



Module 4: Arbitrator's Duty of Disclosure

**Mr. Anthony Houghton SC
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Overview

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The Primary Reason For The Duty



The Rules of Natural Justice

- There are two fundamental elements to the philosophy of natural justice. These are widely held to be necessary to bring about a valid decision.
- They are:
 - a judgement that is free from bias or conflict of interest;
 - obtained after providing an opportunity to present one's case.

The Role Played By The Tribunal



Judicial / Quasi judicial

Neutrality

Sole / Tribunal Members

The production of a final and binding decision in respect of all matters in dispute, having given the parties a fair opportunity to present their cases.

“Impartiality is a cardinal duty of a judge and an arbitrator”.

(eg) Orlov v Roth [2020] HKCFI 1072

Avoidance Of Bias



- Actual Bias
- Apparent Bias

Porter v Magill [2001] UKHL 67

The test to be applied for determining the existence of apparent bias was whether a fair minded and informed observer would conclude that there was a real possibility of bias.

Objective

Whether a fair minded and informed observer would conclude there was a possibility of apparent – or unconscious – bias?

A Statutory Basis



- The Arbitration Ordinance s.25
- (Uncitral Model Law art 12)

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.

Provisions In The Rules



- “Soft law”

HKIAC

Article 11

11.1 An arbitral tribunal confirmed under these Rules shall be and remain at all times impartial and independent of the parties.

11.4 Before confirmation or appointment, a prospective arbitrator shall (a) sign a statement confirming his or her availability to decide the dispute and his or her impartiality and independence; and (b) disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once confirmed or appointed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances.

Other Rules



For example: ICC (2021) Article 11; LCIA Article 5; CIETAC Article 31

Article 11: General Provisions

- 1) Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.
- 2) Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
- 3) An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.

Guidance



Sources:

(1) “common sense”

(2) Previous cases

For example

PAO Tatneft v Ukraine [2019] EWHC 3740

Halliburton v Chubb Bermuda Insurance [2020] UKSC 48

(3) Other soft law

IBA Guidelines



Conflicts of Interest in International Arbitration

2014

“International”

The major attempt to codify guidelines.

Subject to criticism.

Attempts to be non-jurisdiction specific.

IBA Approach



General Principles and Standards

(1) General Principle:

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

Practical Application

“Traffic lights”

Red List



Waivable and Non Waivable

The Red List consists of two parts: ‘a Non-Waivable Red List’ (see General Standards 2(d) and 4(b)); and ‘a Waivable Red List’ (General Standard 4(c)).

These lists are non-exhaustive.

Detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator’s impartiality and independence.

Where an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (General Standard 2(b)).

Waivable Red



Waivable Red List:

situations that are serious but not severe.

“Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator...”

Orange List



a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a)

ie –

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose

Green List



The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view.

Codes Of Ethics



e.g.

CI Arb Code of Professional and Ethical Conduct
Rule 3 Conflicts of Interest

Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so.

Where a member is or becomes aware that he or she is incapable of maintaining the required degree of independence or impartiality, the member shall promptly take such steps as may be required in the circumstances, which may include resignation or withdrawal from the process.

“Mere” Guidance



To what extent do the Guidelines “dictate”?

CHALLENGE PROCEDURES



Procedure

- in legislation - in Rules

Model Law / HK approach:

“Article 13. Challenge procedure

- (1) The parties are free to agree on a procedure for challenging an arbitrator...
- (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.

Decisions On Challenges



- By Appointing / Supervisory bodies
- By Tribunals
- By Court

HKIAC:

11.9 Unless the arbitrator being challenged resigns or the non-challenging party agrees to the challenge within 15 days from receiving the notice of challenge, HKIAC shall decide on the challenge. Pending the determination of the challenge, the arbitral tribunal (including the challenged arbitrator) may continue the arbitration.

Boundaries Of Disclosure



“Justifiable doubts”.

Objective not subjective.

Important consequences may follow a challenge.

Conclusion



An arbitrator candidate must decline appointment (or refuse to continue to act if already appointed) once facts or circumstances exist that, from a reasonable person's point of view having knowledge of the relevant facts, give rise to "justifiable doubts" as to impartiality or independence.

An arbitrator who accepts appointment or who continues with an appointment being aware of the relevant facts faces disqualification.

The "justifiable doubts" standard is intended to be viewed objectively, not subjectively.



Q&A



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