**Appointing the Arbitral Tribunal – Conflicts of Interest and Other Challenges**

1. Read the arbitration agreement

This will be relevant when considering the appointment of a tribunal; in particular the arbitration agreement may specify the number of arbitrations, how appointments are to be made, any special qualifications of the tribunal and any agreement on procedure (e.g. adoption of rules).

2. Where the number of arbitrators is not agreed

This is provided for in Section 23(3) of the Arbitration Ordinance Cap. 609 ("AO"). Application is made to the Hong Kong International Arbitration Centre ("HKIAC"). At present, the Arbitration (Appointment of Arbitrators and Umpires) Rules ("the Rules") made under the previous Ordinance (Cap. 341) still apply. The Rules have been amended so that they refer to AO rather than the previous Ordinance Cap 341 (Schedule 4 Sections 36 to 41 AO). Rule 9 describes the factors to be considered by HKIAC when deciding on the number of arbitrators. The parties and at least three available members of the Advisory Board are consulted. The Advisory Board is composed of representatives of various organisations involved in Hong Kong arbitration.

At present the fee payable to HKIAC is HK$4,000.

New Rules will be made soon.

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

Here Article 11 of the UNCITRAL Model Law ("UML") and Section 24 AO and the Rules apply. Under Section 13 AO HKIAC has been designated as the appointing authority under Articles 11(3) and (4) of UML. Here again the fee is HK$4,000.

Under the Rules, at least three available members of the Advisory Board and the parties must be consulted after HKIAC has nominated a suitable person or persons having regard to the factors in Rule 7.

Having HKIAC as the appointing body under AO has great advantages as appointment by the Court (as provided for prior to 1997) was expensive and time consuming and inhibited parties going to arbitration.

AO provides for HKIAC to appoint where there is disagreement or failure to act in the following scenarios:-

(i) a sole arbitrator
(ii) a 3 person tribunal – both where the Respondent fails to appoint and where party appointed arbitrators fail to agree on the 3rd arbitrator. Also where there is a failure by the designated appointing authority to appoint
(iii) where an even number or an uneven number of arbitrators greater than 3 are to be appointed
(iv) where there are more than 2 parties to the arbitration

Despite the title of the Rules there are no provisions about umpires under the Rules as amended. Under Section 31 (8) AO the Court of First Instance ("CFI") may appoint an umpire. There is no appeal from the CFI's decision.

## 4. Challenges

Under Section 46 AO, an arbitral tribunal has a continuing obligation to be independent and to act fairly and impartially between the parties giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents (i.e. treating the parties with equality). The grounds for challenge are set out in Section 25 AO and Article 12 UML. It is necessary for a challenging party to show that circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or that the challenged arbitrator does not possess qualifications agreed to by the parties. The challenge procedures are set out Section 26 AO and Article 13 UML. Subject to any agreed procedure, the tribunal initially decides the challenge with a right of appeal to the CFI but no further.

Section 27 AO and Article 14 UML deals with the failure or impossibility of an arbitrator to act. One of the grounds is that the arbitrator fails to act without undue delay. The CFI

decides on an application to terminate an arbitrator's mandate under these provisions unless the arbitrator steps down or all the parties agree. Section 28 AO and Article 15 UML deal with the appointment of the substitute arbitrator.

5. 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. Sometimes it can be demonstrated from opinions expressed by or actions of the arbitrator.

(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.

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."*

The object of this seems to be to remove any doubts that a judge may be less stringent in applying the test to a brother judge than would an informed and fair-minded observer.

In the Deacons and White & Case litigation (2003) 6 HKCFAR 322, the Hong Kong 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.

(iii) It is instructive to look at specific cases dealing with apparent bias:-

(a) Lawal v. Northern Spirit (2004) 1 AER 187 (House of Lords)

Subconscious bias by lay members of an Employment Appeal Tribunal if counsel appears before them who has previously sat with them as chairman in another case.

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

Inappropriate for a 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. Although apparent bias was established, the complaining party was found to have waived its rights because it allowed proceedings to continue without protest.

(c) 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.

(d) 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.

(e) 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.

6. IBA Guildelines 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. They supersede relevant points of IBA Rules of Ethics for International Arbitrators 1987.

(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).

(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 an objecting party to take steps to establish challenge.

(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.

7. General 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)

(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 and, if they delay, waiver may arise.

(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.