Challenges to arbitrators for bias: how concerned should we be?

Challenges to arbitrators' appointments for actual or perceived bias is a vogue topic in international arbitration. Whilst nothing new, recent years have seen a marked increase in the regularity with which they have been made. The ICC for example has recorded an increase from an average of 20 per year in the 1990s to an average of 30 per year by 2009.

This trend may be the product of the use of challenges for strategic reasons or tactical advantage but it may also reflect the more complex commercial and professional relationships within the international legal market meaning both that arbitrators have been increasingly affected by conflicts of interest and that there may be a growing sense that such challenges will be successful.

So far as lawyers are concerned, gone are the days when a young man fresh from law school joined a firm and expected to stay there for the rest of his working life and just as unusual these days are the companies who always use the same law firm for all their legal work. With a global legal market, frequent moves of personnel between firms, mergers of firms, multi-disciplinary organisations and significant competition for legal work, the instances where some relationship can be identified that might cause genuine concern or found the basis for a tactical challenge to an arbitrator's appointment, are increasingly prevalent. Further, the global market encourages relationships between lawyers from diverse jurisdictions who work together or, for example, are involved in international organisations together or speak at conferences together.

The view that this international market gives rise to increasing concerns is supported by the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration published in 2004 which stated that 'the growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms....have created more difficult conflict of interest issues to determine'.

As is well-known, the IBA has produced Guidelines on Conflicts of Interest in International Arbitration, prepared by a working group representing 14 jurisdictions, which sought to bring greater clarity and understanding to this issue in the international context. The most important part of the guidelines is its section on the 'Practical Application of the General Standards' which comprises a list of specific circumstances of where an arbitrator's independence or impartiality may be compromised:

- The Non-Waivable Red List contains examples of situations where an arbitrator should not even act with the consent of all the parties.
- The Waivable Red List contains examples of potential conflicts that may be waived by agreement, including that the arbitrator is a lawyer in the same law firm as counsel and previous involvement of the arbitrator's firm in the case or more generally with one of the parties.

- The Orange List set out situations which in the eyes of the parties may give rise to justifiable doubts as the arbitrator's impartiality or independence. The purpose of the list is to enumerate situations that should be disclosed whilst recognising that the proper conclusion may be that there is no basis for justifiable doubt as to independence or impartiality. These include where the arbitrator has himself acted for or against one of the parties or been frequently appointed by one of them and the issue that troubles the independent Bar in various jurisdictions, namely where counsel and the arbitrator are in the same Chambers.
- The Green list contains examples of situations where no appearance of conflict of interest arises from an objective viewpoint.

So what are the principles at play here? Within the UNCITRAL Model Law and UNCITRAL Arbitration Rules are the sibling, if not twin, concepts, of impartiality and independence. The distinction commonly drawn between the two is that independence is something to be judged objectively, whereas impartiality is a subjective matter involving consideration of the mind of the arbitrator. In any circumstances, however, where the test of "impartiality" involves consideration of whether there is objectively an appearance of bias, the distinction is, in practice, one without much of a difference.

At its simplest bias or partiality is the actual (and subjective) predisposition to decide a dispute in a particular way but the objective appearance of bias is generally regarded as equally material. As the House of Lords put it in *Porter v Magill* [2002] 2 AC 537: *"the question is whether the fair-minded and informed observer, having considered the fact, would conclude that there was a real possibility that the tribunal was biased."*

Such an appearance of bias may arise either from a relationship between the arbitrator and one of the parties or their legal representatives or from a relationship between the arbitrator and the subject matter of the dispute. The argument is most commonly that this relationship gives raise to the real possibility that the arbitrator may favour one party or, occasionally, be predisposed against the party. Challenges on this basis typically arise where the arbitrator has a formal and continuing business relationship with one of the parties or their legal representatives or even where such a relationship has existed in the past or is contemplated in the future.

In Hong Kong, section 24 of the Arbitration Ordinance CAP 609 gives effect to Article 12 of the UNCITRAL Model Law. A person approached to act as arbitrator must, at that time and thereafter, disclose any circumstance likely to give rise to justifiable doubts as to his impartiality or independence and an arbitrator's appointment may be challenged if circumstances exist that give rise to such justifiable doubts.

In *Jung Science Information Technology Co Ltd. v ZTE Corporation* [2008] HKCFI 606, this provision was considered by the Court in the context of a an arbitration between the South Korean Claimant and Respondent PRC corporation. JSIT challenged the continued appointment of Mr Philip Yang as tribunal chairman on the basis of the

relationship between this highly experienced chairman and Mr Michael Moser, who was initially and until his retirement, the partner handling the matter for the respondent. That relationship was that both sat on the council of the HKIAC; they spoke at seminars and meetings together; and, it was suggested they were friends. Mr Yang clarified that they had known each other a long time but their relationship was professional and social in arbitration related matters and similar to his relationship with many law firms in Hong Kong.

In considering, the submission that there could be justifiable doubts about Mr Yang's impartiality, Deputy High Court Judge, Lisa Wong SC, applied the test of the "objective fair-minded and informed observer" and asked the question whether there was a cogent and rational link between the association of the arbitrator and a party's legal representative and its capacity to influence the arbitrator's decision. Relying on the English authority of *Taylor v Lawrence* and pointing to the like traditions and culture, she also concluded that the objective onlooker would be expected to be aware of the legal traditions and culture that had played an important role in ensuring high standard of integrity on the part of both the judiciary and the legal professions and be aware of the contact between the two – and regarded that culture as extending to the wider world of dispute resolution. Perhaps unsurprisingly the challenge failed but it highlighted that the potential difficulties with the close contact between those, not by any means exclusively lawyers, involved in arbitration world.

In England, the Arbitration Act 1996 explicitly requires the impartiality of arbitrators in arbitration proceedings - s.33(1)(a) of the Act imposes upon arbitrators the general duty "to act fairly and impartially as between the parties"; under s.24(1)(a) an arbitrator may be removed by the court where "circumstances exist that give rise to justifiable doubts as to his impartiality"; and under s.68(2)(a) an award can be set aside on the basis of serious irregularity including failure to comply with the duty to act fairly and impartially.

The Act, on its face however, does not impose any obligation to be independent or provide for the removal of an arbitrator where there are justifiable doubts as to his independence. This was no oversight and followed the recommendation of the Departmental Advisory Committee on Arbitration. But that position was complicated by the adoption of the European Convention on Human Rights, through the Human Rights Act 1998. Article 6 of the Convention provides the right to a "fair and public hearing .... by an independent and impartial tribunal". So the English courts have equated "the common law test of bias and the requirement under Article 6" [*Lawal v. Northern Spirit Limited* [2003] UKHL 14, at 35]. There is also no obligation of disclosure of circumstances that may give rise to justifiable doubts as to impartiality but a failure to disclose such circumstances may itself give rise to such doubts.

The Rules of the London Court of International Arbitration, by Article 10.3, similarly provide for challenge to the appointment of an arbitrator "if circumstances exist that give rise to justifiable doubts as to his impartiality".

So, despite the adoption of the common expression "justifiable doubts", and as the *ZTE* case demonstrated, what circumstances give rise to justifiable doubts is a vexed question, particularly for proceedings which involve arbitral tribunals and parties of different nationalities and from different legal backgrounds. While justifiable doubts as to an arbitrator's independence or impartiality may be readily agreed upon by two people from the same legal system, an interpretation of this may differ widely if the background and culture of the individual analysing these two points are different. Whilst the IBA Guidelines may assist in judging the international view, they remain simply guidelines.

In 2011, the LCIA added considerably and informatively to the body of understanding as to how it approached challenges on the grounds of alleged justifiable doubts as to impartiality and independence by publishing a special edition of Arbitration International which contained digests of over 30 reasoned decisions on challenges. All the decisions related to arbitration with their seat in England. These digests provide a series of fascinating, if often familiar, examples of the complex interrelationships that exist between parties in this international legal market. An arbitrator who had briefly and some years earlier been a partner in a firm now engaged as counsel for the respondent was unobjectionable but an arbitrator whose partners had worked for companies associated with a respondent was successfully challenged. An arbitrator in the same Chambers as a barrister appearing before him was unobjectionable but not an arbitrator who had acted both for and against the respondent. The fact that an arbitrator was regularly nominated on the recommendation of one of the firms acting in the arbitration was not thought be a ground for challenge.

A similar approach was also taken by the English Commercial Court (Flaux J.) in the case of *A & Others v B & X* [2011] EWHC 2345. This case arose out of an LCIA arbitration. Mr X QC was appointed as arbitrator. He had previously received instructions in unrelated cases from the firms representing both of the parties to the arbitration. One such case had appeared to be settled but the settlement unravelled and he was instructed again to act. Through inadvertence, he failed to disclose the fact immediately.

As well as a challenge to his continued appointment made to the LCIA (which was rejected), an application to remove him was made to the Court. Flaux J adopted the test that "the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

In addressing this issue, he gave detailed consideration to the IBA Guidelines, whilst making clear that they could not override national law. He rejected arguments that the arbitrator would unconsciously not want to disappoint the firm instructing him and that the arbitrator would unconsciously place particular confidence in that firm and he did not consider that any financial relationship was relevant since it had not affected the arbitrator's fee in the litigation.

What, however, is most interesting about this case is the Court's exposition of three aspects of the overarching test. Firstly, the test is an objective one and is not dependent upon the characteristics of the parties, such as their nationality. Instead, "the issue is whether the impartial objective observer, irrespective of nationality would conclude from those facts that there was a real possibility that the arbitrator was biased". Secondly, he emphasised that the test assumes that the impartial observer is "fair-minded" and "informed", in possession of all the facts and not unduly sensitive or suspicious. Thirdly, although this observer is not to be regarded as a lawyer, he is expected to be aware of the way in which the legal profession in this country operates in practice. Each of these tests echoes and elucidates the approach in the *ZTE* case.

The last point, in particular, alludes to a common international perception of and concern about the way in which the English legal profession operates in terms of the relationships between barristers and between barristers and solicitors. Barristers in Chambers together share resources and premises – and some international observers find it inconceivable that an arbitrator can be seen impartially to decide a case where a party is represented by a member of his own Chambers. At least in English law, both the second and third of Flaux J's principles go some way to addressing this issue by making the relevant observer someone familiar with how the relevant legal system works in practice. The irony of the position is that English judges are internationally regarded as independent and impartial even though, and particularly in specialist areas of practice, judges routinely come from the same Chambers as those appearing before them – an observation that does not require much more than a casual observer.

This approach is clearly in line with that taken in Hong Kong or perhaps vice versa. Whether there are justifiable doubts as to an arbitrator's impartiality of independence will always be a question of fact and degree but it may be hoped that the information that the respected LCIA has provided as to its approach, in tune with that of the courts in England and Hong Kong, might point a way towards a workable test on the international stage.