THE LIABILITY OF ARBITRATORS WHEN DETERMING LAND PREMIUM DISPUTES

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Introduction

> ***"When accepting the burden of the reference, the arbitrator can be regarded as undertaking three principal duties – namely to take care, to proceed diligently, and to act impartially. The existence of a moral obligation to perform these duties is undeniable. The question is whether it is backed by a legal sanction."*** (Mustill and Boyd, *Commercial Arbitration* (2nd Ed., 1989 Inner Temple))

1. This paper adopts Lord Mustill's question and examines the potential liability of persons who act as arbitrators in the new Pilot Scheme to determine land premiums launched by the Government on 20 October 2014. The Pilot Scheme requires the Arbitral Tribunal to be composed of 3 arbitrators, all of whom are to be agreed and appointed by the Government and the Applicant. Of the 3 arbitrators appointed, the Chairman is to be a legal professional (a retired judge or qualified lawyer with 10 years' experience) and the two co-arbitrators are to be professional surveyors. To qualify as a co-arbitrator, a surveyor has to (i) have been qualified as a member of a professional body of surveyors (the membership of which is accepted for the purposes of registration under the Surveyors Registration Ordinance, Cap. 417); and (ii) have at least 10 years of experience in land matters and valuation; and (iii) be a Registered Professional Surveyor under the Surveyors Registration Ordinance. Where a person meets the criteria in (i) and (ii) but not (iii), he may still be appointed provided he has 10 years of substantial experience in land matters and professional valuation in Hong Kong.

2. In answering the question posed by Lord Mustill, this paper first sets out the development of the law of arbitration in Hong Kong. The three 'moral duties' suggested by Lord Mustill are then taken in turn.

3. As will be seen, the potential liability of arbitrators was a difficult and uncertain area of law until the intervention of statute, in the form of (in the UK)

section 29 of the Arbitration Act 1996 and (in Hong Kong) section 2GM of the Arbitration Ordinance (Cap 341).

4. Whilst those provisions have brought certainty as to the correct legal test for when arbitrators will be personally liable for the way in which they perform their functions, an absence of case law both in the UK and in Hong Kong leaves some doubt as how that test would be applied in practice. However, the legal uncertainty which led to the introduction of section 29 in the UK provides some guidance as to the rationale behind the immunity granted to arbitrators and so to its limits.

The development of the law of arbitration

5. The Arbitration Ordinance (Cap 341) was first enacted in 1963. Mirroring the provisions in the (English) Arbitration Act 1950, it provided for a unitary arbitration law regime applicable to both domestic and international arbitrations.

6. Following the Law Reform Commission's 1987 report on the 'Adoption of the UNCITRAL Model Law of Arbitration', the Arbitration Ordinance was amended to provide for two separate arbitration regimes: the international regime, based upon the Model Law, and the domestic regime.

7. At this time in the UK, the law on what, if any, immunities arbitrators enjoyed had for a long time been considered a settled question: as with judges, arbitrators were immune from suit. As recognised by Lord Mustill, writing extra-judicially, whilst there was *"no direct authority"* for this:-

> *"For centuries it was treated as axiomatic… it was regarded as self-evident to such a degree that there appears to be no reported instance in which a disappointed party has ever tried to recover damages from an arbitrator."*[1]

8. Rather, such case law as there was concerned whether or not a given expert (often a valuer) when making an expert determination was performing a task sufficiently close to that of an arbitrator to fall within the category of 'quasi-arbitrator', and so enjoy the same immunity.

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1 *Mustill and Boyd* pg225.

9. This settled position was thrown into doubt by two judgments of the House of Lords: *Sutcliffe v Thackrah* [1974] AC 727 and *Arenson v Arenson* [1977] AC 405. Whilst both cases concerned the category of 'quasi arbitrators', the rationale of arbitrator immunity more generally was examined.

10. *Sutcliffe* concerned the liability of architects for issuing interim certificates on a building contract which, due to the negligence of the architects, certified too great a sum. It was conceded by the claimant that both arbitrators and quasi-arbitrators were immune from suit in negligence. The issue for the House of Lords was whether the architects in question fell within the category of quasi-arbitrators. In reaching its judgment, the House of Lords reaffirmed the immunity of arbitrators from liability in negligence.

11. For Lord Reid, this immunity, which is an exception to the general rule that professional men are liable for failures to take reasonable care, was justified on grounds of public policy:

> *"The reason [for the exception] must, I think, be derived at least in part from the peculiar nature of duties of a judicial character. In this country judicial duties do not involve investigation. They do not arise until there is a dispute. The parties to a dispute agree to submit the dispute for decision. Each party to it submits his evidence and contention in one form or another. It is then the function of the arbitrator to form a judgment and reach a decision."*

12. Observing that *"there is so much room for differences of opinion in reaching a decision of a judicial character that even the most skilled and experienced arbitrator or other person acting in a judicial capacity may not infrequently reach a decision which others think is plainly wrong"*, Lord Reid considered that:

> *"…I think that the immunity of arbitrators from liability for negligence must be based on the belief - probably well founded - that without such immunity arbitrators would be harassed by actions which would have very little chance of success. And it may also have been thought that an arbitrator might be influenced by the thought that he was more likely to be sued if his decision went one way than if it went the other way, or that in some way the immunity*

put him in a more independent position to reach the decision which he thought right."[2]

13. Also upholding the category of 'quasi-arbitrators', for Lord Reid, it was insufficient that a party was engaged as an expert to make a decision which affected the rights of more than one party. Instead, for the immunity from liability in negligence to apply, he held it was necessary for the person claiming the immunity to show that *"the functions in the performance of which he was negligent were sufficiently judicial in character."* Similarly, Lord Salmon considered that the presence of a duty to act fairly and impartially towards more than one party was not, of itself, enough to justify immunity from actions in negligence. What was required was something akin to a judicial function.

14. Lord Morris agreed that, as a matter of general principle, liability for negligent acts was the starting point at common law with any exceptions to be justified. Regarding the immunity of arbitrators, Lord Morris took it to be established that the immunity did not apply where there was *"fraud or dishonesty or collusion or the like"*. Lord Morris did, however, agree with Lord Reid that, for reasons of public policy, the law required that arbitrators should not be liable in negligence as their functions were of a judicial nature.[3]

15. Lord Salmon likewise endorsed the conventionally understood position that arbitrators were immune from actions for negligence. However, he was careful to emphasise that it was not that the law failed to recognise the obligation of arbitrators to take reasonable care but for reasons of public policy. He said:-

"The law takes the risk of their being negligent and confers upon them the privilege from inquiry in an action as to whether or not they have been so. The immunity which they enjoy is vital to the efficient and speedy administration of justice."

16. The public policy reasons justifying the immunity were that it was of *"great public importance"* that arbitrators should be able to perform their functions *"free from fear that disgruntled and possibly impecunious persons who have lost their cause or been convicted may subsequently harass them with litigation"*.

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2 736B-C.

3 744E

17. Two particular points of note from the *Sutcliffe* judgment were (1) the limit placed upon arbitrator immunity by Lord Morris, namely that it did not apply in cases of *"fraud or dishonesty or collusion or the like"*; and (2) the recognition that a duty to act impartially and fairly towards multiple parties did not, of itself, justify immunity from an action for negligence.

18. The previously well-established immunity of arbitrators came under much greater scrutiny in the later case of *Arenson*. As with *Sutcliffe*, *Arenson* concerned the scope of the quasi-arbitrator category in the context of a negligent valuation but, in reaching its judgment, the House of Lords also examined the basis of arbitrator immunity.

19. Lords Simon and Wheatley both gave judgments broadly endorsing the view of arbitrator immunity set out in *Sutcliffe*, namely that the 'judicial' nature of the function which arbitrators fulfilled gave rise to sufficiently strong public policy considerations to justify immunity from actions for negligence.[4]

20. Lord Salmon and Lord Fraser, however, were not prepared to go this far. In particular, Lord Salmon considered that the function of an arbitrator would not always necessarily have a 'judicial' character. Arbitrators could, and did, sometimes determine issues without an oral hearing, and largely based upon their own investigations (rather than deciding upon competing submissions). In those cases, with nothing more to rely on that their own examination and expertise, the function the arbitrator performed was more akin to that of an expert providing an opinion than of a judge deciding a case. If so, the rationale for immunity from suit would not apply. Leaving the question of arbitrator immunity open for determination at a later date, Lord Salmon explained his concern with the following example:-

> *"…an expert may be formally appointed as an arbitrator under the Arbitration Acts, notwithstanding that he is required neither to hear nor read any submission by the parties or any evidence and, in fact, has to rely on nothing but his examination of the goods and his own expertise. He, like the valuer in the present case, has a purely investigatory role; he is performing no function even remotely resembling the judicial function save that he finally decides a dispute or difference which has arisen between the parties. If such a valuer who*

4 See 424E-F (Lord Simon), 428 E-F (Lord Wheatley).

is appointed as arbitrator makes a decision without troubling to examine the goods, surely he is in breach of his duty to exercise reasonable care; so would he be if he made only a perfunctory and wholly careless examination.

I find it difficult to discern any sensible reason, on grounds of public policy or otherwise, why such an arbitrator with such a limited role, although formally appointed, should enjoy a judicial immunity which so called quasi-arbitrators in the position of the respondents certainly do not."[5]

21. Lord Fraser also considered that it would not always be possible to distinguish between valuers and arbitrators and that it was difficult to see why the latter should enjoy immunity from suit when the former do not. Lord Fraser likewise left the question open.

22. However, both Lord Salmon and Lord Fraser did agree that the exercise by an arbitrator of true 'judicial functions' gave rise to sufficiently strong reasons of public policy to justify immunity from suit in negligence.

23. Lord Kilbrandon went further still, and was of the opinion that arbitrators did not, in fact, enjoy immunity from suit. As with Lord Salmon and Lord Fraser, Lord Kilbrandon did not consider it possible to draw principled distinctions between the role performed by arbitrators and by other experts instructed to offer an opinion for the benefit of more than one party (and who did not enjoy immunity from liability in negligence). He said:-

"You do not test a claim to immunity by asking whether the claimant is bound to act judicially; such a question… leads to arguing in a circle. Immunity is judged by the origin and character of the appointment, not by the duties which the appointee has to perform, or his methods of performing them."

24. Judicial immunity from actions in negligence, which Lord Kilbrandon did accept, was justified not by the nature of the judicial function but by the nature of the judicial office:-

"The state…sets up a judicial system… who give decisions, whether final or not, on matters in which the state has given them a competence. To these

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5 439H-440C.

tribunals the citizen is bound to go if he wants to maintain particular rights or to obtain an opinion carrying authority ultimately enforceable by the public agencies; like as before them the citizen must appear to answer claims or complaints made against him… The citizen does not select the judges in this system, nor does he remunerate them otherwise than as a contributor to the cost of government. The judge has no bargain with the parties before him. He pledges them no skill. His duties are to the state: it is to the state that the superior judge at least promises that he will do justice between all parties, and behave towards them as a judge should… It is for the state to make such arrangements as may be necessary for the correction of careless or erroneous judicial decisions; if those arrangements are deemed to be inadequate, it is for Parliament to put the matter right. And if it be necessary to state the matter in terms of the law of tort, litigants are not persons to whom judges owe a legal duty of care - a duty which does not exist in the abstract, but only between persons in particular relationships"

25. Writing in 1989, Lord Mustill considered that, following the *Arenson* case, the law of arbitrator immunity could no longer be regarded as clear.[6]

26. The decision in *Arenson* was shortly followed by a report from the Departmental Advisory Committee[7] (DAC) on the Arbitration Bill 1996. The Committee considered that "*although the general view seems to be that arbitrators have some immunity under the present law, this is not entirely free from doubt.*" The Committee recommended that the immunity of arbitrators should be put on a statutory footing, justified by two public policy reasons:-

    a. That immunity from suit, for actions other than those made in bad faith, was necessary to enable the arbitrator to perform the impartial decision making function properly, without fear of legal action;
    b. To ensure the finality of arbitration proceedings. The Committee feared that, if a degree of immunity was not afforded, there was a real prospect *"of the losing party attempting to re-arbitrate the issues on the basis that a competent arbitrator would have decided them in the favour of that party"*.

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6 *Mustill and Boyd* pg 225.

7 Departmental Advisory Committee Report on the Arbitration Bill 1996 (28 September 2006).

27. The second of these policy considerations is the more persuasive. The first can be mitigated against by insurance. The second, however, reflects the commercial demand for a dispute resolution procedure which is flexible, practical and final. The risk that an arbitrator will be negligent, and if so that the parties will be left without redress, is a necessary feature of the system if it is to provide the finality and certainty which the parties seek. The concern that it would, in practice, be easy for an aggrieved party to seek to re-litigate an adverse decision by arguing that a 'competent' arbitrator would have found in their favour appears to be well founded.

28. The recommendations of the DAC were accepted and Parliament enacted the Arbitration Act 1996. Section 29 provides that:-

> ***29.— Immunity of arbitrator.***
> *(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.*
> *(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.*
> *(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).*[8]

29. There is a good argument that, despite the uncertainty introduced by the *Arenson* judgment, which arguably left the question of arbitrator immunity open, section 29 reflects the pre-existing common law position.

30. The reform to arbitration in the UK led, at the invitation of the Attorney General, to a committee of the Hong Kong International Arbitration Centre being formed to consider amendments to the Arbitration Ordinance (Cap 341). Included amongst the amendments was a provision conferring arbitrators with immunity. Section 2GM(1) provided that:-

> *"an arbitral tribunal is liable in law for an act done or omitted to be done by the tribunal, or by its employees or agents, in relation to the exercise or performance or the purported exercise of performance of the tribunal's arbitral*

[8] Section 25 provides that the parties are free to agree with an arbitrator what the consequences of his/her resignation shall be, including as to any liability incurred to the parties.

functions only if it is proved that the act was done or omitted to be done dishonestly."

31. In its 'Report of the Committee on Hong Kong Arbitration Law' (30 April 2003), the Hong Kong Institute of Arbitrators recognised that section 2GM was *"the equivalent to section 29 of the English Arbitration Act 1996."*[9] The Committee considered that *"matters of immunity [had] been adequately dealt with in the amendments introduced in 1996"* and that they should be retained in any further reform.[10] The view of the DAC that immunity was necessary to ensure the finality of arbitration proceedings was expressly endorsed.[11]

32. Further reform to the law of arbitration was recommended by the Department of Justice in its December 2007 consultation of the Draft Arbitration Bill. Recommending the creation of a single unitary arbitration regime, the DoJ recommended retaining the protection of section 2GM[12]. These reforms have now been enacted by the Arbitration Ordinance (Cap 609) which came into force on 1 June 2011. As recommended, section 2GM has been retained in identical terms (now found at section 104 of the Ordinance).

The current position

33. From the above review of the history, the following conclusions can be drawn:-

    a. The personal liability of arbitrators is restricted to cases in which the arbitrator has acted 'dishonestly' (section 104 of Cap 609). This immunity is one of the means by which the finality of arbitration proceedings is achieved;
    b. This restriction on liability was considered to be equivalent to the restriction of liability in section 29 of the Arbitration Act 1996 to cases of 'bad faith';
    c. Both provisions were introduced, following *Arenson*, to resolve legal uncertainty about whether arbitrators might be liable for their actions in negligence.

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9 See paragraph 8.34 fn 40.
10 Para 8.37 of the Report.
11 See paragraph 8.34.
12 See Part 12 of the Consultation.

34. With those conclusions in mind, the potential heads of liability identified by Lord Mustill will be taken in turn.

A duty to act carefully?

35. Clause 3.1.1 of the draft arbitration agreement for the Pilot Scheme provides that arbitrations shall be conducted in accordance with the Hong Kong Arbitration Ordinance (Cap 609).

36. The starting point, therefore, is that the liability of arbitrators is confined by the terms of section 104 of the Ordinance (Cap 609) to whether the act or omission was done/omitted to be done 'dishonestly'.[13]

37. In recommending the 'equivalent' protection of section 29 of the 1996 Act, which uses the term 'bad faith', the DAC considered that English law was *"well acquainted with this expression"* and gave, as an example, the case of *Melton Medes Ltd v Securities and Investment Board* [1995] 3 All ER.[14]

38. *Melton* was, perhaps, an unfortunate example for the DAC to give as, in that case, Lightman J in fact held that the term 'bad faith' (**emphasis** added):-

> *"…has a variety of meanings in different contexts. Thus in the field of administrative law, where the validity of a decision or act is challenged on this ground, it is sufficient that the power to decide or act has been exercised for purposes otherwise than those for which the power was conferred or without regard to the relevant, or only the relevant, considerations. There is no necessary moral connotation. But in the context of the tort of misfeasance in public office, or, as it is sometimes called, deliberate abuse of power, the term has a far more restricted meaning. A moral element is an essential ingredient. Lack of good faith connotes either (a)* ***malice in the sense of personal spite or a desire to injure for improper reasons*** *or (b) knowledge of absence of power to make the decision in question"*[15]

39. If 'bad faith' can have different meanings, the history of the provision strongly suggests that section 29 of the Act was intended to restrict liability to bad faith

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13 The arbitration will also be subject to the Domestic Arbitration Rules of the Hong Kong International Arbitration Centre, adopted to take effect on 2 April 2012. Article 22 of those Rules provides for the immunity of arbitrators in the same terms as section 104.

14 Paragraph 134 of the DAC Report.

15 Pg 147.

in the 'moral' sense described by Lightman J. The alternative meaning, which includes the taking into account of irrelevant considerations, approaches (or indeed could amount to) imposing liability for negligence. The need to resolve uncertainty around the immunity of arbitrators, generated by *Arenson*, would hardly have been solved by imposing liability for bad faith in this 'non-moral' sense.[16]

40. Lightman J's first category of bad faith is also, arguably, inconsistent with the judgment of the Court of Appeal in *Cannock Chase District Council v Kelly* [1978] 1 WLR 1, where Megaw LJ (citing Lord Greene M.R.) observed that:-

> *""Bad faith, dishonesty—those of course, stand by themselves." I would stress—for it seems to me that an unfortunate tendency has developed of looseness of language in this respect—that bad faith, or, as it is sometimes put, "lack of good faith," means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant."*

41. In the Hong Kong Ordinance, the use of the word 'dishonesty' suggests even more strongly that the section intended was to restrict arbitrator liability to those cases in which there is conduct which can be labelled as 'immoral' rather than negligent. As made clear by Megaw LJ, it is a grave charge.

42. This interpretation of section 104 is also more consistent with the duties imposed by the Arbitration Rules 2012, which apply by virtue of clause 3.1.2 of the draft arbitration agreement. In those rules, arbitrators are, contractually, duty bound to act independently, fairly and impartially, (Article 3.2) but *not* with reasonable care and skill. The same duties are imposed by section 46 of the Ordinance.

43. A lack of cases on either section 29 of the 1996 Act or section 104 of the Ordinance makes it difficult to say with certainty how the test of 'dishonesty' will be applied in practice. That same lack of cases does, however, indicate the high threshold which the dishonesty test imposes. Lord Mustill, considering section 29 of the 1996 Act, said that (**emphasis** added):-

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[16] This is an interpretation shared by Mustill and Boyd in their *Companion to Commercial Arbitration* (2001, Butterworths) pg 299.

> *"**The concept of dishonesty (or bad faith, to use the terminology of section 29) involves, we consider, conscious and deliberate fault** on the part of the arbitrator. It would not be appropriate to import from the field of public law the wider concept of bad faith which involves no more than acting for an extraneous purpose or without taking into account all the relevant circumstances and no others. This would be to introduce by the back door a challenge to the arbitrator's decision on matters of law in circumstances where both public policy and the wishes of the parties point to a need for finality."*[17]

44. For these reasons, the author does not consider that arbitrators are under a legally enforceable duty to exercise reasonable care and skill. In performing their functions and arbitrator must, however, act honestly. The test of dishonesty, although not yet considered by the courts in this context, is likely to require deliberate fault or malice.

A duty to act diligently?

45. It is clear from the proposed terms of the draft arbitration agreement that the Government places considerable emphasis on land premium disputes being resolved speedily. The draft agreement imposes a tight timetable which requires the Tribunal to issue its final award within 10 weeks from the date the Tribunal was first constituted (clause 11.1). Although this time limit may be extended, any extension is limited to 4 weeks (clause 11.2) save in exceptional circumstances (clause 11.3).

46. Section 46(3)(c) of the Ordinance likewise requires the Tribunal to *"use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense"*.

47. It is unlikely that anything other than a dishonest failure to conduct the proceedings diligently will result in an arbitrator being personally liable. If, as suggested, an arbitrator cannot be held liable for acting negligently, it is hard to see on what basis they could be held personally liable for acting too slowly.

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17 Mustill, *Companion to Commercial Arbitration* pg 300.

A duty to act impartially?

48. It is well established that arbitrators are under a duty to act impartially. A number of the rules and guidelines governing the land premium dispute arbitrations are intended to secure and guarantee the independence of the arbitral panel including:-

    a. Section 25 of the Ordinance which requires potential arbitrators, when approached, to disclose any circumstances *"likely to give rise to justifiable doubts about his impartiality or independence"*. This duty is an ongoing one and applies throughout the arbitral proceedings. Parties can then, if they consider it necessary, apply to have the arbitrator removed under section 26;
    b. Clause 11.6 of the draft arbitration agreement which requires each member of the Tribunal to declare that they have arrived at their determination without collusion with any party or related entity;
    c. The entirety of the IBA Guidelines on Conflicts of Interest in International Arbitration (2004) which are incorporated by clause 3.1.3 of the draft arbitration agreement.

49. Section 62 of the Ordinance bestows the Court with a power to limit the fees of any arbitrator whose mandate is terminated under section 26.

50. As for whether an arbitrator's potential liability extends any further than the possible reduction/loss or their fee, again the starting point is section 104: any arbitrator who has colluded with one or other party will have acted dishonestly and will be personally liable for any loss that may have been caused.

51. More difficult is whether dishonest impartiality, for which an arbitrator could be personally liable, could ever be established in cases *other* than collusion with one of the parties.

52. Innate or unconscious bias would be unlikely to be enough to establish dishonesty, lacking the element of conscious wrongdoing which is, for the reasons above, necessary.

53. The most obvious example of where it could be argued that an arbitrator has acted dishonestly but without alleging collusion is where an arbitrator is

discovered to have an interest in the outcome which they failed to declare. In such circumstances, an aggrieved party could, in theory, seek to have the award set aside and recover the costs against the arbitrator in question. To succeed, the aggrieved party would need to show that the failure to declare the potential conflict was dishonest rather than negligent. This will be much easier to establish for some conflicts (for example, a direct financial interest in the outcome) than others (such as having been instructed by one of the parties in the past three years but where there is no ongoing relationship).

54. The best means of avoiding such a risk is to follow the IBA Guidelines on Conflicts of Interest in International Arbitration (2004). In addition to setting out a series of key 'standards' to follow to avoid potential conflicts, the guidelines contain a useful practical guide offering examples of the kinds of conflict which can arise and what sort of potential conflicts require disclosure. Standards which all arbitrators should follow include:-

    a. Declining to accept an appointment, or, if the arbitration has already been commenced, refusing to continue to act if the arbitrator has any doubts as to his or her ability to be impartial or independent. The same principle applies if the circumstances are such that, from a reasonable third person's point of view having knowledge of the relevant facts, they give rise to justifiable doubts as to the arbitrator's impartiality or independence (General Standard 2);
    b. 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 should disclose such facts or circumstances to the parties and to the co-arbitrators prior to accepting the appointment. Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure and **it is irrelevant whether the proceedings have just begun or are at a later stage** (General Standard 3);
    c. Making reasonable inquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause their impartiality or independence to be questioned. The IBA Guidelines caution that a *"failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate."*

55. In such case law as there is challenging the independence or impartiality of arbitrators the courts have taken a pragmatic view. In *Jung Science v ZTE Corp* [2008] 4 HKLRD 776 it was alleged that a pre-existing social and professional

relationship between the arbitrator and one of the parties' counsel created a risk of apparent bias. In dismissing the case, Deputy Judge Lisa Wong SC took a sensible view of the realities of arbitration. Recalling the judgment of Lord Woolf CJ in *Taylor v Lawrence*, Deputy Judge Wong observed:-

> *"… the objective onlooker could be expected to be aware of the legal traditions and culture of the English jurisdiction which have played an important role in ensuring the high standards of integrity on the parts of both the judiciary and the profession, and accordingly he would be aware that in the ordinary way contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias… In my view, this statement applies equally well to the legal traditions of Hong Kong and the same statement can be made of the wider dispute resolution circle, embracing those participating in arbitration as arbitrators and arbitration advocates."*[18]

56. Deputy Judge Wong also recognised that the international arbitration circle in Hong Kong was a small one and that links and connections *"would be common"* without *"calling into question independence and impartiality between colleagues"*.

57. Whilst there is a distinction between circumstances giving rise to a duty to disqualify an arbitrator and the circumstances which give rise to a duty to disclose, the approach of the Court in In *Jung Science v ZTE Corp* supports the view that arbitrators can take a sensible view about which factors they ought to disclose. The same measured approach can be seen in the IBA Guidelines, which provide a 'green list' of factors which will, ordinarily, be sufficiently innocuous that it is not necessary to disclose them.

Conclusions

58. Those considering acting as arbitrators in the land premium arbitration scheme can take comfort both in the high test for liability which the Arbitration Ordinance imposes and a lack of case law which demonstrates how rare it is for parties to pursue an arbitrator personally.

59. The biggest risk an arbitrator faces is, perhaps, being accused of failing to be impartial or failing to make reasonable investigations to confirm that no conflict arises from accepting the arbitral appointment. Either failure could,

[18] Paragraph 55.

potentially, be argued as being dishonest. The most effective way to counter this risk is for arbitrators to adopt an 'if in doubt, disclose' mentality to potential conflicts and to have careful regard to the IBA guidelines on conflicts of interest.

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