

The Chartered Institute of Arbitrators East Asia Branch

'Nuts & Bolts' of Arbitration (2012-2013) Lecture 2 "Appointing the Arbitral Tribunal - Conflicts of Interest and Other Challenges"

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1. Introduction

- HK Arbitration law is based on Uncitral Model Law ("UML") with additions and some changes.
- For those dealing with arbitrations with a seat outside HK, the UML provisions may well be relevant. The Court of the seat normally takes the place of HKIAC.

2. Read the arbitration agreement

- Number of arbitrators
- If parties do not agree, how will appointment be made?
- Must the tribunal have special qualifications?
- Language - avoid more than one
- Seat - what effect does this have?
NB "place" of arbitration under UML
- Agreement on procedure (e.g. adoption of rules)

3. Where the number of arbitrators is not agreed

- Sections 23(3) Arbitration Ordinance Cap. 609 ("AO")
- Application to HKIAC, fee HK\$4,000
- Arbitration (Appointment of Arbitrators and Umpires) Rules ("the Rules") made under previous Ordinance (Cap. 341) still apply (NB. The Rules have been amended so that they refer to AO rather than the previous Ordinance (Schedule 4 Sections 36 to 41 AO))
- New Rules will be made soon
- Rule 9 - factors to be considered
- Advisory Board and parties are consulted

4. Where the parties cannot agree on the appointment of an arbitrator

- Article 11 UML and Section 24 AO and the Rules apply
- Application to HKIAC. Fee HK\$4,000
- Under the Rules the Advisory Board and the parties must be consulted after HKIAC has nominated a suitable person having regard to factors in Rule 7
- Advantages over appointment by the Court
- Single arbitrator
- 3 person tribunal - both where Respondent fails to appoint and where party appointed arbitrators fail to agree on 3rd arbitrator
- Even number or uneven number greater than 3
- More than 2 parties
- No provisions about umpires under the Rules as amended (but see Sections 30 and 31 AO)

5. Challenges

- Obligations of arbitral tribunal (S46 AO)
- Independence
- Acting fairly and impartially between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponent (i.e. treat them with equality)
- Grounds for challenge (S25 AO and Article 12 UML) - justifiable doubts as to arbitrator's impartiality or independence (sometimes referred to as bias)
- Challenge procedure (S26 AO and Article 13 UML)
- Tribunal initially decides challenge with right of appeal to CFI but no further
- Failure or impossibility to act (S27 AO and Article 14 UML) NB "undue delay"
- CFI decides unless arbitrator steps down or parties agree. NB Appointment of substitute (S28 AO and Article 15 UML)

6. Examples of bias

- Under UML Article 12(2), an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence (generally referred to as bias).

(i) Actual bias

This is difficult to prove. Possibly it can be demonstrated from opinions expressed by or actions of the arbitrator.

6. Examples of bias (cont'd)

(ii) Apparent bias

- Test approved by the English House of Lords in Porter and Magill (2002) 2AC at page 494 is:-
- "The Court must ascertain all the circumstances which have a bearing on the suggestion the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased."
- The test applies to arbitrators as well as judges.

6. Examples of bias (cont'd)

- This brings English law into line with the law in Scotland and most of the Commonwealth and as expressed by the European Court of Human Rights in Strasbourg. The test is not, as previously thought, to be applied by reference to the views of another judge but by reference to the views of a reasonable person. In *Johnson v. Johnson* (2000) 201 CLR 488 (a case before the Australian Court of Appeal) the fair-minded observer was described as follows:-
 - *"The observer is taken to be a reasonable person, who adopts a balanced approach and is neither complacent nor unduly sensitive or suspicious. In arriving at any conclusion of bias or the absence of it, the observer is assumed to be fully informed of all facts capable of being known to the general public in relation to the relevant decision-making process."*

6. Examples of bias (cont'd)

- The object of this seems to be to remove any doubts that a judge must be less stringent in applying the test to a brother judge than would an informed and fair-minded observer. However how is the test to be applied in practice?
- In the Deacons and White & Case litigation (2003) 6 HKCFAR 322, the Court of Final Appeal did not see fit to comment on the test because on the application for leave to appeal, the parties agreed that the test in Porter and Magill should apply. The test was also accepted by the parties in PCCW-HKT Telephone Ltd. v. Telecommunications Authority (2008) 2 HKLRD 282 at 288, a case in the Hong Kong Court of Appeal.

6. Examples of bias (cont'd)

- Standards in England increasingly strict, see:-
 - (1) Lawal v. Northern Spirit (2004) 1 AER 187 (House of Lords)
- Subconscious bias by lay members of EAT if counsel appears before them who has previously sat with them as chairman in another case.

6. Examples of bias (cont'd)

(2) ASM Shipping v. TTMI (2006) 2 AER (Comm) 122

- Apparent bias. Inappropriate for QC to be umpire (sitting in hearing) when he had previously acted as counsel on instructions of solicitors acting for one of the parties who had also acted in a discovery application in another case (between different parties) where suggestion of dishonesty made against a witness and that witness gave evidence at the hearing before the umpire.
- NB waiver

6. Examples of bias (cont'd)

(iii) Arbitrator's fee arrangements

- Arbitrators can let their personal interest in obtaining fees conflict with their obligation to be impartial and independent. Thus it renders an arbitrator open to an allegation of apparent bias if, during the arbitration, he or she enters into a special fee arrangement with one party but not the other (see the Norjarl case 1992 1 KB 863). Hence the importance of informing both parties of fee arrangements at the time of appointment.

6. Examples of bias (cont'd)

(4) Communications with parties

- Normally an arbitrator should only communicate with the parties on a mutual basis (i.e. both parties should be aware of communications).
- However a recent HK case reported at (2007) 3 HKLRD 741 decided that an arbitrator could communicate with one of the parties without divulging the contents of the communication where the two party appointed arbitrators were deciding on the appointment of the third arbitrator and the communication had nothing to do with the merits of the dispute. Such communications are not evidence of apparent bias.

6. Examples of bias (cont'd)

- Relationship between solicitors for one of the parties and an arbitrator
 - In another recent case reported at (2008) 4 HKLRD 776 it was held that an ongoing professional and social relationship was, in context of Hong Kong, not evidence of apparent bias. The arbitration community in Hong Kong is a small one and lawyers and arbitrators inevitably meet socially and professionally.

7. IBA Guidelines on Conflicts of Interest in International Arbitration (available at www.ibanet.org)

– Points to note:-

- (a) Approved by IBA in May 2004. Based on generally accepted best international standards. Need to be developed further.
- (b) They only are binding if agreed to by parties. Supersede relevant points of IBA Rules of Ethics for International Arbitrators 1987.

7. IBA Guidelines on Conflicts of Interest in International Arbitration (available at www.ibanet.org) (cont'd)

- (c) They are subject to relevant procedural law and practice and to any Rules agreed to by parties.
- (d) Part I Start with 7 General Standards.
Part II Lists provide concrete examples and are non-exhaustive.
- (e) Non-waivable Red List is where financial or personal interests of arbitrator disqualifies automatically (e.g. Pinochet case (2000) 1 AC119).

7. IBA Guidelines on Conflicts of Interest in International Arbitration (available at www.ibanet.org) (cont'd)

(f) Waivable Red List.

Generally disqualifies but parties may waive in writing provided they are fully informed of facts.

(g) Orange List

Examples of circumstances which, in the eyes of the parties, may give rise to justifiable doubts. Disclosure should be made by arbitrator but parties have 30 days in which to make express objection otherwise potential conflict of interest waived. Disclosure is not an admission of bias. N.B. If arbitrator does not accept objection, onus is on objecting party to take steps to establish challenge.

7. IBA Guidelines on Conflicts of Interest in International Arbitration (available at www.ibanet.org) (cont'd)

(h) Green List

No need to disclose.

NB Guidelines try to achieve a compromise between parties' entitlement to information and the need to avoid excessive disclosure which encourages objections and consequent delay and costs.

8. Lessons to be learned

- (a) On being invited to accept appointment
 - (i) advise both parties of conditions of appointment
 - (ii) do a conflict search
 - (iii) in case of doubt disclose NB Green list exceptions
 - (iv) if either party objects with some arguable reason do not accept appointment (it is better to save parties' expense of challenge proceedings)

8. Lessons to be learned (cont'd)

- (b) On becoming aware of possible reasons, for challenge after appointment
 - (i) Disclose if any doubt otherwise a party may discover and try to set aside award.
 - (ii) If you are confident no good reason for challenge, wait for a party to take action. They will think twice before incurring costs / delay.

NB waiver

8. Lessons to be learned (cont'd)

(iii) If challenge proceedings are issued and opposed:

It is possible for you to withdraw as arbitrator at any time (see Article 13(2) UML) e.g. if, on reconsideration, you think there are good grounds. Although you can continue the arbitration under Article 13(3) UML this is dangerous as costs and time will be wasted if challenge successful.

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Q&A



Thank you

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