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Section 3: Regional Overviews

Challenges to Arbitrators

David Foster, David Edwards

O'Melveny & Myers LLP

The question of how to minimise the number of challenges to arbitrator appointments is a perennial problem for both practitioners and institutions. One of the attractions of international arbitration as a means of resolving cross-border commercial disputes is the assumption that the tribunal will determine the case fairly and impartially, without regard to the nationality of the parties, and in accordance with generally recognised standards of due process. If either party has cause to believe that an arbitrator lacks the requisite degree of objectivity, or is for some reason incapable of performing his duties fairly and impartially, then it is right that such a party has an opportunity to object to that person sitting on the tribunal. On the other hand, it is not unknown for a party to seek to delay the arbitral process by raising unwarranted objections to a nominated arbitrator, or to derail the process entirely by a late application to remove an arbitrator midway through the case (invariably when previous interim or procedural decisions have been adverse to the applicant). When dealing with such challenges, a balance must be struck between responding fairly to legitimate concerns, while seeking to discourage frivolous complaints and the disruption that flows from them.

The level of disruption will vary in every case, but it can be substantial. Even if a challenge is made early and ultimately unsuccessful, it will delay the conduct of the arbitration as well as leading to additional costs being incurred. The ICC's recent Report on Techniques for Controlling Time and Costs in Arbitration cites objections to the appointment of an arbitrator as a factor tending to give rise to delay and advises parties to "give careful thought" as to whether an appointment might give rise to an objection.[1] The Report does not advise how to avoid objections later in the arbitral process, presumably because such objections normally arise from the conduct of the arbitration and are beyond the control of the appointing party. Late objections or challenges are particularly troublesome and often require numerous additional hearings before they can be resolved. For instance, a recent challenge alleging apparent bias against two members of a three-man tribunal in an ongoing LCIA arbitration[2]

led to the appointment of a separate three-man division of the LCIA[3] to determine the application. When the application was rejected after several rounds of written submissions and an oral hearing, the party alleging bias launched a fresh application to the English Commercial Court under section 24 of the Arbitration Act 1996 (which is still pending).

Pre-appointment disclosure of information

In order to reduce the risk of a challenge during the course of an arbitration, it is customary for a proposed arbitrator to disclose, before accepting an appointment, any information that might be considered relevant to his or her suitability to preside over the case. If, following such disclosure, one of the parties feels it would be inappropriate for the individual concerned to accept the appointment, that party has an opportunity to object and should do so promptly so that the matter can be resolved at an early stage. Most arbitration institutions include in their procedural rules a regime for disclosure of information by prospective arbitrators prior to appointment, together with time limits for any objections filed as a result of such disclosure.
Article 5.3 of the LCIA Rules, for instance, states:
Before appointment by the LCIA Court, each arbitrator shall furnish to the Registrar a written resume of his past and present professional positions; …and he shall sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration. Each arbitrator shall thereby also assume a continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other members of the Arbitral Tribunal and to all the parties if such circumstances should arise after the date of such declaration and before the arbitration is concluded.

Article 10.4 of the LCIA Rules requires the parties to challenge any appointment within 15 days of the formation of the tribunal or (if later) after becoming aware of any circumstances raising a ground for challenge.
There is a similar scheme set out in the ICC Rules, articles 7(2) and 7(3):
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. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
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.

Article 11 of the ICC Rules provides that any challenge to the appointment of an arbitrator must be submitted within 30 days from the date when the party making the challenge received

notice of the appointment or was informed of the facts and circumstances giving rise to the challenge.
Such rules are intended to minimise the risk of a late challenge to an arbitrator by 'flushing out' grounds for objection at an early stage. The rules themselves contain no detailed guidance for prospective arbitrators (or the parties to arbitration) as to what information should be disclosed, or what kinds of relationship or connection might give rise to legitimate doubts about an arbitrator's suitability. However, guidance on these issues may be found in the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines).[4]
The stated aim of the IBA Guidelines is to "help parties, practitioners, arbitrators, institutions and the courts in their decision-making process" when dealing with issues of impartiality, independence and disclosure of information. Although the IBA Guidelines may be overridden by any applicable rules of national law or the arbitral rules agreed by the parties, they have achieved a measure of acceptance and are a useful aide for arbitrators faced with issues of pre-appointment disclosure.
Nevertheless, despite the availability of resources such as the IBA Guidelines, and the growing sensitivity on the part of prospective arbitrators to issues of potential conflict or perceived bias, there does not appear to be any reduction in the number of challenges. If anything, the frequency of challenges in European arbitrations seems to be increasing. Parties (or their legal advisers) have become highly adept at identifying a perceived flaw in the arbitral process or an extraneous factor affecting the partiality of an arbitrator, and are increasingly willing to make a formal objection when the opportunity arises. Two recent cases summarised below are illustrative.

Eureko v Poland

One of the most high profile challenges of the last 12 months arose from an investment treaty dispute between the Republic of Poland and the Dutch insurance company Eureko BV. This was an ad hoc arbitration seated in Brussels, in which the claimant alleged that the decision to nationalise a leading national insurance company by the Polish government contravened the provisions of the Netherlands-Poland bilateral investment treaty. The tribunal appointed to determine the dispute was typically heavyweight for this kind of dispute: Yves Fortier (president), Judge Stephen Schwebel and Professor Jerzy Rajski. The tribunal published its Partial Award on Liability dated 19 August 2005 in which, by majority opinion (Rajski dissenting), it held in favour of Eureko that Poland had breached various provisions of the investment protection treaty.
In October 2005, Poland served a notice of recusal upon Judge Schwebel, arguing that his close relationship with the US law firm Sidley Austin gave rise to justifiable and legitimate doubts about his impartiality and independence, and requesting that he recuse himself from the case. Sidley Austin were representing the US-based multinational Cargill Corporation

against Poland in another investment treaty case, and American Lawyer magazine had published an article suggesting (erroneously) that Judge Schwebel was acting as one of Cargill's legal advisers in that other case. Although Judge Schwebel had worked alongside Sidley Austin in several cases, and although his own legal practice used the same office building in Washington, DC, he denied acting for Cargill in the ongoing arbitration against Poland referred to by American Lawyer.

In December 2006, the Belgian court held that there was no evidence to contradict Judge Schwebel's denial of any involvement in the Cargill case, and the fact that he shared the same building with Sidley Austin and had worked with the firm on other unrelated cases was insufficient to raise legitimate doubts about his impartiality. The application to replace him was duly dismissed.

However, the Belgian court's decision does not appear to be the end of this story. In January 2007, Poland filed an appeal in Belgium against the court's ruling, claiming that the court had ignored further evidence of Judge Schwebel's close links with the US firm. According to press reports on the case,[5] Poland is seeking to rely upon Judge Schwebel's role in another investment treaty dispute between Vivendi and Argentina, where he is acting as co-counsel for the claimant (once again alongside Sidley Austin). One of the authorities relied upon by Vivendi in that case was the Partial Award rendered by the majority (Schwebel and Fortier) in the Eureko case. Poland argues in its appeal in the Eureko case that this in itself demonstrates a clear conflict of interest sufficient to raise justifiable doubts as to Judge Schwebel's impartiality in the arbitration.[6]

The recent appeal raises questions about the extent to which it remains possible for the same individual to play the role of arbitrator and counsel in separate disputes, particularly where the legal issues are similar. It is a particular problem for arbitrators and lawyers acting in investment treaty disputes, where the pool of reputable arbitrators is more limited than for general commercial disputes, and where substantially the same or similar issues of interpretation of standard treaty provisions will invariably arise again and again in different cases. In yet a further twist, it has also been reported that Argentina has voiced objections to Vivendi's reliance upon the Eureko case as an authority in its written submissions as a result of Judge Schwebel's role on the Eureko tribunal.

ASM Shipping

The complications arising from an arbitrator acting as counsel in separate proceedings are also illustrated in ASM Shipping v TTMI. This case has already achieved a degree of notoriety due to an earlier challenge to an award under section 68 of the Arbitration Act 1996 on the grounds of serious irregularity.[7] The irregularity in question was the apparent bias of one of the members of the tribunal. Briefly, the arbitrator in question (Duncan Matthews QC) was a member of a three-man tribunal at the hearing of a preliminary issue. One of the claimant's

principal witnesses at that hearing, a Mr Moustakas, had previously been involved in a separate arbitration where Mr Matthews had been acting as advocate. During that earlier case, allegations of dishonesty had been levelled at Mr Moustakas by the clients and solicitors instructing Mr Matthews.

After Mr Moustakas had completed his evidence in the preliminary issue hearing, Mr Matthews disclosed his involvement in the previous case (which was already known to the claimant) and the claimant objected to him continuing to sit as arbitrator. Mr Matthews refused to recuse himself, and although the issue of his continuing to sit was the subject of further correspondence, no application was made to remove him. On 23 December 2004, nearly two months after the preliminary issue hearing, an award was rendered by the tribunal that was largely favourable to the respondent. Only then did the claimant apply to the court, not to remove Mr Matthews from the tribunal, but to challenge the validity of the award under section 68. Morison J held that the claimant had lost the right to challenge the award on the grounds of apparent bias because it had failed to make an application promptly and had taken up the award. However, in his judgment Morison J also held that "Mr Matthews QC should not continue to act in this matter" and should recuse himself, which Mr Matthews duly did a short time after the judgment was handed down.

This judgment of Morison J was an interesting (and controversial) decision. In particular, it concluded that the arbitrator's prior involvement in a dispute that had also involved one of the witnesses in the present dispute (not one of the parties themselves) was sufficient to satisfy the test for apparent bias. The judge also held that Mr Matthews should recuse himself in circumstances where no specific application had been made to remove him under section 24 of the Arbitration Act 1996.

Perhaps unsurprisingly, that was not the end of the controversy. Shortly after Morison J's judgment was handed down, the claimant asked whether, in the circumstances, it was appropriate for the other two members of the tribunal to remain in place. This issue ultimately gave rise to the most recent challenge to the two remaining arbitrators (Bruce Harris and A G Scott) under section 24 of the Arbitration Act 1996 on the grounds that "circumstances exist that give rise to justifiable doubt about [their] impartiality". Judgment on this application was delivered on 28 June 2007 by Andrew Smith J.[8]

The main argument in support of the challenge was that when one member of a tribunal is found to have been tainted by actual or apparent bias, it automatically follows that the whole tribunal and each member of it is similarly tainted. The authorities cited in support of this wide-ranging proposition included R v Sussex JJ ex parte McCarthy,[9] R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte[10] and Re Medicaments.[11] Smith J declined to accept that there was a general rule applicable in every case where one member of a tribunal had been removed. He noted, for instance, that it was common practice when a juror had to be discharged for the judge to consider whether there was a risk of 'contamination' of other jurors and, if there was no reason to think that there was, then to continue the trial with the remaining jurors. The Sussex Justices and Pinochet cases were

distinguished on the basis that the tribunals in those cases had already reached a decision, and in such circumstances it was unsurprising that those who had committed themselves to a decision should not form part of the tribunal conducting a rehearing. The enquiry as to the existence of apparent bias in relation to the remaining members of a tribunal would therefore depend upon the particular facts of each case.
Accepting for the sake of argument that Mr Moustakas would be an important witness for the claimant in the remainder of the arbitration, Smith J held that any objection to the two remaining arbitrators could only be made on the basis that there was a risk that they would be other than impartial because they had been influenced by discussions with Mr Matthews concerning that witness. On the evidence available to him, the judge dismissed this proposition as “fanciful”. Mr Matthews had stated during the hearing that he could recall nothing relating to the previous case in which he had acted as counsel. Consequently the judge could not accept that a fair-minded and informed observer would conclude that there was any real possibility that there had been discussions between Mr Matthews and the other arbitrators that might improperly influence their assessment of Mr Moustakas’s evidence. The owners’ challenge under section 24 was therefore dismissed (most of the grounds for the challenge were also held to be outside the time limit under section 73 of the 1996 Act).

Problems for the future

Although the most recent challenge in ASM Shipping was unsuccessful, the fact that this type of argument was raised at all is indicative of the recent trend to pursue objections even if the grounds appear novel or speculative. What then might the future hold? Assuming that parties continue to take an aggressive approach to issues of bias and conflict of interest, we will no doubt continue to see challenges based upon an arbitrator’s conduct or participation in different cases. This is likely to remain a theme in European arbitration for as long as lawyers continue to accept appointments to sit on tribunals while practising as advocates. In addition to ‘subject matter’ conflict, there will be increased sensitivity to ‘issue conflict’, where the appearance of bias results from an arbitrator advancing a particular point of view, either in separate proceedings when acting as counsel, or in a textbook, journal or speech, on an issue of law relevant to the case in which he sits on a tribunal.
For practitioners in England, there may even be renewed attempts to challenge the system whereby barristers occupy the same set of chambers and work independently, but accept appointments as arbitrator or counsel in cases where other members of chambers are involved. The leading authority on whether a conflict arises in this type of situation is still Laker Airways v FLS,[12] which firmly rejected the argument that a conflict of interest could arise. Might this decision (Rix J at first instance) be revisited and overturned? Some of the leading commercial sets of barristers’ chambers are increasingly marketing themselves as a ‘brand’ in a similar way to solicitor law firms; legal directories frequently refer to the reputation of a set

of chambers as a whole, or the ability of a set to conduct certain types of specialist work. Some of the features that previously distinguished barristers' chambers from law firms have also been eroded over recent years, and there has been an increase in mobility between the two professions. What are foreign parties to a London arbitration therefore going to think when they come to London and see one or more members of a tribunal, as well as counsel acting for the opposing party, drawn from the same chambers? Even if the English Court does not revisit Laker Airways, this does not preclude this kind of argument being raised in European arbitrations seated outside England.[13]

One suspects that objections to arbitrator appointments and applications to remove arbitrators are going to continue to be a feature of European arbitrations for the foreseeable future, and that there will be plenty of scope for ingenious legal advisers to test the parameters of what does or does not give rise to a perception of bias. Arbitrators, for their part, will need to be increasingly sensitive to any set of circumstances that might be construed as evidence of partiality or conflict, and avoid saying or doing anything, in any context, that might suggest they are other than fair-minded in relation to the cases over which they preside.

Notes

1 Paragraph 14 ('Avoiding Objections').
2 The authors' firm, O'Melveny & Myers LLP, is acting for one of the parties in this case, the details of which remain confidential.
3 The division was constituted pursuant to article 10.4 of the LCIA Arbitration Rules and article D(2) of the LCIA Constitution.
4 The IBA Guidelines should be read in conjunction with the Background Information on their drafting history, which is intended to assist in their understanding and interpretation.
5 Investment Treaty News, 17 January 2007.
6 On 29 October 2007 the Brussels Court of Appeal rejected Poland's appeal, enabling the arbitration to proceed to the assessment of damages.
7 ASM Shipping Ltd v TTMI Ltd [2005] All ER (D) 271 (Nov).
8 ASM Shipping Ltd v Harris & Others [2007] EWHC 1513 (Comm).
9 R v Sussex JJ ex parte McCarthy [1924] 1 KB 256.
10 R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119.
11 Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700.
12 Laker Airways v FLS Aerospace [1999] 2 Lloyds Rep 45. This decision was recently confirmed by the Court of Appeal in Smith v Kvaerner Cementation Foundations Ltd [2006] 3 All ER 593, in which the court stated that the mere fact that counsel for the other party and the Recorder were from the same chambers "creates no risk of bias nor, to those with experience of our system, any appearance of bias". See also Nye Saunders and Partners v

Bristow (1987) 37 BLR 92, Taylor v Lawrence [2003] QB 528 and Birmingham City Council v Yardley [2004] EWCA Civ 1756.
13 For instance, Michael Hwang SC has written about the ICC International Court of Arbitration dealing with a recent challenge based on an English arbitrator QC and counsel QC being members of the same set of chambers: Transnational Dispute Management, vol 2, issue 1 (January 2005). The arbitration was seated outside England in a Model Law jurisdiction. The ICA dismissed the challenge in that case, but, as is customary, did not provide reasons.