

# Challenge of an Arbitral Award

## Impartiality of an Arbitrator and Improper Constitution of the Tribunal

**Authored By**

**Niharika Dhall**

**Advocate at Law Senate**

[www.lawsenate.com](http://www.lawsenate.com)

B3/73, Safdarjung Enclave, Lower Ground Floor, New Delhi - 110029 India.

+91-11-26102873, +91-11-26104773

contactus@lawsenate.com, info@lawsenate.com

Copyright © 2015 Law Senate. All rights reserved

This article discusses a specific ground, improper constitution of the arbitral tribunal, for challenge of an arbitral award in the Courts of the lex arbitri.

The *Bundesgerichtshof*, German Federal Supreme Court has recently set aside an arbitral award rendered by a three member arbitral tribunal on the grounds that the tribunal was improperly constituted as one of the arbitrators was successfully challenged in Court but only after the Tribunal had rendered a unanimous decision and handed down the award.

The decision was rendered in December 2014, in the case of I ZB 23/14. The dispute arose out of a lease agreement for a thermal bath. In accordance with the agreement a three member tribunal was appointed to resolve the dispute with each Party nominating an arbitrator and the two arbitrators together appointing the Chairperson. The Tribunal was seated in Germany.

Upon the successful establishment of the Tribunal, one of the Parties challenged the appointment of the Chairperson on the grounds of independence and impartiality. The challenge was dismissed by the Tribunal, after which, the challenging Party approached the Court. While the matter was pending before the Court, the arbitral tribunal conducted its proceedings and handed down an award in April 2013 against the challenging party. In January 2014, the Court rendered a decision on the challenge of the arbitrator in favour of the challenging Party, finding the same justified. Armed with this judgement, the challenging Party sought to set aside the arbitral award rendered by the tribunal on the grounds that the tribunal was improperly constituted.

The question then arose before the Court as to whether a unanimous award rendered by a three member Tribunal could be set aside due to the successful challenge of one of the three arbitrators.

The remaining two arbitrators (who were both Party-appointed) submitted a statement to the Court that the Tribunal had reached a unanimous decision and that the same award would be rendered even with a new chairperson as the two party appointed arbitrators would have the majority vote.

The Court, however, did not accept this line of reasoning and set aside the award in accordance with Section 1059(2)(d) of the German Code of Civil Procedure (Zivilprozessordnung) which provides that an arbitral award may be set aside if the composition of the arbitral tribunal or the

arbitral procedure was not in accordance with a provision of this Book or with an admissible agreement of the parties and this presumably affected the award.<sup>[1]</sup> This section is based on Article 34(2)(iv) of the UNCITRAL Model Law.<sup>[2]</sup>

The Court also examined the extent to which the challenge of one arbitrator “*affected the award*” when the same was unanimous. It opined that the standard for establishing whether or not the improperly constituted tribunal affected the award should not be very high. The fact that the award was unanimous has no bearing on the finding that the improper constitution of the tribunal affected the award. The same goes for the statement given by the remaining arbitrators that the Tribunal would reach the same decision with another Chairperson. The rationale behind this is that the challenged arbitrator participated in the deliberations and meetings and could therefore have influenced the decision of the other arbitrators by his presence and involvement in the proceedings.

Thus, the Court concluded that it is not necessary to substantiate the causal link between the improperly constituted tribunal and the award, nor is it necessary for the Court to make a specific finding in this respect as the mere involvement of the challenged arbitrator in the final award is sufficient to set aside the award.

This decision is a well-reasoned judgement and will hold persuasive value in all jurisdictions where the challenge of an arbitrator in the courts of the *Lex Arbitri* does not automatically stay the arbitral proceedings. The German law is based in the UNCITRAL model law and therefore, this judgement has a significant implication for all jurisdictions which follow the model law.

---

<sup>1</sup> Section 1059 Application for setting aside

2) An arbitral award may be set aside only if: d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of this Book or with an admissible agreement of the parties and this presumably affected the award.

<sup>2</sup> Article 34 : Application for setting aside as exclusive recourse against arbitral award

(2) An arbitral award may be set aside by the court specified in article 6 only if: (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.