CHALLENGES TO THE APPOINTMENT OF ARBITRATORS: A COMPARATIVE ANALYSIS OF THE TRENDS IN INTERNATIONAL COMMERCIAL ARBITRATION AND INTERNATIONAL INVESTMENT ARBITRATION

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ABSTRACT

International Commercial Arbitration and International Investment Arbitration have two main differences in their challenge procedure. These are; the time limit to raise a challenge against an arbitrator; and the test applied by tribunals to challenge the arbitrator. Investment arbitration and commercial arbitration have divergent takes with respect to the time limit for raising a challenge. While commercial arbitration provides for a specific period, investment arbitration refrains from providing such a limit. This provision under investment arbitration has prompted parties to file baseless challenges at any stage of proceedings, thus causing grave prejudice to the other party. Similarly, the tests applied by both to adjudge neutrality vary. Commercial arbitration uses the 'justifiable doubts' standard where doubts are considered justifiable if there is either a real apprehension of bias or a real possibility of bias. Investment arbitration uses the 'manifest lack of qualities' standard. The use of the term 'manifest' indicates that the arbitrator's lack of qualities must be conclusively established. Thus, the burden of proof to challenge an arbitrator is much higher in investment arbitration as compared to commercial arbitration. There is an urgent need for institutional arbitration facilities to deliberate on their challenge provisions and amend their rules to prevent the filing of frivolous challenges to hamper the flow of proceedings. This article aims to analyse the difference in the challenge procedure in International Commercial Arbitration and International Investment Arbitration and seeks to draw out the missing pieces in the provisions contained in International Investment Arbitration.

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1. INTRODUCTION

One *sui generis* feature of international arbitration is party autonomy, whereby a party has the freedom to choose its own decision makers.[1] The liberty given to parties to appoint arbitrators of their choice has often been abused by them. Parties have a predilection to appoint arbitrators who may lean in their favour. This, in turn, violates the principles of natural justice and pollutes the stream of justice. Subsequently, a plethora of doubts and suspicion arise in the mind of the other party. Therefore, with passage of time a system in international arbitration has evolved which provides for a procedure to challenge the appointment of the arbitrators on grounds of impartiality and independence within a stipulated time period.

As a general rule, challenges must be made at the earliest,[2] however the time limit requirements for filing a challenge differ vastly in International Commercial and Investment Arbitration. International Commercial Arbitration institutions provide for a fixed time limit to challenge an arbitrator on grounds of lack of impartiality and independence.[3] The failure of a party to file a challenge within the stipulated time limit implies a waiver of that right.[4] On the other hand, International Investment Arbitration does not expressly lay down an ascertained time limit to challenge the arbitrator.[5]

Most arbitral tribunals permit challenges to the appointment of arbitrators on the grounds of independence and impartiality. Independence and impartiality of an arbitrator is the focal point of arbitration proceedings, without which the final award would be vitiated.[6] The interpretation of the terms '*independence'* and *'impartiality*' across various commercial as well as investment arbitration tribunals are almost uniform; although the standards for proving the same might differ among various conventions or institutions. The two terms are often incorrectly presumed to be interchangeable in nature.[7] The concept of independence is

[1] Charles B Rosenberg, 'Challenging Arbitrators in Investment Treaty Arbitrations- A Comparative Law Approach' (2010) 27 Journal of International Arbitration 505.

[2] Federica Cristani, *The Law and Practice of International Courts and Tribunals* (Brill 2014) 160-162.

[3] Clyde Croft, Christopher Kee & Jeffrey Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (CUP 2013) 143-146.

[4] UNCITRAL Arbitration Rules, art 30; SIAC Arbitration Rules 2016, rule 41.

[5] Cristani (n 2).

[6] Indu Malhotra, *Commentary on the Law of Arbitration* vol 1 (4th edn, Wolters Kluwer 2020) 513.

[7] Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 255.

concerned with the relationship between the arbitrator and either of the parties.[8] This term is entitled to an objective test.[9] On the other hand, impartiality is a subjective concept since it refers to the state of mind of the arbitrator on account of which he either favours one party and opposes the other.[10]

The success rate for the challenge differs between the 2 types of arbitration i.e., commercial and investment arbitration. It is believed that there is a low possibility of success of a challenge under the International Court of Arbitration ["ICC"] Rules, Singapore International Arbitration Centre ["SIAC"] Rules and United Nationals Commission on International Trade Law ["UNCITRAL"] Rules. However, there exists an even lower possibility of success under Investment Arbitration conventions such as International Centre for Settlement of Investment Disputes ["ICSID"]. Reasons for this will be explained subsequently in this article.

Challenge proceedings were extremely rare earlier.[11] However, due to the increased importance given to arbitration as a medium to resolve commercial and investment disputes, parties often explore possibilities of challenging the arbitrators' appointment where there is the slightest element of doubt as to their independence and impartiality.[12] This opens the floodgates to various challenge proceedings, most of which are groundless. Baseless and frivolous challenges cause serious prejudice to the other party in terms of legal fees, expenses, long drawn-out proceedings and uncertainty; this nullifies the *raison d'être* for entering into arbitration.[13]

This article aims to critically analyse and compare the procedure for challenge of an arbitrator under International Commercial Arbitration and International Investment Arbitration. It seeks to shed light on the need for institutional arbitration facilities to amend their procedural rules to ensure that parties are unable to use the challenge procedure as a delay or '*guerrilla tactic*'.[14] In Part II of this article, the authors will argue that International Investment Arbitration facilities ought to take a leaf out of the book from the International Commercial

[8] ibid; *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* (2001) ICSID Case No ARB/97/3, Decision on the challenge to the president of the committee (3 October 2001) paras 14 and 18.

[9] Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2020) 1910.

[10] Born (n 9).

[11] Redfern, Hunter, Blackaby and Partasides (n 7) para 4.91.

[12] ibid.

[13] Born (n 9) 2034-2035.

[14] ibid.

Arbitration regime when it comes to the time limit to file a challenge. In Part III of this article, the authors would like to draw the readers' attention to the inconsistencies and ambiguity in the challenge standards adopted under International Commercial and Investment Arbitration regimes.

2. TIME LIMIT TO CHALLENGE THE ARBITRATOR

Article 13 (2) of the UNCITRAL Rules states that a party who intends to challenge an arbitrator shall file his challenge by way of a written statement with the reasons for challenge either '*after becoming aware of the constitution of the arbitral* tribunal' or '*after becoming aware of any circumstance referred to in article 12(2),*'[15] The time limit under the UNCITRAL Rules are enforced strictly with tribunals granting leniency sparingly.[16]

Article 10.3 of the London Court of International Arbitration ["LCIA"] Rules provide for a shorter time frame of 14 days as compared to UNCITRAL Rules.[17] Similarly, SIAC Arbitration Rules also provide for a time limit of fourteen days.[18] The ICC Rules are less stringent with regard to the time period to raise a challenge as they provide for a thirty day time limit for either party to file a challenge.[19]

Several countries have taken inspiration from the practice in International Commercial Arbitration and have sought to imbibe the same in their legislation. France, Switzerland, Montenegro and India are few such examples. The Arbitration and Conciliation Act 1996 ["Indian Arbitration Act"] of India which has been drafted on the basis of the framework of the UNCITRAL Model Law, has an identical provision under Section 13 which provides for a fifteen day time limit to raise a challenge.[20]

However, some countries have abstained from incorporating this provision in their legislation, The United Kingdom's ["UK"] Departmental Advisory Committee in arbitration law decided against adopting provisions of ICC Rules and UNCITRAL Rules as they

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[15] UNCITRAL Arbitration Rules, art 13.

[16] Redfern, Hunter, Blackaby and Partasides (n 7) 312.

[17] LCIA Rules, art 10.

[18] SIAC Arbitration Rules 2016, art 15.

[19] ICC Rules of Arbitration, art 14.

[20] Arbitration and Conciliation Act 1996, s 13.

believed that the procedure was too formal and could enable parties to hoodwink the tribunal by creating artificial delays.[21] This decision, however, invited substantial criticism.[22]

2.1 OBSERVANCE OF A FIXED TIME LIMIT UNDER INTERNATIONAL COMMERCIAL ARBITRATION

Article 13 of UNCITRAL Rules assumes that if the challenge has not made within the fifteen day period, the party has impliedly waived his right to challenge the arbitrator.[23] This provision has been explained under Article 30 of the UNCITRAL Rules.[24] A party is considered to have waived all objections regarding the provisions of the rules or of the arbitration agreement have not been complied with, if he '*proceeds with the arbitration without promptly stating his objection to such non-compliance*'.[25] In the case of *Island Territory of Curacao v. Solitron Devices, Inc.,* a Court opined that a failure to raise a timely objection regarding the arbitrators impartiality when such grounds were known to the party constituted a waiver of the right to challenge.[26]

The fifteen-day time period under the UNCITRAL Rules are inflexible, and untimely challenges are liable to be rejected at the threshold.[27] The fifteen day requirement under article 13(2) has a sound reasoning behind its mandatory nature.[28]A dishonest party may seek refuge under the challenge provision to temporarily delay, stall and disrupt proceedings.[29]A party may choose to initiate challenge proceedings at a time where utmost prejudice will be caused to the other party. Commentator David Caron has said that permitting anybody to raise a challenge at a belated stage is grossly unfair and a '*perversion of the arbitral*

[21] Robert M Merkin, *Arbitration Law* (LLP 2004) para 10.26.

[22] ibid.

[23] Howard M Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) 408.

[24] UNCITRAL Arbitration Rules.

[25] UNCITRAL Arbitration Rules, art 30.

[26] Island Territory of Curacao v Solitron Devices, Inc, 356 F Supp 1 (SDNY 1973); Redfern and Hunter (n 3) 316 and 347.

[27] Croft, Kee and Waincymer (n 3).

[28] David D Caron and Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, OUP 2013) 257; Malhotra (n 2).

[29] Ibid.

process'.[30]

According to some courts, the fifteen day time period begins from the day on which the party gained direct and clear knowledge i.e., actual knowledge of the facts which lead to justifiable doubts regarding an arbitrator's impartiality.[31] Some courts have opined that it is not necessary for a party to conduct due diligence and conduct investigations where the arbitrator was obligated to provide a disclosure.[32]

A German court has interpreted the phrase '*after becoming aware of*' as used in the ZPO i.e., German Code of Civil Procedure in a manner where the time period for challenging an arbitrator is triggered only when the challenging party acquired actual knowledge of the ground for challenge.[33] Even constructive knowledge has not been considered to be satisfactory enough to trigger the time limit.[34]

In the arbitration of *Vito G. Gallo v. Government of Canada* ["Gallo Arbitration"] the tribunal opined that if a party was permitted to invoke evidence of constructive knowledge, the arbitrators' duty of continuous disclosure would be rendered nugatory.[35] Furthermore, it is against the letter and spirit of the law to place the burden on the party to conduct their own due diligence as it would render the law i.e. Article 12 of the UNCITRAL Rules, a dead letter.[36] Although the challenge must be instituted within fifteen days of acquiring actual knowledge of the grounds for challenge, if the other party opposes the fact that the challenge was not instituted in a timely manner, they bear the burden to prove that the challenge was untimely. In the challenge proceedings of the Gallo Arbitration, the tribunal held that the burden of proving that the claimant had knowledge of relevant circumstances more than fifteen days prior to the institution of the challenge proceedings rested upon the respondent.[37] The challenge was dismissed as untimely under the UNCITRAL Rules as well as the ICSID Convention.

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[30] Caron and Caplan (n 28) 257.

[31] 28 Sch 24/99 (2000) OLG Report Berlin 14/2000 248; UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations Publication 2012) 69.

[32] Born (n 9) 2086.

[33] 28 Sch 24/99 (n 31); UNCITRAL (n 31).

[34] ibid.

[35] *Vito G Gallo v Government of Canada* (2007) PCA Case No 55798, Decision on the Challenge to Mr J Christopher Thomas, QC (14 October 2009) para 20, 24.

[36] ibid.

[37] Gallo (n 35).

2.2 NON-OBSERVANCE OF STRICT TIME LIMIT UNDER INTERNATIONAL INVESTMENT ARBITRATION

Rule 9(1) of the ICSID Convention mandates that a challenge of an arbitrator must be raised '*promptly*' before the arbitration proceedings come to an end.[38] Until the verdict of the challenge is decided, the arbitration proceedings continue to remain suspended.[39] Thus, the unchallenged arbitrators make their best attempt to decide the challenge expeditiously to continue with the proceedings.[40] Rule 27 of the ICSID Convention is analogous to Article 30 of the UNCITRAL Rules; it states that a party is automatically assumed to have waived its right to object to a violation of any rule if it has not raised its' objection in a prompt manner.[41]

ICSID Convention does not provide for a specific time limit for the challenge of an arbitrator. It makes no mention of any '*strict temporal requirements*' for the admissibility of raising a challenge.[42] Despite the absence of a fixed time limit, in investor state disputes, tribunals have been generally known to adopt a restrictive approach.[43]

The word '*promptly*' has remained undefined in the rules, leaving much room for interpretation. Some ICSID tribunals have, in the past held 53 days to not fall under the scope of '*promptly*'[44], whereas other liberal tribunals have held a longer period of 8 months to not fall under the definition of '*promptly*'.[45] Tribunals have held different timelines to not fall under the meaning of '*promptly*' due to the lack of clarity and uncertainty surrounding this rule. This lacuna will continue to plague investment arbitration until some explanation or clarification is furnished.

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[38] ICSID Convention, rule 9 (1).

[39] ibid.

[40] Meg Kinnear, 'Effectiveness of International Law', in American Society of International Law (ed), *Proceedings of the Annual Meeting*, (vol 108, CUP 2014) pp 412-416.

[41] ICSID Convention, rule 27; Redfern (n 7) 316.

[42] Cristani (n 2).

[43] ibid.

[44] *Suez, Sociedad General de Aguas de Barcelona, S A and Interagua Servicios Integrales de Agua, S A v Argentine Republic* (2003) ICSID Case No ARB/03/17 Decision on the proposal for the disqualification of Gabriella Kauffman Kohler (22 October, 2007).

[45] *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12 Decision on the Challenge to the President of the Tribunal, (February 25, 2005).

2.3 *CRITICAL ANALYSIS AND RECOMMENDATIONS OF AUTHORS*

Arbitrator challenges were scarce in investment arbitrations.[46] However, in the recent past there has been an astronomical increase in the number of challenges raised.[47] Most of these challenges are eventually unsuccessful due to their frivolous nature.[48] This demonstrates the significance of the mandatory time limit to file a challenge, without which proceedings would be inevitably side-tracked. The mandatory time limit as seen in International Commercial Arbitration serves as an impermeable mechanism to prevent the filing of challenges at a later period. The investment arbitration regime is in dire need of a more robust framework to adjudicate on the time limit to raise a challenge.

The UNCITRAL Rules contain a provision which states that parties must file the challenge within fifteen days after becoming aware of, either the constitution of the tribunal or after taking cognizance of any circumstances which affect the impartiality or independence of the arbitrator. The ICSID Convention has not accommodated for such a provision under Rule 9. The term '*promptly'* is subjective in nature. The absence of the definition of the word '*promptly'* has created a dichotomy of opinions with regard to the permissible timeline to admit a challenge. Since the triggering point for filing the application challenging the arbitrators' appointment remains unspecified, further uncertainty is brought about.

An insertion of the definition of the word '*promptly*' may help to mitigate the lack of uniformity and uncertainty that surrounds the time limit to challenge an arbitrator. In the past Courts have construed the term '*promptly*' to mean '*within a reasonable time in light of all the circumstances*'.[49] This definition appears to be apt for the ICSID Convention. Tribunals may interpret the term on a case to case basis and in cases with a similar factual matrix, they may use those cases as precedent while adjudicating on the challenge.

Alternatively, the ICSID Convention could also incorporate a provision similar to UNCITRAL Rules regarding a time limit for filing a challenge to prevent parties from taking

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[46] Chiara Giorgetti, 'The Arbitral Tribunal: Selection and Replacement of Arbitrators' *in* Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (International Litigation in Practice, vol 8, Brill Nijhoff 2014) 145-172.

[47] ibid.

[48] Judith Levine, '"Late-in-the-Game" Arbitrator Challenges and Resignations' in *Proceedings of the Annual Meeting (American Society of International Law) The Effectiveness of International Law* (vol 108, CUP 2014) 419-423.

[49] *State v. $17,636.00 in U.S. Currency,* 650 So. 2d 900 (Ala. Civ. App. 1994); *State v. Chesson*, 948 So.2d 566, 568 (Ala. Civ. App. 2006).

undue advantage of the challenge provision and disturbing the sanctity of arbitral proceedings. A definite time period to challenge an arbitrator will also help in ensuring that tribunals interpret the provisions in a similar manner globally to ensure equitable and uniform treatment. Furthermore, it will encourage parties to act expeditiously and file their challenges in a timely manner.

However, the authors acknowledge the fact that no party should be placed at a disadvantage if there is an inadvertent delay in filing the challenge proceedings. Investment disputes have exceedingly high stakes and the award passed by a biased arbitrator is vulnerable to challenge.[50] In such a situation, the filing of a challenge in an untimely manner could cause grave prejudice, especially in investor state disputes. If a provision regarding a timeline is to be inserted under investment arbitration rules, it may be of a directory nature.

The authors believe that a viable solution to deter parties from filing untimely and frivolous challenges would be to impose exemplary costs.[51] In a recent investor-state dispute, costs were imposed by the tribunal on a party on account of bringing forth a frivolous and unjustified challenge.[52] Tribunals must penalise unscrupulous parties who aim to prolong arbitral proceedings to set an example.

3. STANDARDS FOR ADJUDICATING ON A CHALLENGE PROCEEDING

Under Article 12 (1) of the UNCITRAL Rules, a challenge to disqualify an arbitrator can be initiated if circumstances exist which give rise to '*justifiable doubts regarding his independence and impartiality*.'[53] An identical standard has been adopted under the Article 10 of LCIA Rules[54] and Article 11 of the SIAC Arbitration Rules, 2017.[55]

Under the ICC Rules, an arbitrator maybe challenged on grounds of '*impartiality or independence or otherwise*'.[56] The use of the word '*otherwise*' casts the net far and wide and lays down an amorphous standard to challenge an arbitrator[57] since it allows the parties to

[50] United Nations Conference on Trade and Development 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (New York and Geneva 2010) 23.

[51] Levine (n 48).

[52] ibid.

[53] UNCITRAL Arbitration Rules, art 12(1).

[54] LCIA Arbitration Rules, art 10.

[55] SIAC Rules 2016, art 11.

[56] ICC Rules of Arbitration, 2021, art 14.

challenge the arbitrator on any grounds they deem fit.[58]

Under Article 57 of the ICSID Convention, a challenge to disqualify an arbitrator can be initiated if there is a '*manifest lack of the qualities*' enlisted under Article 14 (1) of Convention which also includes the qualities of independence and impartiality under its umbrella.

However, most of the above-mentioned rules or conventions have not provided a definite set of circumstances which could be referred to while deciding upon the arbitrator's neutrality. The International Bar Association Guidelines on Conflicts of Interest in International Arbitration ["IBA Guidelines"] have been frequently relied upon by commercial arbitration tribunals while deciding challenges to arbitrators.[59] The ICC Court has formulated its own non-exhaustive list inspired by the IBA Guidelines to lay down circumstances which may serve as grounds for disqualification.[60] In certain investment arbitrations challenges, parties have placed reliance on the IBA guidelines.[61] However, it is the authors' view that due to the high stakes involved in investment arbitration, the tribunals must meticulously examine and place emphasis on the facts of each case to decide the challenge, rather than mechanically apply guidelines which are non-exhaustive and not binding on the parties.[62]

The threshold for challenge under International Commercial Arbitration and International Investment Arbitration are at variance with each other.

3.1 STANDARD FOR CHALLENGING AN ARBITRATOR UNDER INTERNATIONAL COMMERCIAL ARBITRATION

The burden of proof for challenging an arbitrator in case of commercial arbitration is fairly low. The use of the term '*justifiable doubts*' lays down an objective standard to judge the

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[57]Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer Law International 2012) 243.

[58] ibid.

[59] *National Gird Plc v The Republic of Argentina* (2007) LCIA Case No UN 7949, Decision on the challenge to Mr. Judd R. Kessler (3 December, 2007); *ICS Inspection and Control Services Limited v. The Republic of Argentina* (2009) Decision on challenge to Mr. Stanimir A. Alexandrov (17 December, 2009).

[60] Loretta Malintoppi and Alvin Yap, 'Challenges of Arbitrators in Investment Arbitration Still Work in Progress?', in Katia Yannaca-Small (ed), Arbitration Under International Investment Agreements: A Guide to the Key Issues (2nd edn, Oxford University Press 2018) 163.

[61] *OPIC Karimum Corporation v The Bolivarian Republic of Venezuela* (2011) ICSID Case No ARB/10/14, Decision on the proposal to disqualify Professor Philip Sands, arbitrator (5 May, 2011); *Total S.A. v. Republic of Argentina* (2015) ICSID Case No ARB/04/01, Decision on the proposal to disqualify Teresa Cheng (26 August, 2015).

[62] IBA Guidelines on Conflicts of Interest in International Arbitration (2014) 3.

independence and impartiality of the arbitrator.[63] The test laid down to assess the independence and impartiality of an arbitrator under International Commercial Arbitration is from the viewpoint of a fair-minded, reasonable third person. A reasonable and fair minded third person has been interpreted to be a member of the public who (i) is not a legal practitioner; (ii) is neither completely ignorant about the law or the facts of the case; and (iii) is neither excessively suspicious, sensitive or complacent.[64]

At present, two different tests are being used by commercial arbitral tribunals in order to determine the existence of justifiable doubts i.e., (i) the '*reasonable apprehension test*' and (ii) the '*real possibility test*'. A third test formulated by the Courts in England known as the '*real danger test*' has been rendered defunct after the formulation of the '*real possibility test*'. The '*real danger test*' test failed to lay sufficient emphasis on the perspective of the general public as well as the aggrieved party. It eventually led to the examination of the facts of the matter solely from the perspective of the judiciary.

3.1.1 'Reasonable Apprehension' Test

Common law jurisdictions such as, Canada, Australia and South Africa have adopted the '*reasonable apprehension*' test.[65] Under this test, even the '*mere appearance of bias'* is sufficient grounds to challenge the arbitrator under Article 12.[66] The genesis of this test lies in the common law judgement of *R v. Sussex Justices, ex parte McCarthy*. In the aforementioned judgement, Lord Hewart opined that '*Justice must not only be done but must undoubtedly and manifestly be seen to have been done*'.[67]

The '*reasonable apprehension*' test analyses the justifiable doubts standards from the view point of a reasonable, fair-minded third person who is aware of the facts and circumstances of the case.[68] If such a person concludes that there is an appearance or likelihood that the arbitrator's decision might be influenced by factors other than the merits of the case at hand,

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[63] Caron and Caplan (n 28) 208.

[64] *Johnson v Johnson* (2000) HCA 48, para 53; *Jung Science Information Technology Co Ltd v ZTE Corporation* (2008) HKCFI 606, para 52.

[65] Samuel Ross Luttrell, 'Bias challenges in International Arbitration: The Need for a 'Real Danger' Test' (DPhil thesis, Murdoch University 2008) 68.

[66] *Challenge Decision of 11 January 1995* (1997) vol XXII *YBCA*, paras 23 and 24; *Commonwealth Coatings Corp v Continental Casualty Co et al* (1968) 393 U.S. 145, para 9.

[67] *R v Sussex Justices, Ex Parte McCarthy* (1924) 1 KB 356.

[68] *National Gird Plc* (n 59); IBA Guidelines on Conflicts of Interest in International Arbitration (2014) 5.

the arbitrator can be disqualified.[69] The implementation of this perilously low standard would entail the threat of '*opportunistic or tactical challenges*'.[70] This would open doors for the '*black art of challenges'*[71]. *De minimis* challenges would be brought by parties simply as a tactic to delay and disrupt the proceedings or simply in order to get their dispute decided by an arbitrator who might be more inclined in favour of their view.[72]

3.1.2 'Real Possibility' Test

The origin of real possibility test can be attributed to the English judgement of *Porter v. Magill*. In this judgement, Lord Hope of Craighead held that the test for determining impartiality and independence is based on whether a fair-minded and informed observer, having considered the facts, would deduce that there was a '*real possibility*' that the arbitrator was prejudiced.[73]

The '*real possibility*' test has not yet gained universal acceptance. Although the '*real possibility*' test has been accepted and adopted by jurisdictions such as England[74] and Hong Kong[75], the courts of Canada[76] and Australia[77] have rejected the '*real possibility test*' and have retained the '*reasonable apprehension*' test.

The threshold laid down under the '*real possibility*' test is higher as compared to the '*reasonable apprehension*' test. Under the latter, mere suspicion of bias is sufficient grounds to initiate a challenge, whereas under the former, a real risk regarding the arbitrators' bias is required to be proved. The insertion of the word '*real*' before the word '*possibility*' imposes a higher evidentiary burden of proof on the claimant.[78] The addition of the word '*real*' warrants the consideration of rigid facts, evidence and external factors as compared to mere logical suspicion[79]

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[69] ibid.

[70] *Halliburton Company v Chubb* (2020) UKSC 48.

[71] Luttrell (n 65) 274.

[72] ibid.

[73] *Porter v Magill* (2002) 2 AC 357, para 103.

[74] ibid.

[75] *Deacons v White and Case Ltd Liability Partnership and Ors* (2003) 6 HKCFAR 322.

[76] *Mugesera v Canada (Ministry of Citizenship and Immigration)* (2005) 2 SCR 91.

[77] *Ebner v Official Trustee in Bankruptcy* (2000) HCA 63.

[78] Luttrell (n 65) 44.

[79] ibid.

Most institutional commercial arbitration centres such as LCIA, ICC and SIAC make use of the '*justifiable doubts*' standard with regards to challenge proceedings. This has instilled a sense of uniformity throughout International Commercial Arbitration.

3.2 STANDARD FOR CHALLENGING AN ARBITRATOR UNDER INTERNATIONAL INVESTMENT ARBITRATION

In contrast, under investment arbitration, the burden of proof for challenging an arbitrator is fairly high. The ICSID Convention uses the '*manifest lack of qualities*' standard to determine neutrality of the arbitrator.[80] The qualities required to be possessed by the arbitrator are enlisted under Article 14 (1) of the ICSID Convention. Article 14 (1) necessitates the arbitrator to possess the following 3 qualities- (i) high moral fibre, (ii) proficiency in the fields of law, finance, industry or commerce and (iii) faith in the arbitrator regarding his independence while making a judgement.[81] The chief criterion is competence in the field of law.[82]

The English and French version of the ICSID Convention makes reference only to the independence of the arbitrator under Article 14(1).[83] The Spanish version of the ICSID Convention makes mention of the quality of *'imparcialidad de juicio'*[84] i.e., full confidence of the parties in the arbitrator's impartiality of judgement. Universal practice in investment arbitration shows that while assessing the element of bias in an arbitrator, the investment arbitral tribunals have analysed both the qualities i.e., independence, as well as impartiality.[85]

The term '*manifest*' in Article 57 poses a threat of ambiguity and imposes a relatively high burden of proof on the claimant.[86] Professor Christoph Schreuer has noted that the term '*manifest*' implies '*something which can be discerned with little effort and without deeper*

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[80] ICSID Convention, art 57.

[81] ICSID Convention, art 14.

[82] ibid.

[83] Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* (Brill vol 8 2017) 12-13.

[84] ICSID Convention (Spanish version), art 14.

[85] Suez (n 44) paras 28–30; M. Kinnear & F. Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules, in Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (C Giorgetti edn, 2015); *Fábrica de Vidrios Los Andes, C A and Owens-Illinois de Venezuela, CA v Venezuela*, ICSID Case No ARB/12/21, Reasoned Decision on the Proposal to Disqualify L Yves Fortier, QC, Arbitrator (28 March, 2016) para 28.

[86] Christoph H. Schreur, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention A Commentary* (2nd edn, Cambridge University Press 2009) 1202.

analysis'.[87] Several ICSID tribunals have interpreted the term '*manifest*' to be synonymous with the words '*obvious'* or *'evident*'.[88] Therefore, the manifest lack of qualities require the claimants to provide sufficient and objective proof or evidence regarding the arbitrator's lack of impartiality and independence. The use of the term '*manifest*' does not mean that an arbitrator undoubtedly lacks the above-mentioned qualities.[89] On the contrary, it means that the arbitrator's lack of qualities must be conclusively and distinctly established.[90]

The failure of the ICSID Convention to provide an exhaustive definition for the term '*manifest*' has paved way for varied interpretations of the standards of impartiality and independence of the arbitrators under investment arbitration.

3.2.1 The 'Highly Probable' Standard

In cases such as *Amco v. Indonesia*[91], *Tidewater v. Venezuela*[92] and *Universal Compression v. Venezuela*[93], the tribunals emphasised that the word '*manifest*' imposes a strict standard for disqualifying the arbitrator and equated the term '*manifest*' to the phrase '*highly probable*'.[94] The tribunals emphasised that mere apprehension of bias is not sufficient grounds to challenge an arbitrator's appointment.[95] It is imperative for the parties to provide concrete proof to substantiate their claims. This test raises further questions rather than providing answers. The term '*manifest*' has been equated to the phrase '*highly probable*'. However, the definition or the explanation of the phrase '*highly probable*' has not been provided for by these judgements,[96] leading to further ambiguity.

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[87] ibid, 938.

[88] Suez (n 44) para 34.

[89] *Universal Compression International Holdings, S L U v The Bolivarian Republic of Venezuela* [2011] ICSID Case No ARB/10/9, Decision on the proposal to disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, arbitrators (20 May, 2011) para 71.

[90] ibid.

[91] *Amco Asia Corporation and others v Republic of Indonesia* [1982] ICSID Case No ARB/81/1, decision on proposal to disqualify an arbitrator (24 June, 1982).

[92] *Tidewater Inc Tidewater Investment SRL Tidewater Caribe, C A Twenty Grand Offshore, LLC Point Marine, LLC Twenty Grand Marine Service, LLC Jackson Marine, LLC Zapata Gulf Marine Operators, LLC v The Bolivarian Republic of Venezuela* (2010) ICISID Case No ARB/10/5, decision on claimants' proposal to disqualify Professor Brigitte Stern, arbitrator (23 December, 2010).

[93] Universal Compression (n 89).

[94] Tidewater (n 92) para 39.

[95] Universal Compression (n 89).

[96] Daele (n 57) 238.

3.2.2 The 'Real Risk' Standard

In cases such as *Vivendi v. Argentina*[97] and *Bluebank v. Venezuela*[98], the ICSID Tribunals leaned towards the reasonable doubts test as used by tribunals which follow the UNCITRAL rules. The tribunals held that the facts leading to the appearance of bias in the arbitrator must be carefully considered and the arbitrator must be disqualified only if a '*real risk*' of bias based on the established facts could be apprehended by a reasonable, fair minded third person.[99] Mere speculation or suspicion cannot be relied upon in order to disqualify an arbitrator.[100] The threshold established in the *Vivendi* and *Bluebank* cases is a lenient threshold as compared to the concrete proof threshold established under *Amco* and *Tidewater*. This low threshold increases the success rate of arbitrator challenges and makes it easier to disqualify an arbitrator but at the same time increases the protection awarded to parties against biased arbitrators.[101] In the authors' opinion, this test somewhat resembles the real possibility test used frequently in International Commercial Arbitration. However, due to the high stakes involved in investment arbitration, there is a need to adopt a more stringent standard for the disqualification of arbitrators.

3.2.3 The 'Evident and Obvious' Standard

Challenge decisions such as *Fábrica de Vidrios Los Andes v. Venezuela* [102] and *Electrabel v. The Republic of Hungary*[103] assumed a middle ground and stated that the test for manifest lack of qualities entails that the lack of independence and impartiality must be '*evident and obvious*' from the consideration of a reasonable fair minded third person.[104] This standard is relatively more burdensome as compared to the real risk standard since it requires objective evidence in order to establish an arbitrator's bias.[105] However, the authors opine that the

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[97] Vivendi (n 8) para 25.

[98] *Bluebank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (2013) ICSID Case No ARB/12/20, Decision on the parties' proposal to disqualify a majority of the tribunal (12 November, 2013).

[99] Vivendi (n 8) para 25; *SGS v Pakistan* (2002) ICSID Case No ARB/01/13, Decision on Disqualification of Arbitrator (19 December 2002), para 24.

[100] Daele (n 57) 223; *Saipem v Bangladesh* (2007) ICSID Case No ARB/05/7, Decision on Jurisdiction (21 March, 2007) para 47.

[101] Daele (n 57) 225.

[102] Fábrica (n 85).

[103] *Electrabel S.A. v Republic of Hungary* (2008) ICSID Case No ARB/07/19, Decision on the claimant's proposal to disqualify a member of the tribunal (25 February, 2008).

[104] Fábrica (n 85).

[105] Daele (n 57) 240.

'*evident and obvious*' standard is an abstract standard and lacks clarity and precision since the qualities of being '*evident and obvious*' are subjective and differ from person to person.

No concrete or definitive test has been decided till date to judge the manifest lack standard under ICSID. However, commentator Christoph Schreuer believes that the term '*manifest*' certainly implies a higher threshold to prove independence and impartiality as compared to the justifiable doubts standard under commercial arbitration.[106] The evidentiary and conclusive proof required under the manifest lack standard imposes a greater burden on the claimants as compared to commercial arbitration.

3.3 CRITICAL ANALYSIS AND RECOMMENDATIONS

Under International Commercial Arbitration, the mere appearance or possibility of bias would be sufficient to disqualify an arbitrator. On the other hand, the threshold in order to establish an arbitrator's lack of independence and impartiality is higher[107] under International Investment Arbitration due to the use of the term '*manifest*' as it demands concrete evidence. The rationale behind this is that the stakes of investment arbitration are extremely high since most of the matters involved are of public interest and such decisions could potentially have far reaching political and economic consequences.[108]

The authors concur with the opinion of commentators as well as various arbitral tribunals that the '*reasonable apprehension*' test used under commercial arbitration sets a dangerously low threshold for the disqualification of arbitrators.[109] It is common for lawyers to act as arbitrators, thus, quite often an arbitrator has to decide on an issue for consideration in which he has already assumed a particular stance in another case. The Courts of Hague have placed special emphasis on the fact that it is unsafe and erroneous to assume that an arbitrator lacks independence and impartiality and is not open minded simply because he has acted as a lawyer in another case where a similar issue was argued by him.[110] Such circumstances do not by default lead to the appearance of bias. Besides, the low threshold also encourages the parties to bring up frivolous challenges against arbitrators.

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[106] Schreur, Malintoppi, Reinisch and Sinclair (n 86) 1202.

[107] ibid.

[108] Noah Rubins and Bernhard Lauterberg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration* (2010) 1.

[109] Born (n 9).

[110] *The Republic of Ghana v Telekom Malaysia Berhad* (2004] HA/RK 2004.667 (5 November, 2004) para 11.

The commercial arbitration institutions and conventions could provide an exclusive definition of the phrase '*circumstances which give rise to justifiable doubts*'. The inclusion of an exhaustive definition would lead to the implementation of conclusive test to determine the arbitrators' neutrality. These institutions and conventions may consider adopting a non-exhaustive list system similar to the Red, Orange and Green lists adopted under the IBA Guidelines. The IBA Guidelines, although, non-binding, have been instrumental in deciding various arbitrator challenges.[111] Adoption of a list system which would enlist the circumstances leading to challenges against arbitrators may aid in eliminating the possibility of frivolous challenges.

The '*real possibility*' test lays down a reasonable standard for challenging an arbitrator on grounds of lack of impartiality and independence. The requirement of a higher evidentiary burden of proof as compared to mere apprehension curbs the possibility of frivolous challenges and the award being set aside on grounds of bias.[112]

The authors believe that it would be prudent for the ICSID Convention to incorporate the definition of the word '*manifest*' to prevent any misinterpretation by tribunals. This may assist tribunals to adopt a more uniform approach while adjudicating on a challenge proceeding, thus ensuring uniformity in the threshold used by these tribunals.

Upon analysis, the authors conclude that a suitable test which would interpret the standard of '*manifest lack of qualities*' would be one where *firstly*, an objective standard is used to assess an arbitrator's competence; *secondly*, in order for a challenge to the arbitrator to succeed, the claimants must establish facts conclusively which make it '*obvious and highly probable*' that an arbitrator is incompetent to exercise independent and impartial judgement[113] and *lastly*, claims based on mere speculation, inference or suspicion should be considered insufficient to disqualify the arbitrator.[114]

[111] National Gird Plc (n 59); ICS (n 59).

[112] Luttrell (n 65) 9.

[113] *Saint-Gobain Performance Plastics Europe v The Bolivarian Republic of Venezuela* (2013) ICSID Case No ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February, 2013) para 78.

[114] Universal Compression (n 89).

4. Conclusion

From the above analysis the authors conclude that it is imperative for International Investment Arbitration facilities to clarify their stand with regards to their prescribed time limits for raising challenges to arbitrators. Both commercial as well as investment arbitration facilities need to clarify their stance regarding an appropriate standard to determine the impartiality and independence of arbitrators. These measures might aid in preventing the filing of frivolous challenges. Frivolous and malicious challenges to arbitrators pose a significant risk to the principle of finality.[115] The principle of finality must be given preference over the principle of correctness in some cases of international arbitration.[116]

The provision of a definite timeline to raise a challenge under International Commercial Arbitration is advantageous for the arbitrating parties as delays are curbed and proceedings flow continuously. The authors believe that it may prove beneficial for ICSID to deliberate on Rule 9 (1) of the ICSID Convention and consider defining the term *'promptly'* to eliminate the confusion that arbitrators face while adjudicating on time limit issues.

Upon a comparative analysis of the trends in the commercial as well as investment arbitration, the authors strongly opine that the usage of an extra-ordinarily low threshold i.e., '*the* reasonable apprehension test' would open doors for the unnecessary and frivolous challenges since trivial challenges would be brought by parties simply to delay and disrupt the proceedings. Contrary to this, the vague and ambiguous '*manifest lack of qualities standard*' sets a high bar resulting in various interpretations by tribunals, eventually creating chaos and confusion among the decision makers. The field of international arbitration yearns for a water tight and uniform test for challenging an arbitrator. The tests and standards laid down presently impose either an extra-ordinarily high or low threshold to disqualify arbitrators which are inconsistent across various jurisdictions and conventions. The need to find an appropriate and consistent test is long overdue. The insertion of appropriate amendments in institutional arbitration rules for commercial as well as investment arbitration will go a long way in eliminating frivolous challenges.

The challenge procedure is undoubtedly an indispensable provision in arbitration to ensure that the principles of natural justice are adhered to. However, the authors believe that unless there is a greater amount of regulation of challenge proceedings by way of legislation, parties

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[115] *Positive Software, Inc v New Century Mortgage Corporation*, 476 F 3d 278 (5th Cir 2007).

[116] Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (OUP, 2008) p 277.

will continue to take undue advantage of this provision. Providing for a fixed time limit to file challenge proceedings as well as striking a balance between the standards used in commercial arbitration and investment arbitration while adjudicating on such proceedings will certainly establish a stricter and more effective regime in International Commercial Arbitration and International Investment Arbitration.