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EXPARTE COMMUNICATION

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Introduction

The case: HCCT 5/2007 - Pacific China Holdings Ltd. v. Grand Pacific Holdings Ltd ("Pacific China") [2007] 3 HKLRD 741

ICC arbitration- Ex-parte communication separately by the two party appointed arbitrators with their respective nominating/appointing parties for the purpose of nomination of the third arbitrator/Chairman and non disclosure of details of such private communications

Risk of ex-parte communication no matter how innocent: challenge to Mr. Carter, Chairman of the Board of AAA. Mr. Carter's integrity was not disputed.

GENERAL

No ex-parte communication between an arbitrator and one of the parties after commencement of arbitration and proper constitution of the tribunal

Commencement of arbitration: Arbitration can be commenced pursuant to enforceable provisions in the contracts, within the time limit provided, if any or by reference to institutional rules or by the service of a notice to

commence arbitration or notice to appoint or concur in the appointment of an arbitrator

Section 31(1) (Part II- Domestic) of the Hong Kong Arbitration Ordinance provides:

"An arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other party or parties a notice requiring him or them to appoint or concur in appointing an arbitrator..."

Reason for restriction against ex parte communication:

1. perception of bias;
2. natural justice: not to hear from one side
3. procedural unfairness

Judicial Conduct: Guide to Judicial Conduct October 2004 ("the Guide")

The Guide prepared as guidance to judges to:

1. Uphold the rule of law
2. Resolving disputes parties fairly and impartially without fear or favour

3. Maintain public confidence: must be and be seen to be independent

Guidance Principles for Judges

1. Propriety in all matters of conduct, both in and out of court
2. Justice must be done and seen to be done: impartiality exist as a fact and a matter of reasonable perception. [If partiality is perceived, the perception is likely to leave a sense of grievance and of injustice having been done]
3. Communication concerning a case [¶ 30 of the Guide]

"There should be no communication concerning a case between the judge and any of the parties in the absence of the others unless the consent of those absent is obtained. The principle of impartiality generally prohibits private communications between the judge and any of the parties. If the court receives such a private communication, it is important for it to ensure that the other parties concerned are fully and promptly informed".

The same is expected of any arbitrator adjudicating disputes

- Ethical Code of Conduct for Arbitrators of HKIAC

Rule 2 " An arbitrator in communicating with the parties shall avoid impropriety or the appearance of impropriety. There shall be no private communication between an arbitrator and any party regarding

substantive issues in the case. All communications other than proceedings in the hearing shall be in writing...".

- Code of Ethics for an arbitrator of Singapore International Arbitration Center

"4. Communications

4.1 Before accepting an appointment, an arbitrator may only enquire as to the general nature of the dispute, the names of the parties and the expected time period required for the arbitration.

4.2 No arbitrator shall confer with any of the parties or their counsel until after the Registrar gives notice of the formation of the Tribunal to the parties.

4.3 Throughout the arbitral proceedings, an arbitrator shall avoid any unilateral communications regarding the case with any party, or its representatives."

- In Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd (No. 2) [1998] 1 HKC 192 at 206 Chan CJHC in the Court of Appeal said : " We have also been referred to a number of cases regarding the 'misconduct' of an arbitrator in receiving evidence or communication from one party to the arbitration...In our view, they simply illustrate that the principle of natural justice demands that arbitration proceedings, like litigation, must not only be conducted fairly but also be seen to be conducted fairly, lest this undermines the public's confidence in the arbitration process".

- This is echoed/reinforced by Sir Anthony Mason NPJ in the same case at the Court of Final Appeal [1999] 2 HKC 205 at 233 B-G where he said:

"...In this respect, the opportunity of a party to present his case and a determination by an impartial and independent tribunal which is not influenced, or seen to be influenced by private communications are basic to the notion of justice and morality in Hong Kong".

Recursal of a Judge

Recursal of D Judge Poon as he then was in Deacons v. White & Case [2003] 3 HKC 374

The test in Porter v. Magill [2002] 1 AER 465

The apparent bias test: "whether the fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased".

Informed bystander: Kirby J.'s dictum in Johnson v. Johnson (2000) 201 CLR 488:

"The attributes of the fictitious bystander to whom the courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed about the law in general or the issue to be decided. Being reasonable and fair minded, the bystander before making a decision important to the parties and the community, would ordinarily be

taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances... Acting reasonably, a fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious”.

See also:

1. Phoon Lee Piling Ltd. V. The Hong Kong Housing Authority [2003] HKCU 554 para 20 per Roger VP
2. Jung Science Information Technology Co. Ltd v ZTE Corp. HCCT 14/2008
3. §§ 9.28 to 9.91 of Arbitration in Hong Kong: A Practical Guide, Sweet & Maxwell 2003 on “Real Danger or Real Possibility of Bias”

Duties imposed by ICC Rules of Arbitration

1. Article 7.1: “Each arbitrator must be and remain independent of the parties involved in the arbitration.”

Independence: Freedom from outside influence or connection; and personal and subject matter independence.

Impartiality: Without pre-disposition to decide for or against a party without proper regard to the true merits of the case

2. Article 7.2: "Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and 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...".
3. Article 7.3: "An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration."
4. Article 15.2: "In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

Standards of conduct for arbitrators during ICC proceedings: §13.07
International Chamber of Commerce Arbitration 3rd Edition by Craig, Park and Paulsson:

1. An arbitrator communicating with a party in writing should address a copy of the communication to the other party, the other arbitrators, and the Secretariat.
2. An arbitrator should not discuss the merits of the case or receive evidence or legal argument from a party in the absence of the other party and his fellow arbitrators.
3. An arbitrator may communicate with a party regarding the fixing of procedural dates or other practical and material aspects of the

arbitration, but the contents of such communication should immediately be made known to other party and arbitrators.

4. The arbitral tribunal should generally allow the parties to modify or adopt procedural rules.
5. An arbitrator should not discuss the merits of the arbitration with another arbitrator in the absence of the third arbitrator, unless the latter has agreed and is informed of the subject of the discussion.

Commercial Arbitration by Mustill & Boyd 2nd Edition 1989 (at page 260)

An arbitrator "must not communicate privately with either party, without the knowledge and consent of his co-arbitrator and of the other party".

Challenge Procedure under ICC Rules

1. Article 11.1: "A challenge of an arbitrator, whether for an alleged lack of independence or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based".
2. Article 11.2: "For a challenge to be admissible, it must be sent by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the

challenge is based if such date is subsequent to the receipt of such notification”.

3. Article 7.4: ICC Court does not give reasons for its decisions on challenges.
4. Article 7.4 of ICC Rules provides that the decision of the Court of ICC on the challenge of an arbitrator shall be final.

[See §§ 13.04-13.07 on Arbitrator’s disqualification in International Chamber of Commerce Arbitration 3rd Edition by Craig, Park and Paulsson]

Challenge procedure under UNCITRAL Model Law (“ML”)

1. Art 12 of ML: an arbitrator can be challenged “only if circumstances exist that give rise to **justifiable doubt** as to his partiality or independence”.
2. Art 13(2): “Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenges, the arbitral tribunal shall decide on the challenge”.
3. Art 13(3): “If a challenge under **any procedure agreed upon** by the parties or under the procedure of paragraph(2) of this article is not successful, the challenging party may request...the court...specified in article 6 to decide on the challenge, which decision shall be subject to no appeal”.

4. In Pacific China "[a]ny procedure agreed upon" is the ICC Rules, which provides under Article 11 for a challenge of an arbitrator whether for an alleged lack of independence or otherwise, to the Secretariat and for the Court of ICC to decide on the merits of a challenge.
5. The court specified in Article 6 of ML, pursuant to section 34C(4) of the Ordinance, is the Court of First Instance.
6. As to "**justifiable doubt**", section 24 of the Arbitration Act of UK is worded to allow English Court to remove an arbitrator where "(a) circumstances exist that give rise to justifiable doubts as to his impartiality".
7. In ASM Shipping Ltd of India v TTMI Ltd of England [2006] 2 ALLER (comm.) 122, it is written:

"Although the test in section 24 of the Act is worded differently ("justifiable doubts as to his impartiality" as opposed to "real danger of bias") I respectfully agreed with Rix J in Laker Airways Inc. v FLS Aerospace Ltd [1999] 2 Lloyd's Rep 45 at page 48, column 2 that section 24 lays down an objective test which reflects the position at common law. Accordingly, the discussions of the common law principles to be found in R v Gough and similar cases illustrate the approach which ought to be adopted when a question of this kind arises in the context of arbitration".

Ex-parte Communication for the appointment of the Chair

Exception to no ex-parte communication

1. Writings of well known academics and arbitrators that ex parte communication for the selection of the Chair may be necessary as an exception to the rule of no ex parte communication. See the following passages:

- (a) Ethics and Effectiveness: Doing Well by doing Good by Nicolas Ulmer:

"Having strongly affirmed the above principle [of prohibition of ex parte communications] I do note that it does have certain, quite limited, exceptions. It is permissible to discuss (not argue) practical and logistic aspects of the arbitration...Such communications are particularly permissible, and sometimes necessary, during the process of appointing arbitrators and constituting the tribunal. In particular it is generally acknowledged to be proper for a party and the arbitrator they have nominated to concert on the joint-nomination by the arbitrators of a Chairman of the Tribunal. This is, essentially, a partial extension of a party's right to nominate an arbitrator."

- (b) The Party Appointed Arbitrators in International Controversies: Some Reflections by Andreas F. Lowenfeld
30 Tex. Int'l L.J. 59 (1995) CWA2/162-173 at CWA2/166.

"There seems to be an unwritten rule, however, that if the agreement to arbitrate provides that the two arbitrators nominated by the parties shall choose the presiding arbitrator, it is expected that the candidates being considered be cleared with counsel...".

International Bar Association ("IBA")

1. Article 5.2 of the IBA Rules of Ethics for International Arbitrators permits the obtaining of the views of the party who nominated the arbitrator. It provides:

"If a party-nominated arbitrator is required to participate in the selection of a third or presiding arbitrator, it is acceptable for him (although he is not so required) to obtain the views of the party who nominated him as to the acceptability of candidates being considered".

2. In a similar vein, the IBA Guidelines on Conflicts of Interest in International Arbitrations detailed the General Standards regarding Impartiality, Independence and Disclosure. In the Practical Application of the General Standards, IBA sets out four lists: Non-Waivable Red List, the Waivable Red List, the Orange List and the Green List. The IBA Guidelines Part II para 6 states:

"The Green List contains non-exhaustive enumeration of specific situations where no appearance of, and no actual conflict of interest exists from relevant objective point of view. Thus the arbitrator has no duty to disclose situations falling within the Green List. In the opinion of the Working Group, as already expressed in the Explanations to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of "the eyes of the parties."

3. Under the Green List, para 4.5.1 is the situation where

"the arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute."

4. It is said in an Article that "the Green List illustrates the types of situations where disclosure is not necessary and has been published to avoid over-disclosure, which can sometimes lead to unnecessary challenges...". See A Challenging to the Appointment of an Arbitrator under the UNCITRAL Rules by Craig Shephard and Chiu 78 [2005] Asian DR 78

JAM

1. In America, the Rule 14 of Rules of the Judicial Arbitration Mediation Services ("JAMS") provides:

"Rule 14 Ex Parte Communications

No party may have any ex parte communication with a neutral arbitrator regarding any issue related to the arbitration. Any necessary communication with a neutral arbitrator, whether before, during or after the arbitration hearing, shall be conducted through JAMS. The parties may agree to permit ex parte communication between a party and a non neutral arbitrator."

2. Further the Arbitrators Ethics Guidelines of JAMS at paragraph G(4) states:

"4. Notes regarding international arbitration. Tripartite Arbitrations in which the Parties each appoint one Arbitrator are common in international disputes; however, all Arbitrators by whomever appointed, are expected to be independent of the Parties and to be neutral. They are sometimes expected to communicate ex parte with the Party that appointed them solely for the purpose of the selection of the chairman and not otherwise."

3. It seems there is a distinction in the US between the role of party appointed arbitrator, usually considered to be non neutral and the presiding or the third arbitrator, the neutral.

American Arbitration Association ("AAA")

1. This is reflected in such as AAA's "Guide for Commercial Arbitrators":

"Occasionally, a neutral arbitrator will serve on a case with arbitrators appointed by the parties. For example, a panel might be composed of an arbitrator appointed by the claimant, an arbitrator appointed by the respondent, and a neutral arbitrator.

It is recommended that the neutral arbitrator ascertain from the party-appointed arbitrators the nature and extent of any relationship between arbitrator and the party that appointed the arbitrator, and whether there will be any direct communication between such arbitrators and the party appointed them."

4. This matter of neutrality of party-appointed arbitrator was specifically dealt with in the 2004 Revised Code of Ethics for Arbitrators of AAA:

"Presumption of Neutrality

A presumption of neutrality is applied to all arbitrators, including party-appointed arbitrators. This reverses the presumption of non-neutrality for party-appointed arbitrators that was contained in the 1977 code...".

5. On the matter of ex parte communication, the 2004 Revised Code was explained in an article (Revised Code of Ethics for Commercial Arbitrators Explained by Bruce Meyerson and John Townsend Feb/Apr 2004 Dispute Resolution Journal):

"The 2004 Revision provides guidance...on what a prospective arbitrator may discuss on an ex parte basis with the appointing party concerning the potential appointment. Canon III.B (1) limits the discussion to three general subjects: (1) the identities of the parties, counsel or witnesses, (2) the general nature of the case, and (3) the arbitrator's suitability or availability for the appointment. Discussion of the merits of the case is specifically prohibited, except to a limited extent for Canon X arbitrators.

In addition, Canon III.B allows a party-appointed arbitrator to consult with the appointing party concerning (a) the choice of the third arbitrator, (b) compensation, (c) the status of the arbitrator as a neutral or as a Canon X arbitrator."

Conclusion

For the avoidance of challenges which necessarily prolong the arbitration and may besmirch of one's reputation (even though he or she may be vindicated end of the day), arbitrators should try his/her utmost to avoid ex parte communications of any form without the consent of the parties and his/her co-arbitrators. If unsolicited information is received, he/she should promptly copy the all the parties in, including his co-arbitrators.

Questions not dealt with in Pacific China

1. Where the parties adopted ICC Rules in which Article 7.4 for the decision of the ICC Court on challenge of an arbitrator to be final, whether Hong Kong Court has jurisdiction to hear an appeal that goes against and challenges the decision of the ICC Court pursuant to Art 13(3) of ML?
2. Whether the procedural law of Hong Kong (under the existing Ordinance) governs an ICC arbitration which takes place in Hong Kong?