COURT CHALLENGES TO ARBITRATORS UNDER THE PILOT SCHEME

A. Introduction

1. The purpose of this paper is to look more closely at the potential for challenges to the arbitral tribunal appointed under the Pilot Scheme for Arbitration on Land Premiums (**the Pilot Scheme**) and, in particular, to consider the principles and applicable guidance relating to the independence and impartiality of arbitrators appointed under that scheme.

2. The limited potential for challenge to an arbitrator's appointment conducted pursuant to the Pilot Scheme, or to awards made under the Scheme, reflects the very limited forms of challenge which are always available to any parties arbitrating in Hong Kong by virtue of the mandatory provisions of the present Hong Kong Arbitration Ordinance (Cap 609) (**Arbitration Ordinance**) and notwithstanding the decision to incorporate, through the terms of the draft standard form arbitration agreement (**the Arbitration Agreement**), some of the further optional provisions relating to challenges and appeals contained within Schedule 2 of the Arbitration Ordinance[1].

3. The operation of these statutory provisions, and the way in which such a challenge may be approached in practice, is further modified or affected in the case of Pilot Scheme arbitrations by the incorporation, through the terms of the Arbitration Agreement, of:

   (i) the Domestic Arbitration Rules (2 April 2012 ed.) of the Hong Kong International Arbitration Centre (**the HKIAC Rules**); and

   (ii) the Guidelines on Conflicts of Interest in International Arbitration published by the International Bar Association (**the IBA Guidelines**).

4. In this paper I will briefly set out the various mechanisms of potential challenge of arbitrators and awards by reason of arbitrator conduct and conflicts, and then will

[1] By Clause 3.1.1 of the published Draft Arbitration Agreement, Sections 4 and 7 of Schedule 2 of Ordinance, but not Section 5, are applied.

consider in more detail the duties of independence, impartiality and disclosure which have already been touched upon in the first paper this evening.

B. Mode of Challenge

5. The principal mode of challenge to the appointment of an arbitrator is a challenge, or series of challenges, made pursuant to s. 26 of the Arbitration Ordinance, which implements Article 13 of the UNCITRAL Model Law (**Model Law**). As we shall see, those provisions are modified by the terms of the HKIAC Rules, which we will consider in detail later on.

6. Issues involving the conduct of the arbitral tribunal (or one of its members) may also be the focus of challenges to an award itself, pursuant to Sch. 2, S. 4 of the Arbitration Ordinance, which the parties to a Pilot Scheme arbitration 'opt-into' by the terms of the Arbitration Agreement itself. The principal aim of such a challenge is the setting aside of the award, but a bi-product may be the removal and replacement of the arbitral tribunal.

7. Pursuant to Sch. 2, S.4, a party may apply to the CFI to set aside an award where there is shown to have been a *"serious irregularity affecting the tribunal"* which has caused or will cause "substantial injustice" to a party, in one of 9 specified categories (categories (a) to (i)). These include:

   Category (a): a failure by the arbitral tribunal to comply with its duties under s. 46 of the Arbitration Ordinance (which, we will see, are the mandatory duties of the tribunal to be independent and impartial and to adopt fair procedure);

   Category (f): that the award, or the way in which it was procured, is contrary to public policy;

   Category (i): that there has been irregularity in the conduct of the arbitral proceedings.

Any of these grounds may involve a complaint as to the impartiality or independence of the tribunal, possibly arising from fairness of the arbitral tribunal's conduct of the arbitration itself.

8. Under ss. 81 and 86 of the Arbitration Ordinance, which largely implement Articles 34 and Article 36 of the UNCITRAL Model Law, the parties to any arbitration commenced under the present Arbitration Ordinance also have an extremely limited power to seek to set aside an award upon other very narrow grounds, or to resist enforcement of the award. One such ground is where the court holds that *"an award is in conflict with the public policy of this State"*. It is at least arguable that a sufficiently reprehensible act on the part of the arbitral tribunal, or a member of it, could offend against the fundamental rights of residents contained within Chapter III of the Basic Law (which, for example, includes the right to equality before the law) and that this could engage ss. 81 and 82, such that the CFI could intervene. Whether, and in what circumstances, a challenge brought on this basis is genuinely possible is an interesting question, for another day. In practice these provisions do not grant any additional mode of challenge where a challenge pursuant to Schedule 2, S. 4 would not succeed anyway.

9. Since s. 26 of the Arbitration Ordinance (implementing Article 13) is the usual and direct mechanism of challenging an arbitral tribunal, or a member of it, and since the issues of impartiality and independence which might arise upon a challenge to an award, may all equally arise in relation to a s. 26 challenge, for the remainder of this paper we will concentrate upon s. 26.

Challenging the Arbitrator at HKIAC and the CFI (S. 26/Art. 13)

(1) The Procedure for Challenge

10. It is, of course, in the nature of an arbitration that the parties are given wide discretion to agree many aspects of how an arbitration will be conducted. Section 26, which implements Article 13 of the UNCITRAL Model Law, permits the parties to agree a

process for challenging an arbitrator and, as I have already mentioned, by the terms of the Draft Agreement the parties have taken advantage of this power.

11. Article 13(2) specifies a default mechanism for a challenge to an arbitrator. The default mechanism specifies that a challenge is determined, in the first instance, by the arbitral tribunal itself. However, Article 13(1) of the UNCITRAL Model Law, as enacted by s. 26 of the Arbitration Ordinance, gives the parties freedom to agree an alternative procedure.

12. By the terms of the Draft Agreement parties to a Pilot Scheme arbitration adopt the HKIAC Rules. Article 4 of those Rules specifies a different procedure for the first stage of challenge to an arbitrator. Article 4.1 of the HKIAC Rules states:

> ***"A party who intends to challenge the Arbitrator shall, within 15 days after becoming aware of the appointment of the Arbitrator or after becoming aware of any circumstances referred to in Article 3.4, send a written statement of the reasons for the challenge to the Arbitrator. Unless the challenged Arbitrator withdraws from his office or the other party agrees to the challenge, the challenging party may request, within 30 days after having received notice of the Arbitrator's decision not, or failure, to withdraw, HKIAC to decide on the challenge, which decision shall be subject to no appeal...."***

13. So, under the HKIACK procedure:

    (1) Within 15 days of appointment, or of a party becoming aware of grounds for challenging the appointment of an arbitrator, the party must send written reasons for challenging the appointment to the arbitral tribunal.

    (2) However, the arbitral tribunal does <u>not</u> determine the validity of any challenge. If the relevant arbitrator refuses to resign (or does not respond), the challenging party has 30 days to request HKIAC to determine the challenge.

14. Despite the final words of Article 4.1 – *"which decision shall be subject to no challenge"* – the power of the parties to agree a procedure for challenge, contained within Article 13(1), is expressly made subject to Article 13(3), which states:

> ***(3) If a challenge under any procedure agreed upon by the parties or under the [Article 13(2) procedure] is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide on the challenge, which decision shall be subject to no appeal..."***

15. Thus, if HKIAC rejects a challenge, the challenging party may request *"the court or other authority specified in article 6"* to decide on the challenge within 30 days. Section 13 of the Arbitration Ordinance, replaces Article 6 of the Model Law as it applies in Hong Kong. That section specifies[2] that the *"court or other authority"* for the purposes of S. 26/Art. 13(3) is the CFI. As properly reflects the fundamental nature of the duties of independence and impartiality in relation to which the continued appointment of an arbitrator can be challenged, the CFI has therefore retained supervisory jurisdiction over all arbitral tribunals contained in Hong Kong.

16. What happens if the challenge is late? One might expect that the answer was very clear. Firstly, the default provisions of Article 13 and the HKIAC rules both provide a clear deadline for raising the first stage of a challenge (15 days of appointment/knowledge). Article 13 also provides a clear deadline for making a second stage challenge to the CFI (30 days of HKIAC decision). Neither provision contains any power for HKIAC or the CFI to extend these deadlines.

17. Secondly, s. 11 of the Arbitration Ordinance, which implements Article 4 of the Model Law, states:

> ***"A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object."***

18. However, I consider it unlikely that a court would hold that Article 4 was relevant. Although the parties *"may derogate"* from the default challenge procedure contained within Article 13(2), in the sense that they may adopt a different procedure, the grounds

[2] Section 13(4)

of challenge to an arbitrator relate to duties from which neither the parties nor the arbitral tribunal can derogate: the parties to an arbitration are unable to agree that a arbitrator can ignore his duty of impartiality.

19. It seems clear that, in all but the most exceptional cases, the courts are likely to view these time limits as inflexible. The policy of the Model Law is very firmly to exclude the intervention of the courts in all but the most extreme situations and any challenge to an arbitrator or an award will be faced with considerable reluctance on the part of the courts to intervene. *Perhaps* in the most extreme case (for example, perhaps a case of behaviour by the arbitrator of the sort identified by the Hong Kong Court of Appeal as justifying the setting aside of a decision even though the result of the arbitration could not be different[3], it may be arguable that CFI can consider a challenge, notwithstanding a failure to comply with the time restrictions, where the public policy of the certainty and finality of judgments was outweighed by the public policy involved in supporting (for example) the fundamental principle of equality before the law. However, we will have to wait and see whether any such exceptional case is ever raised before the Hong Kong courts before we can know how the court will strike the balance between upholding the principle of the impartiality of decision makers, and the principle of non-interference in arbitral process.

(2) Grounds for challenge

20. The grounds upon which a challenge may be brought under s. 26/Art. 13 are set out in s. 25, which implements Article 12 of the Model Law.

21. Article 12(2) of the UNCITRAL Model Law, as enacted by s. 25 of the Ordinance, states:

> ***"(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he participated, only for reasons of which he becomes aware after the appointment has been made."***

[3] See Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd (CACV 136/2011, per Hon Tang VP at [105].

22. Article 3.4 of the HKIAC Rules (mentioned in Article 4.1, set out earlier in this paper) is in the same terms.

23. Thus, the Arbitration Ordinance and the HKIAC Rules provide only two bases of challenge:

    (i) that the arbitrator lacked the necessary qualifications which the parties agreed were necessary; or

    (ii) that the arbitrators impartiality or independence is called into doubt.

24. To remind you, the qualifications agreed by the parties under the Pilot Scheme are :

    (i) In the case of the chairman, qualification as a lawyer with at least 10 years post-qualification experience, or a retired judge;

    (ii) In the case of a co-arbitrator:

        (a) that they are a Registered Professional Surveyor under the Surveyors Registration Ordinance (Cap. 417);

        (b) have been qualified for 7 years as a member of a body recognised by the SRO;

        (c) have at least 10 years experience in land matters and professional valuation.

25. Except in the case of a deliberate fraud it is hard to imagine circumstances in which a challenge on grounds of qualification, after appointment of an arbitrator, could arise. In practice then, all challenges to an arbitrator under the Pilot Scheme will be brought on the basis that a party contended that there were justifiable doubts about an arbitrator's impartiality and independence.

26. Article 12(2) states that if a party participated in the appointment, a challenge by that party is only possible in relation to a matter which the party becomes aware of after the appointment. Again, it is possible that this is not quite the absolute rule that it appears to be. As IBA Guidelines (which we will examine in a moment) recognise, there may be circumstances in which a breach of the principles of impartiality and independence is so extreme and fundamental that the CFI could still intervene, even if the parties were

originally content. If, for example, the arbitrator had a direct financial interest in the outcome of the award - and was thus judge in his own cause –the CFI might perhaps conclude that the exclusion of the court's power to intervene was contrary to the Basic Law and thus refuse to be limited by this provision.

27. However, as with challenges brought out of time, the prospects of any challenge being entertained in relation to something about which the parties knew at the time is perhaps, at best, only a theoretical possibility.

28. As to those matters of which the parties are aware at the time of appointment, I will return to the duty of disclosure a bit later. But first we will consider in more detail the concepts of Impartiality and Independence.

(3) The concepts of Impartiality and Independence

29. In John's paper he has already touched upon the nature of the arbitrator's duties of impartiality and independence in the context of the potential liability of arbitrators.

30. Unlike its predecessor, the present Ordinance imposes express duties of impartiality and independence upon arbitrators. The material parts of s. 46 are as follows:

> ***"(2) The parties must be treated with equality.***
>
> ***(3) When conducting arbitral proceedings or exercising any of the powers conferred on an arbitral tribunal by this Ordinance or by the parties to any of those arbitral proceedings, the arbitral tribunal is required—***
>
> ***(a) to be independent;***
>
> ***(b) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and***
>
> ***(c) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.***

For good measure, ss. 46(3)(a) and (b) are repeated as Article 3.2 of the HKIAC terms.

31. It will be noted that although an arbitrator is also under an express duty to avoid unnecessary delay and expense, and to adopt appropriate and fair procedures, breaches of those duties will not give rise to grounds for challenging an arbitrator. Unless, that is, such breaches themselves provide a basis for justifiable doubts as to the arbitrators continuing impartiality and independence.

32. Whilst s. 46 (and Article 3.1 of the HKIAC Rules) is a useful reminder of the duties of an arbitrator, the enactment of a specific statutory duty of impartiality and independence has not materially altered the law in relation to the duties of an arbitrator. It has long been recognised that the duty of independence and impartiality of decision makers is fundamental to any legal system, including any system of arbitration. That such a duty is central to the concept of natural justice, as recognised in the Hong Kong Basic Law, is well recognised in Hong Kong authorities. For example, in Hebei Import & Export Corp v. Polytek Engineering Co Ltd [1999] HKLRD 665 Sir Anthony Mason NJP said:

> ***"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 notions of justice and morality in Hong Kong."***[4]

33. Independence and Impartiality, whilst overlapping, are distinct concepts:

    33.1. A state of 'independence' means that the arbitrator is 'free from the control' of either party, or indeed some third party.

    33.2. A state of 'impartiality' means that the arbitrator would not favour one party more than the other.

    Thus, an arbitrator may lack impartiality without having had any prior contact with any of these particular parties, by virtue of matters or predilections which might be expected to influence his judgment, whereas it is unlikely that an arbitrator would lack

[4] At 691I-692A.

independence unless he had a prior relationship of some sort with the parties or someone connected to them[5].

34. Of course, in a situation of actual bias – that is, where a decision maker is held to have acted on the basis of his prejudice or predisposition towards one of the parties – so that an actual breach of the duties contained in s. 46 is established - there would be no difficulty in establishing grounds to challenge the arbitrator's continued appointment under Articles 12 and 13. However, it is extremely rare that there is sufficient evidence to establish actual bias on the part of a decision-maker. Parties who are not impartial rarely declare the fact openly, and are often unconscious of the fact themselves.

35. However, the basis of challenge is not that the parties lack impartiality or independence and this is not what must be established before HKIAC or the CFI. Article 12(2) permits a challenge were "*circumstances exist that give rise to **justifiable doubts** as to his impartiality or independence"* . Thus the relevant test is that there exists a basis for justifiable doubt, and the use of the word *"justifiable"*, makes clear that this issue is to be judged against an objective standard.

36. As to the relevant standard to be applied, the courts of Hong Kong have adopted the test which has evolved in a series of English decisions of the Court of Appeal, the House of Lords and the Supreme Court in relation to the independence and impartiality of judges and arbitrators (in relation to which the test is the same). As has been mentioned earlier this evening, in Jung Science Information Technology Ltd v. ZTE Corporation [2008] 4 HKLRD 776 (which itself involved a challenge to an arbitrator brought pursuant to Articles 12 and 13) the Hong Kong CFI reviewed its earlier decisions

[5] In fact, because a lack of independence will merit a reasonable basis for doubting the impartiality of an arbitrator, in the drafting of the English Arbitration Act 1996, it was thought appropriate to refer only to impartiality.

and those of the Hong Kong Court of Appeal[6] and concluded that the test to be applied in Hong Kong was that that adopted by the UK Supreme Court[7]:

> ***"... the test is whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased".***[8]

This test, which is often referred to as the 'reasonable apprehension of bias' test, was also applied, without reference to Jung Science and without further elaboration, by the CFI in Granton Natural Resources Co Ltd v. Armco Metals International [2012] HKEC 1686.

37. As with so many legal tests, this test involves an assessment made through the eyes of a hypothetical being: the 'objective fair-minded and informed observer' – described by Lord Hope as another one of the *"the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively"*[9]. As is also common with such tests, this hypothetical observer may bear no resemblance to any of the parties to the arbitration. The parties to an arbitration are not often as fair-minded as a party with no interest in the outcome.

38. As to the characteristic of this hypothetical 'fair-minded observer', in Jung Science the Deputy Judge adopted the description provided by Burrell J in Pacific China Holdings Ltd v Grand Pacific Holdings Ltd [2007] 3HKLRD 741. Such a person is an educated layman[10]; will have sought to become acquainted with the basic relevant considerations; will have some idea of how arbitrations work, and the pressures upon arbitrators; will not reach

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[6] Deacons v White & Case Limited Liability Partnership & Others (unrep., HCA 2433/2002),approved by the Court of Appeal in Deacons v White & Case Limited Liability Partnership & Others [2003] 2 HKLRD 840.

[7] The same test applying to both: see AT&T Corp v Saudi Cable Co [2000] 2 All ER (Comm) 625 (CA), per Lord Woolf MR at paras 39–40.

[8] Although long referred to as the "reasonable apprehension of bias" test, its precise terms and formulation have been gradually refined by the English Courts. The modern formulation, adopted in the Jung Science case, derives most immediately from the judgment of Lord Phillips in Director General of Fair Trading v Proprietary Association of Great Britain[8] [2001] 1 WLR 700 in the Court of Appeal[8] adopted by Lord Hope in Porter & Another v Magill [2002] 2 AC 357 (HL)[8].

[9] Helow v Secretary of State for the Home Department [2008] 1 WLR 2416, at para. 1.

[10] *"not a lawyer"* and yet *"not wholly uninformed and uninstructed about the law"*.

hasty conclusions, and is neither complacent nor suspicious. A similar description was provided by Lord Hope in the UK Supreme Court in Helow v Secretary of State for the Home Department [2008] 1 WLR 2416.

39. However, in relation to Pilot Scheme arbitrations, because of the incorporation of the IBA Guidelines we will see that the point of view of the parties themselves (as opposed to our fair-minded observer) is of some continuing relevance in Pilot Scheme arbitrations. This is because, in considering the arbitrator's duty of disclosure, the arbitrator must also consider those matters which the particular parties might consider gave rise to doubts as to independence and impartiality.

40. In a moment we will consider the application of the 'reasonable apprehension of bias' test to particular circumstances. However, we must first consider the context in which the arbitrator will initially have to consider issues relating to his own impartiality and independence: in complying with his or her duty of disclosure.

(4) Disclosure

41. Article 12(1)[11] states:

> ***"(1) 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."***

42. The purpose of this duty has been described as being *"to inform and alert [the parties] at an early stage about possible doubts and, thus, [to help] to prevent the appointment of an unacceptable candidate."*[12]

[11] As enacted by s. 25(1) of the Arbitration Ordinance.
[12] See UNCITRAL Analytical Commentary 1985.

43. In a Pilot Scheme arbitration, the Arbitration Agreement prescribes the mechanism for disclosure. It requires[13] each co-arbitrator and the chairman to complete and sign a standard declaration form, which is to perform three functions:

    (i) To declare the co-arbitrator's/chairman's independence and impartiality.

    (ii) To disclose any matter that *"might be relevant"*[14] to their independence and impartiality.

    (iii) To confirm the arbitrator's on-going duty of disclosure during the arbitration process.

44. However, as Article 12 makes absolutely clear, the duty of disclosure continues *"throughout the arbitral process",* which arguably even includes any period of potential challenge to the arbitration.

45. The statutory duty imposed by Article 12(1) is only to disclose matters which are "*likely"* to raise *"justifiable doubts"* in the mind of our hypothetical observer, and not merely to disclose anything which might *"possibly"* raise a doubt in the minds of either of the parties. However, it is important to note that this is an issue which has also been modified under the Pilot Scheme by the adoption by the parties to a PSALP arbitration of the IBA Guidelines which apply a different and (in almost all imaginable circumstances) a much lower threshold for the necessity of disclosure of potential issues of conflict. In relation to Disclosure, the guidelines state (with my emphasis):

> ***"If facts or circumstances exist that <u>may</u>, in the <u>eyes of the parties</u>, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them."***

[13] Draft Clause 6.1.
[14] This wording is taken from the Lands Department *Information Note relating to the Pilot Scheme for Arbitration on Land Premium*.

46. It should also be noted that a failure to make a disclosure which HKIAC or the CFI considers should have been made may *itself* be a matter which later gives rise to *"justifiable doubts"* about impartiality or independence (see Jung Science Information Technology Co Ltd v. ZTE Corporation [2008] 4 HKLRD 776, para.57). Thus, it seems that a failure to disclose something which HKIAC or the CFI considers should have been disclosed may, in certain circumstances, justify a challenge, even if the matter which was not disclosed would not have given rise to justifiable doubts in itself.

47. The temptation for an arbitrator might therefore be to identify absolutely any present or prior relationship, however trivial and tenuous. However, an arbitrator who makes unnecessary disclosures may not find himself free of criticism either. In Taylor v. Lawrence [1999] 2 All ER 353, Lord Woolf (whose comments on this issue were also adopted by the Deputy Judge in the Jung Science Information Technology case) said that the making of a disclosure necessarily involves the implication that the relationship disclosed might affect the judgment and approach of the judge or arbitrator, and so should not be made unnecessarily. In my view, logic of that view is very 'debateable'. However, what this remark should, at least, make clear is that an arbitrator carries a substantial burden to consider carefully and thoroughly the necessity of making disclosures.

48. In relation to Pilot Scheme arbitrations, significant assistance has been provided by the specific adoption and incorporation of the IBA Guidelines, since these guidelines *"reflect the understanding of the IBA Arbitration Committee as to the best current international practice"* in relation to ensuring of impartiality and independence of arbitral tribunals, and provide very practical guidance.

49. The IBA Guidelines do not have the status of law. In the Jung Science Information Technology case the court did not refer to them at all, and (as far as I am aware) there has been no detailed consideration of the Guidelines, or evaluation of their accuracy, in any relevant decision of the Hong Kong or UK Courts, even in those cases where some reference has been made to them.

50. Even though the parties to a Pilot Scheme arbitration will have specifically adopted the Guidelines, even the closest adherence to them could not have the effect of excluding all possibility of a potential successful challenge to the CFI. The parties could not, by adopting some new test, derogate from the statutory test which has been imposed by the Arbitration Ordinance. So, it remains theoretically open to a party to challenge the tribunal before the CFI even if the IBA Guidelines suggest that it is appropriate for the arbitrator to continue to act in particular circumstances, or not to disclose particular facts.

51. However, in so far as there may be a divergence between the application of the general legal test as to disclosure, and the standard of disclosure required by the IBA Guidelines, it is highly unlikely that following the IBA Guidelines will give rise to any difficulty. The IBA Guidelines find the potential for concern in relation to bias in various circumstances in which the UK courts have been very reluctant to do so and, as I have already mentioned, require disclosure to be assessed in a way which is much more likely to necessitate a disclosure than the Arbitration Ordinance requirement. Accordingly, the prospects of the CFI concluding that an arbitrator who has adhered to the IBA Guidelines has nevertheless failed to make some necessary disclosure, or has improperly continued to act in the face of a complaint that there are justifiable grounds for doubting his impartiality or independence, are very remote.

52. In practice the Guidelines have been drafted with careful regard for judicial decisions in this area but with an obvious policy of erring well on the side of caution.

The IBA Guidelines

53. The IBA Guidelines divide into two sections:

    (1) The *General Standards Regarding Impartiality, Independence and Disclosure*, which set out to 'unpack' and explain the application of the test for justifiable doubts as to a lack of independence or impartiality; and

(2) The *Practical Application of the General Standards*, which attempt to categorise frequently occurring circumstances by the likelihood (in the view of the IBA) that they would give rise to justifiable doubts as to an arbitrator's independence and impartiality.

54. They should be considered mandatory reading for anyone acting in relation to a Pilot Scheme arbitration. This is paper not a substitute for that task.

55. Within the *General Standards*, the Guidelines make a number of useful and important general points in support the application of the overall basic test which I particularly draw to your attention:

55.1. If the proposed arbitrator, or the appointed arbitrator, has *"any doubt about"* his or her ability to be impartial and independent, (s)he should decline to accept the appointment, or refuse to continue to act[15].

55.2. Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure[16].

55.3. The decision whether to make a disclosure should not be affected by the stage at which it is being considered. That is, the obligation to disclose remains as strong near the end of the arbitration as at the beginning[17].

55.4. Although the parties may have failed to challenge the arbitrator within the relevant period after disclosure by the arbitrator (or the party otherwise be coming aware) certain levels of conflict must be considered non-waivable[18].

55.5. The guidelines apply equally to arbitral or administrative secretaries and assistance either to an individual arbitrator or to the tribunal. It is the

[15] General principle 2(a).
[16] General principle 3(d).
[17] General principle 3(e).
[18] General principle 4(b).

responsibility of the tribunal to ensure that the same duty is respected by their assistants and secretaries[19].

55.6. An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, and any facts and circumstances which may reasonably give rise to doubts as to his or her impartiality or independence. *"Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries."*[20]

56. As John has already explained, within the second section of the Guidelines – the *Practical Application* - the IBA have categorised commonly occurring factual situations into four groups for the purposes of evaluation of the necessity of disclosure, and the effect upon impartiality and independence:

The Non-waivable Red List.

56.1. This list includes examples of circumstances in which justifiable doubts as to the arbitrator's impartiality necessarily exist, to the degree that any waiver by the parties, expressly or by inaction, would be insufficient to prevent a subsequent challenge of the arbitrator's appointment. It includes situations which offend the overriding and fundamental principle that no person can be a judge in his own cause. In such situations an arbitrator should not wait to be challenged, or even enquire whether the parties are content for him or her to continue; he should not accept the appointment.

56.2. The IBA's examples include:

[19] General principle 5(b).
[20] General principle 7(d).

(i) Where there is an *"identity"*[21] between a party and an arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

(ii) Where the arbitrator has some controlling influence (for example, as a director) on a party or upon an entity which has a direct economic interest in the outcome of the arbitration.

(iii) Where the arbitrator has a *"significant"* financial or personal interest in one of the parties, or the outcome of the case.

(iv) Where the arbitrator or his firm regularly advises a party, or an *"affiliate"*[22] of the party, **and** the arbitrator derives significant income from that service.

56.3. This list reflects those circumstances in which the courts of various jurisdictions have, in the past, held that the disqualification of a judge or arbitrator is automatic[23].

The Waivable Red List.

56.4. This list includes examples of circumstances which are considered by the IBA to be *"serious but not as severe"* as those in the preceding list. The IBA recommends that, in such circumstances, *"an arbitrator should not serve as an arbitrator"* but, nevertheless, an arbitrator may accept an appointment, or continue to act, if all the parties, all arbitrators and the arbitral institution

[21] NB: when considering the identity of the parties and arbitrator (for the purposes of considering impartiality and independence):

(i) The party should be taken to include any other legal or physical person which has a controlling influence upon it, or a direct economic interest in it, or a duty to indemnify it (General Principle 6(a)).

(ii) The arbitrator also bears the identity of his firm, but the fact that the activities of the firm involve one or other of the parties does not *necessarily* constitute a cause of conflict. (General principle 6(b).

[22] The IBA defines this term to include all companies within a group of companies, including parent companies.

[23] As for example, where the tribunal has a direct financial interest in the subject of an appeal: Cheng Kai Man, William . The Panel on Takeovers and Mergers [1994] 2 HKLR 253; close family member with direct financial link: Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] 2 WLR 870.

have full knowledge of the relevant conflict of interest, and if all parties expressly agree to the appointment or continuation of the arbitrator.

56.5. The IBA's examples include (amongst others):

(i) Where the arbitrator has given legal advice, or provided expert opinion on the dispute to a party or affiliate of one of the parties or has had some other prior involvement in the dispute.

(ii) Where the party has a less direct financial interest, as for example:

(a) Where the arbitrator holds shares in a party its affiliate which is a non-publicly listed company;

(b) Where a *"close family member"*[24] has a *"significant"* financial interest in the outcome of the dispute;

(c) Where the arbitrator, or a close family member, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in dispute;

(iii) Where the arbitrator has a significant relationship with the parties, as for example:

(a) The arbitrator currently represents or advises one of the parties or an affiliate, or a party's lawyer;

(b) The arbitrator is in the same practice as a representative of the parties;

(c) The arbitrator has some controlling influence (for example, as a director) in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute;

[24] The IBA defines this term, somewhat circularly, to mean "a spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists".

(d) The arbitrator's practice had a previous but terminated involvement in the case, without the arbitrator being involved;

(e) The arbitrator's law firm has a current significant financial relationship with one of the parties or its affiliate, or regularly advises one of the parties;

(f) The arbitrator has a close family relationship with one of the parties, or someone with a controlling influence (for example, as a director) in a party or affiliate, or with counsel representing a party.

The Orange List.

56.6. This list includes examples of situations which, depending upon the particular circumstances, <u>may</u> give rise to doubts as to the arbitrator's impartiality. As a result the arbitrator has a duty to disclose all such situations, but the parties are deemed to have accepted the arbitrator if no timely objection is made to the appointment or continuation of his appointment.

56.7. A disclosure of such circumstances does not, of course, imply the existence of a conflict; nor should it result in any presumption of disqualification of the arbitrator. The purpose of a disclosure is to permit the parties to explore and consider whether, objectively, there exist circumstances which a reasonable third party with suitable knowledge would consider raised justifiable doubts about impartiality and independence.

56.8. Equally, the failure to disclose such circumstances will not automatically mean that a challenge to the arbitrator or award will be successful. It should be noted that the IBA Guidelines state: *"Non disclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances*

that he or she failed to disclose can do so"[25]. **NB** In the light of the comments of the Deputy Judge in Jung Science Information Technology Co Ltd v. ZTE Corporation [2008] 4 HKLRD 776 at para.57, considered above at paragraph 46 of this paper, this assertion on the part of the IBA may represent, at best, something of an over-generalisation and should be regarded as unsound.

56.9. The IBA's examples include (amongst others):

(a) The arbitrator has served as counsel for one of the parties (or an affiliate) in the last three years, or has been consulted by the party (or an affiliate) making the appointment in an unrelated matter, but there is no ongoing relationship;

(b) The arbitrator has been appointed as arbitrator on two or more occasions in the last three years by a party or its affiliate;

(c) The arbitrator's law firm has, within the last three years, acted for or against that party (or an affiliate) in an unrelated matter;

(d) The arbitrator's firm is currently renders services to a party (or affiliate) but without involvement of the arbitrator or any significant commercial relationship having arisen;

(e) The arbitrator or his firm represents a party (or affiliate) on a regular basis, but such representation does not concern this dispute;

(f) The arbitrator is in the same firm or chambers as another of the arbitrators or counsel for a party;

(g) A close personal relationship exists between the arbitrator and counsel for a party;

[25] See Part II, para. 5, p. 18.

(h) *"Enmity exists"* between an arbitrator and counsel, or a party, or someone with controlling influence (for example, as a director) in a party or affiliate, or someone with an economic interest in the outcome, or with one of the witnesses or experts;

(i) The arbitrator has been appointed on more than three occasions by the same counsel, or same firm, within the past three years.

(j) The arbitrator's practice is currently acting adversely to one of the parties or an affiliate;

(k) The arbitrator has a past association with a party (such being a former employee or partner);

(l) A close personal friendship exists between the partner and someone with a controlling influence (for example, as a director) in a party or an affiliate, an entity with a direct economic interest in the result, or with one of the experts or lay witnesses.

(m) The arbitrator holds shares (directly or indirect) which *"by reason of number or denomination constitute a material holding in one of the parties"*, or an affiliate, which is publicly listed;

(n) The arbitrator has some controlling influence (for example, as a director) in an affiliate of a party where the affiliate is <u>not</u> directly involved in the dispute;

(o) The arbitrator has publicly advocated a position on the case;

(p) The arbitrator holds a position as an appointing authority in relation to the dispute.

The Green List

56.10. This list includes examples of circumstances where, objectively judged, no appearance or actual conflict is expected to arise, so that the duty of disclosure does not arise.

56.11. The IBA's examples include:

(a) The arbitrator has previously published a legal opinion relevant to the dispute (but not on the case itself);

(b) A firm *"in association or alliance"* with the arbitrator's practice, but which does not share significant revenues, renders services to a party or affiliate in an unrelated matter;

(c) The arbitrator is a member of the same professional body as, or has a relationship via a social media with, a representative of the party;

(d) The arbitrator has previously served as an arbitrator with counsel for one of the parties;

(e) The arbitrator serves as an officer of the same professional association of another arbitrator or counsel for a party;

(f) The arbitrator has participated in seminars, conference or working parties with another arbitrator or counsel for a party;

(g) The arbitrator has had initial contact with a party limited to matters relating to his qualifications and availability to serve, or to the identities of possible chairpersons, or and did not address the merits or procedural aspects of the case other than to obtain a basic understanding of the case;

(h) The arbitrator holds an *"insignificant"* number of shares in one of the parties, or an affiliate, which is publicly listed;

(i) The arbitrator someone with a controlling influence (for example, as a director) on the party (or of an affiliate) have worked together in the past as joint experts, or arbitrators in the same case;

(j) The arbitrator has a relationship with one of the parties or an affiliate through a social media network.

Observations on the IBA Guidelines

57. It should be stressed, and is stressed by the IBA themselves within the Guidelines[26], that there is room for debate as to whether a particular situation should be in one list other another. Many of the example situations inherently raise issues of 'fact and degree' by the use of terms such as *"significant"*. So, for example, shareholdings in one of the parties fall within red, orange and green lists depending on whether the company is publicly or privately listed, and whether the shareholding is *"material"* or *"insignificant"*.

58. As John has already mentioned this evening, comments of the Deputy Judge in Jung Science in relation to interactions between the arbitrator and others within the same legal or arbitral community are of particular potential relevance to Pilot Scheme arbitrations, and the issue of *"justifiable doubts"* about independence and impartiality. To remind you, the Deputy Judge first adopted and approved the view of the English courts, that a reasonable fair-minded objective observer would be taken to be aware of the legal traditions and structures of the community, and that 'ordinary contact between the judiciary and legal professionals' would not, of itself, cause our hypothetical fair-minded observer to conclude that there was any real possibility of bias[27]. Usefully, she also went further:

> *"In my view, this statement applies equally to the legal traditions and culture 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."*

[26] See Part II, para. 8, p. 20.
[27] Following Lord Woolf CJ in Taylor v Lawrence (ibid) at p.370

59. That comment was made in the context of an international arbitration, but the contact which was under consideration was contact between the arbitrator and the representative of one of the parties by virtue of them both serving on the board of HKIAC itself. Clearly there is a direct analogy between this, and the close community of valuation surveyors operating in any given market area. What this part of the judgment recognises is the ability of professionals to interact with each other on a professional level (without significantly connected commercial interests) without that feature alone giving rise to justifiable concerns about independence and impartiality.

60. As John has already commented, the Jung Science case demonstrates a pragmatic attitude on the part of the Hong Kong CFI. The extreme reluctance of the courts in this jurisdiction (as in the UK) to intervene in the arbitral process is perhaps more fully illustrated by the decision of Logy Enterprises Ltd v. Haikou City Bonded Area [1997] HKLY 186, relating to a complaint of apparent bias in the context of the enforcement in Hong Kong of the award of an arbitrator appointed by the China International Economic and Trade Arbitration Commission. The challenge was rejected by the Hong Kong Court of Appeal despite the arbitrator having been a 'high-ranking official' of the entity which had issued a certificate which was heavily relied upon by the other party to the arbitration[28].

61. However, there is no room for complacency. As the IBA Guidelines make clear, the particular nature of the relationship under consideration may move a situation between the separate categories adopted in the IBA Guidelines. Despite the pragmatic approach adopted by the courts, historic relationships with either party to the arbitration will have to be looked at with great care.

62. Chan Man Yiu v. Kiu Nam Investment Corporation [2000] HKEC 1355 is a somewhat extreme example of bad practice which did lead to the replacement of the arbitrator. In that case the arbitrator had been appointed without he, or the respondents, having disclosed to the applicants that the arbitrator was a close friend, and had frequently

[28] See also: Granton Natural Resources Co Ltd v. Armco Metals International Ltd (ibid).

represented, the expert and representative for the respondent, who was also the party responsible for the works which were the subject of dispute. Unsurprisingly, by the date of hearing there was already agreement between the parties that the arbitrator should be replaced.

63. More useful guidance is contained in the decision of the English High Court in A v. B [2011] EWHC 2345, in which a challenge was unsuccessfully brought against an arbitrator on the basis that he had been instructed as counsel by both sides' solicitors at some time in the past. The court rejected the suggestion that any real possibility of bias arose from a risk of 'unconscious predisposition' towards one party. However, in his judgment Flaux J commented:

> *61. Of course, if the arbitrator has an actual predisposition towards the particular firm of solicitors because he is actually considering his relationship with the firm and wishing to foster that relationship, that would amount to actual bias, but there is no suggestion of any such actual predisposition here, nor could such a serious allegation be advanced in the absence of any evidence.*
>
> *62. What might be described as a difficult halfway house between such an actual predisposition and Mr Milligan's allegation of unconscious predisposition may be the case to which I adverted several times during the hearing, of the barrister arbitrator who receives a very substantial proportion of his instructions as counsel, say 60%, from one of the firms acting in the arbitration. It may well be, not just that that is a matter which would have to be disclosed by the arbitrator at the outset, but that (at least where there was no waiver by the parties) there might be a real possibility of apparent bias.*

64. Moreover, it should be remembered that in all these cases the courts were considering the objective standard of the "*objective fair-minded and informed observer"*. Since the standard for disclosure (although not potential challenge) adopted in the Pilot Scheme involves considering what information should be disclosed through the eyes of the parties, and disclosing any matter which *"may"* give rise to doubts, rather than which (as Article 12 specifies) are *"likely"* to do so, it seems probable that any arbitrator considering accepting appointment under the Pilot Scheme will have to make very careful investigation of the parties to seek out potential areas of connection, and then to give very full disclosure in relation to any relationship they may have with the parties or

their representatives which he discovers. If they do not, it is likely that the relationship will take on much more significance than it would have been given if timely disclosure of it were made.

65. Of course, the overriding theme this evening's discussion is the potential liability of arbitrators. The real theme of the decisions I have mentioned, and the lesson which I hope can be drawn from this paper, is that if proper and early disclosure is made, only in the most extreme cases of 'automatic disqualification' – the IBA's Non-Waivable Red List – will an arbitrator's participation even be capable of challenge, let alone potentially expose him to liability.

66. In the particular circumstances of a Pilot Scheme arbitration, the suggestion by Lord Woolf[29] that any disclosure implies that there is some recognised threat to impartiality does not apply. My advice is, disclose everything.

TOBY WATKIN

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Disclaimer

[29] Taylor v. Lawrence [1999] 2 All ER 353.