpaa, op. cit., p.210.

36) Andrew Tweeddale and Keren Tweeddale, op. cit., p.74.

37) Ibid.,p.150.

38) Contractor(Italy) v. State Agency(1997) XXII Ybk Comm Arbn 222-6: Andrew Tweeddale and Keren Tweeddale, op. cit., p.150.

39) Country X v. Company Q (1997) XXII Comm Arbn 227-42: Andrew Tweeddle and Keren Tweeddale, op. cit., p.150.

The doubts existing on the part of the party raising the challenge must be 'justifiable' on some objective basis. The rule on impartiality and independence of arbitrators should apply to both party-appointed arbitrators and non-party-appointed arbitrators. The word 'justifiable' in Article 12(2) would not provide sufficient guidance. in my view, it would be desirable to add an additional paragraph to make the ground for challenge of arbitrators more explicit. The following specific examples seem clearly to raise justifiable doubts: a financial or personal interest in the outcome of the arbitration, or family or commercial ties with either party or with a party's counsel.

3. Meaning of Impartiality

In general, impartiality means that an arbitrator will not favor one party more than another, while independence requires that the arbitrator remain free from the control of either party. Impartiality thus refers to the arbitrator's internal disposition, while independence refers to external control over the arbitrator. Impartiality is state of mind and thus somewhat elusive, while independence involves some relationship and is thus much more a question of fact. there is however, no strict division between the two concepts, as external factors or conditions-although not necessarily sufficient to put in question the arbitrator's independence-might strengthen the objective justifiability of the doubts expressed by a party about an arbitrator's impartiality.[40]

The requirement of impartiality is a principle of natural justice. Everyone is entitled to a fair hearing by an impartial arbitrator. As stated by the Court of Appeal in Locabail(UK) Ltd v. Bayfield Properties Ltd,[41] justice is portrayed as blind not because she ignores the facts and circumstances of

40) David d. Caron, Lee M. Caplan and Matti Pellonpaa, op. cit., p.215.
41) [2000] QB451, CA, at para 2: Andrew Tweeddale and Keren Tweeddale, op.cit., p.639.

individual cases but because she shuts her eyes to all considerations extraneous to the particular case.[42]

In PT Reasuransi Umum Indonesia v. Evanston Insurance Co[43] the court held that partiality will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.[44]

Arbitrators may be challenged for bias. In Johnson v. Johnson the Australian High Court held that bias meant whether a fair-minded lay observe might reasonably apprehend that the arbitrator might not bring an impartial and unprejudiced mind to the resolution of the question the arbitrator is required to decide.[45]

In England the test for bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[46]

4. Meaning of Independence

The arbitration institution will typically draw the arbitrator's attention to the requirement of independence vis-a-vis the parties. Some institutions will require the arbitrators to confirm in writing that they are, and will remain, independent of the parties, and to disclose any fact or circumstance which might raise doubts regarding their independence in the eyes of the parties. This is the case as far as the ICC International Court of Arbitration is concerned. Article 7(1) of the ICC Rules of Arbitration provides that every arbitrator must be and remain independent of the

42) Andrew Tweeddale and Keren Tweeddale, op.cit., p.639.
43) (1993) 8 International Arbitration Report (No 1) B-1-1B-4: Andrew Tweeddale and Keren Tweeddle, op. cit., p.150.
44) Andrew Tweeddale and Keren Tweeddle, op. cit., p.150.
45) Johnson v. Johnson (2000) 2001 CLR 488, 492: Andrew Tweeddale and Keren Tweeddale, op. cit., p.144.
46) Porter v. Magill [2001] UKHL 67, [2002] 2 AC 357, 494, Davidson v. Scottish Ministers [2004] UKHL 34: Andrew Tweeddale and Keren Tweeddale, op. cit., p.144.

parties involved in the arbitration. Thus a potential arbitrator in an ICC proceeding will have to disclose any relationship he/she has, or may have had, with any of the parties, not only with the party that has nominated him/her as arbitrator. Also, an arbitrator should usually disclose any relationship, in particular professional, he/she has, or may have had in the past, with any of the lawyers acting for the parties in the arbitration.[47]

The Korean Supreme Court held that where there was the fact that an arbitrator has worked at the same law firm as one of the parties's counsel, this may not be considered as the grounds for challenge for the justifiable doubts as to the independence of an arbitrator.[48]

Supervision by the arbitration institution generally implies that the institution may refuse to appoint an arbitrator, or to confirm the choice of an arbitrator proposed by a party, if it considers that the arbitrator is not independent vis-a-vis the parties. if a fact or circumstance arises in the course of the procedure, which may raise doubts regarding the independence of an arbitrator, the arbitration institution will generally decide on any challenge that may be raised by any of the parties.[49]

It has been stated that independence implies the courage to displease, the absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator.[50]

5. Absence of Required Qualifications

The parties may remove an arbitrator under Article 24(1)(a) of the English Arbitration Act if he does not possess the qualifications specified in their arbitration agreement, unless a party has made a unilateral

47) UNCTAD/WTO, International Trade Centre, *Arbitration and Alternative Dispute Resolution,* p.70.

48) The Korean Supreme Court, April 29, 2005 decision, 2004 Da 47901: Sun-Ju Jeong, "Challenge of Arbitrators", *Journal of Arbitration Studies,* Vol.17 No.1, Korean Association of Arbitration Studies, March 2007, p.45.

49) Ibid., p.72.

50) Andrew Tweeddale and Keren Tweeddale, op. cit., p.150.

mistake as to his qualifications. Where an arbitrator is required to be engaged in a profession the word "engaged" require that the arbitrator, at the time of his appointment, is practising in his trade or profession and is not retired. However, in Pan Atlantic Group Inc v. Hassenb Insurance Co of Israel Ltd[51] an arbitrator who had retired after being appointed was not precluded from proceeding with the arbitration. The Court of Appeal stated that it would be ridiculous for an arbitrator not to be able to retire from his job during the course of arbitration. Where the parties choose an arbitral tribunal of "commercial men" these words are taken to mean persons who are not practising members of the legal profession at the time the appointment is made. A non-practising lawyer or a professional arbitrator working in a commercial world would qualify.[52]

6. Incapacity

An arbitrator may be removed under Article 24(1)(c) of the English Arbitration Act not only for actual physical or mental incapability in conducting the arbitration but also if there are any justifiable doubts as to that arbitrator's physical or mental capacity.[53]

7. Refusing or Failing to Act as Required

An Arbitrator may be removed for refusing of failing to conduct the proceeding properly under Article 24(d)(i) of the English Arbitration Act or for refusing or failing to use all reasonable dispatch in conducting the proceedings or in making the award. In both cases it must be shown that this has caused or will cause substantial injustice to the party making the application to remove the arbitrator. In Kelsey Association Ltd v. Ruddy

51) [1992] 2 Lloyd's Rep 120: Andrew Tweeddale and Keren Tweeddale, op. cit., p.645.
52) Pando Compania Naviera SA v. Filmo SAS [1975] QB 742: Andrew Tweeddale and Keren Tweeddale, op. cit., p.645.
53) Andrew Tweeddale and Keren Tweeddale, op. cit., p.645.

Developments Ltd[54] an application for the removal of the arbitrator, on the basis of its competence, was refused, although the court accepted that the arbitrator displayed a "nonsensical" approach to procedural law. The court held that the arbitral tribunal was not so incompetent as to make a reasonable person lose confidence in the tribunal.[55]

V. Challenge Procedure of Arbitrator

1. Challenge Procedure of Arbitrator under Arbitration Laws and Rules

Under the UNCITRAL Model Law: (1) The Parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article; (2) Failing such agreement, a party who intends to challenge an arbitrator, shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge; (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide on the challenge, which decision shall be subject to no appeal : while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make

54) [1998] ADRLJ 6: Andrew Tweeddale and Keren Tweeddale, op. cit., p.646.
55) Andrew Tweeddale and Keren Tweeddale, op. cit., p.646.

an award.[56]

Under the UNCITRAL Arbitration Rules a party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge.[57]

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made : (a) When the initial appointment was made by an appointing authority, by that authority ; (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority ; (c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.[58]

The Arbitration Act of Korea Article 14 and KCAB Arbitration Rules Article 25(2) provide the similar to the UNCITRAL Model Law Article 13.

Under the ICC Rules of Arbitration: (1) A challenge of an arbitrator, whether for an alleged lack of 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 sent by a party either within 30

56) UNCITRAL Model Law Article 13.
57) UNCITRAL Arbitration Rules Article 11.
58) UNCITRAL Arbitration Rules Article 12.

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 need be, 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.[59]

Most of national arbitration laws and institutional arbitration rules state that the parties are free to agree on a procedure for challenging an arbitrator, and if the parties have not agreed on these procedure, a party may challenge an arbitrator by submitting a written statement of the reasons for the challenge to the arbitral tribunal within fifteen days of becoming aware of the relevant facts.

However, under the ICC Rules of Arbitration a party should submit a written statement specifying the facts and circumstances on which the challenge is based within 30 days from receipt of the notification of the appointment of the arbitrator, or from the date being informed of the facts and circumstances on which the challenge is based.

The challenge is a serious matter which may greatly delay arbitral proceedings. For this reason, the UNCITRAL Model Law and Arbitration Rules set forth several formal requirements intended to prevent stale or unsubstantiated challenge.

2. Notice of Challenge

Article 13(2) of the UNCITRAL Model Law establishes the period within which a challenge must be made. Under this provision, a written statement

59) ICC Rules of Arbitration Article 11.

of the reasons for the challenge must be sent by the challenging party within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance constituting bias for the challenge. For example, if facts believed to constitute a ground for challenge become known for the first time via disclosure by an arbitrator and disclosure occurs after appointment, then the 15 day period runs from the date of disclosure to the challenging party and not the date of appointment.[60]

Also Article 13(2) establishes who should be sent in the event of a challenge as well as the form and contents of notification. It requires that notice be sent to the arbitral tribunal. The challenge must be in writing and must state the reasons for the challenge although not necessarily providing the evidence justifying the challenge. The purpose of the notice is to enable the other party to decide whether he will agree to the challenge and the challenged arbitrator to decide whether he will withdraw from office.[61]

3. Decision on Challenge

Article 13(3) of the UNCITRAL Model Law provides the process for deciding the challenge in case where a party's challenge to an arbitrator is not accepted by the other party or the challenged arbitrator does not withdraw.

If a challenge is not successful, the challenging party may request the court or other authority to decide on the challenge within 30 days after receiving notice of the decision rejecting the challenge.

Article 13(3) provides for immediate court review of unsuccessful challenges, but with three features designed to reduce the risk of delay : a short time period for seeking court review, no appeal of the court's

60) David D. Caron, Lee M. Caplan and Matti Pellonpaa, op. cit., p.241.
61) Ibid., p.246.

decision, and, most important, discretion in the arbitral tribunal to continue the arbitration during the court proceedings. The court is to review all unsuccessful challenges, whether decided initially by the arbitral tribunal under article 13(2) or by another authority under an agreed on challenge procedure.

Article 13 sets forth specific time limits within which a challenge can be made, and failure to comply with those time limits bars a later effort to attack the award on the grounds on which the challenge could have been based.

Article 13 provides a right to challenge an arbitrator only under certain conditions, and those conditions include a requirement that the challenge be brought within the time limit stated therein. Thus a party who fail, to raise a timely challenge should presumable be barred from using that mechanism to raise his objections.[62]

The arbitral tribunal may continue the proceedings even while such a challenge is pending in a court. However, the court's decision on the challenge is not subject to appeal. Although not explicitly stated, the absence of an appeal suggests that the court's decision is final upon issuance, and hence an arbitrator must resign if the court agree with the challenge.

VI. Conclusion

The personal qualifications of arbitrators include honesty, integrity, impartiality, independence and general competence in the subject matter of the dispute. Beyond these general requirements, arbitration practice is generally an open field. Some systems however, such as court-annexed arbitration, require that attorneys serve as arbitrators.

62) Howard M. Holtzmann and Joseph E. Neuhaus, op. cit., pp.408-409.

Since arbitrators act in a quasi-judicial capacity, they are held to the same high standards of impartiality by which judges are bound. They should conform their conduct to the relevant code of ethics such as the AAA Code of Ethics for Arbitrators in Commercial Disputes.

The AAA Code of Ethics for Arbitrators in Commercial Disputes set forth rather comprehensive guidelines for arbitrators, which are generally reflected in the ethics rules of several other organizations. Many of these guidelines address the essential qualifications of an arbitrator. For example, an arbitrator should ensure that he has the essential competence, and time to conduct an arbitration. Moreover, an arbitrator should generally be independent and unbiased. Arbitrators are often compared in this regard to judges, who must meet relatively strict standards to avoid appearance of impropriety.

The rules of most arbitration institution require disclosure of most professional, financial, social and personal relationships between an arbitrator and parties or their counsel. Deliberate failure to disclose such a relationship, may itself be considered unethical conduct, even though the relationship alone might not necessarily be a sufficient ground to vacate an award.

To protect the integrity of the arbitral proceedings parties to those proceedings must have confidence that the presiding arbitrator or arbitrators will make every effort to reach a fair and timely result. Therefore, the requirements that the arbitrators be impartial and independent and that they not fail to act are essential if the arbitration institution is to maintain the respect needed to be effective means of settling commercial disputes.

In conclusion, fair and just processes for resolving disputes are indispensable in our society. Commercial arbitration is an important method for deciding many types of disputes. In order for commercial arbitration to be effective, there must be broad public confidence in the integrity and fairness of the process. Therefore, an arbitrator has a

responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved.

Arbitrator plays an integral part in any arbitral proceedings. Also an arbitration institution will be judged by the quality of arbitrators it maintains on its roll. Therefore, in order to become an international arbitration center in the Northeast Asia, the Korean Commercial Arbitration Board should first make an effort to include on its panel of arbitrators well-qualified arbitrators from diverse back ground and legal cultures. Also the education and training is the critical element for enhancing the qualification of the arbitrator. Therefore, the KCAB and Korean Association of Arbitrators should prepare and provide the regular education and training program for prospective or practicing arbitrators.

References

Bennett, Steven C., *Arbitration: Essential Concepts*, ALM Publishing, 2002.

Caron, David, D., Caplan, Lee M. and Pellonpoa, Matti, *The UNCITRAL Arbitration Rules : A Commentary*, Oxford University Press, 2006.

Carbonneau, Thomas E. and Jaeggi, Jeannette A., *AAA Handbook on Internationa Arbitration & ADR*, American Arbitration Association and JurisNet LLC, 2006.

Derains, Yves and Schwartz, Eric A., *A Guide to the ICC Rules of Arbitration*, Kluwer Law International, 2006.

Holtzmann, Howard M. and Nauhaus, Joseph E. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer Law and Taxation Publishers, 1994.

Jeong, Sun-Ju, "Challenge of Arbitrators", *Journal of Arbitration Studies*, Vol.17 No.1, Korean Association of Arbitration Studies, March 2007.

Nolan-Haley, Jacqueline M., *Alternative Dispute Resolution*, West Publishing Co.,1999.

Park, Chul-Gyoo, "Authorities and Duties of Arbitrators under the Korean Arbitration Act and the American Arbitration Act", *Journal of arbitration Studies*, Vol.16 No.1, Korean Association of Arbitration Studies, March 2006.

Schafer, Erik, Verbist Hermann and Imboos, Christophe, *ICC Arbitration in Practice*, Kluwer Law International, 2004.

Tweeddale, Andrew and Tweeddale, Keren, *Arbitration of Commercial Disputes*, Oxford University Press, 2007.

UNCTAD/WTO International Trade Centre, *Arbitration and Alternative Dispute Resolution*, 2001.

UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration, 1985.

UNCITRAL, UNCITRAL Arbitration Rules, 1976.

ICC, International Court of Arbitration Rules of Arbitration, 1998.

AAA, International Arbitration Rules, 1993.

LCIA, Arbitration Rules, 1998.

http://www.uncitral.org

http://www. adr.org

http://www.lcia.org

http://www.iccarbitration.org

http://www.kcab.or.kr

ABSRACT

A Comparative Study on the Qualifications and Challenge of Arbitrator in Commercial Arbitration

Lee, Kang Bin

This paper intends to review the qualifications of arbitrator, the disclosure of disqualifications by arbitrator, the challenge grounds of arbitrator, and the challenge procedure of arbitrator under the arbitration laws and rules.

There are no provisions for the qualification of arbitrator in the UNCITRAL Model Law on International Commercial Arbitration. Under the UNCITRAL Model Law on person shall be precluded by reason of his nationality from acting as an arbitrators.

Under the UNCITRAL Model Law 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 impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties.

Under the UNCITRAL Model Law an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.

Under the UNCITRAL Model Law the parties are free to agree on a procedure for challenge an arbitrator. Failing such agreement, a party who

intends to challenge an arbitrator shall send a written statement of the reasons for the challenge to the arbitral tribunal within 15 days after becoming aware of the constitution of the arbitral tribunal or any circumstance that give rise to justifiable doubts as to his impartiality or independence. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

In conclusion, an arbitrator has a responsibility not only to the parties but also to the process of arbitration, and must observe high standards of conduct so that the integrity and must observe high standards of conduct so that the integrity and fairness of the process will be preserved.

Key Words : Qualifications of arbitrator, Disclosure of disqualification, Grounds for Challenge, Justifiable doubts, Impartiality, Independence, Challenge procedure