WCCAS ENERGY, MINING & RESOURCES ARBITRATION CONFERENCE

CALGARY, 13 MAY 2014

"APPOINTING ARBITRATORS: PATHWAYS & PITFALLS"

WHEN IS CLOSE, TOO CLOSE?

SPEAKING NOTES – JANET E. MILLS

As lawyers, we are trained to think critically, to push boundaries and to challenge the status quo. Not surprisingly, with the proliferation of commercial arbitration and the relative competitiveness in the professional arbitrator business, our legal training is influencing the manner in which challenges are being advanced and the way in which those challenges are proceeding. Historically, the mere whisper of a challenge to an arbitrator's impartiality or independence was sufficient for that arbitrator to "do the gentlemanly thing" and resign. Better to resign and preserve one's professional reputation as being unquestionably impartial. There were precious few international arbitrators back then and other appointments were sure to follow in the not too distant future.

No longer is that true. It seems of late that no judge retires from the bench without proclaiming him or herself to be an arbitrator. Senior legal practitioners are now hanging out new shingles as arbitrators rather than remaining as Counsel Emeritus to their law firms. Arbitration chambers abound. The long held secret is out. Arbitration practice is sexy. The work is interesting, intellectually challenging, remunerative and highly desirable.

With this proliferation comes an explosion of possible conflict challenges.

WHEN IS CLOSE, TOO CLOSE?

To be entirely honest, I don't know. There is no certain answer to this question. The only certainty is that each case is examined on its own merits and decisions appear to be made on a case by case basis with little predictability from jurisdiction to jurisdiction – as we will see, cases that appear to be obvious are not always decided in accordance with our expectations. What I

can say is that it appears “close” must be very close as the vast majority of arbitrator challenges taken to a formal hearing are denied by the courts or where appropriate, the arbitral institutions.

- Independence – objective test to confirm that no conflict of interest exists.
- Impartiality – subjective test to ensure there is an absence of prejudice or bias.
- Although two very separate concepts, they are often considered together in challenge cases.

The duty of disclosure of an arbitrator is an ongoing obligation to advise the parties of any circumstances that are likely to give rise to any justifiable doubts as to his or her impartiality or independence.

- entrenched in the UNCITRAL Model Law
- adopted in domestic legislation by many jurisdictions, including Canada, Mexico, Australia, New Zealand, the Netherlands and Singapore.
- Germany has adopted this language for launching challenges to arbitrators, but the initial disclosure obligation on arbitrators omits the “justifiable” requirement – all matters must be disclosed that may give rise to *any* doubts but the arbitrator is protected from frivolous challenges by invoking the “justifiable” qualification for challenge purposes
- England – no “independence” requirement and arbitrators are relieved from making interest disclosures unless the conflict of interest would give rise to justifiable doubts regarding the impartiality of the arbitrator
- United States – the Federal Arbitration Act makes no provision for removing an arbitrator during the course of the arbitration – rather, evident partiality or corruption in the arbitrator is grounds for vacating an award once rendered

- parties do have an obligation to raise any concerns during the course of the arbitration or risk being deemed to have waived any issues with respect to arbitrator bias

A failure to disclose may not independently sustain a challenge but if examined in the aggregate of other factors, may warrant removal if the overall threshold is met for apparent bias

- 2001 decision of the English House of Lords in Porter v Magill set the standard – whether the circumstances would lead a *fair-minded and informed observer* to conclude there was a real possibility that the tribunal was biased

LCIA challenge cases provide insight into the myriad of issues that give rise to arbitrator challenges. The grounds for challenge can be grouped as follows:

1. Nationality – this is a substantive test where an arbitrator will be deemed a *de facto* national of a country in circumstances where his connections to it are so concentrated that his technical nationality does not ensure neutrality – will be unaffected by nationality of counsel and an oversea's door tenancy in UK chambers is insufficient to establish a UK base

2. Culture – neutrality requires distance of legal, political and religious culture – in today's complex geopolitical environment, this may become a more prevalent basis for challenge – it has been held though that mere academic writings is not a sufficient basis to challenge

3. Professional and Personal Relationships – time and distance will often determine this issue:

* arbitrators are attributed the professional relationships of their law firm partners BUT this may be subject to greater review with the proliferation of global firms – ICC has taken a more generous view of late

* an arbitrator may sit where a barrister is from the same chambers – organization of barristers in England is well known and several European courts have upheld this notion; however, an ICSID case involving Slovenia refused to allow a party to change counsel just prior to the commencement of the formal hearings as the new barrister was from the same chambers as one of the arbitrators – to do so could call into question the legitimacy of the tribunal after its constitution.

* previous engagements – seemingly time and distance from the engagements as well as the magnitude of the fees generated from those engagements will determine whether a challenge may be sustained

* repeat appointments – objective assessment – will not constitute a ground for disqualification *per se* – must look at the economic importance of the relationship and whether the dependence on that relationship could reasonably suggest a real possibility of bias in the eyes of a fair minded and informed observer

* relations between arbitrators – longstanding and continuing relationship between the chair and one arbitrator – exceptions are made for industries (such as reinsurance) where it is expected that the arbitrators are drawn from the senior executive ranks of that industry

IBA Guidelines on Conflicts of Interest

- Red/Orange/Green Lists

- intended to provide a uniform standard for arbitrators to disclose issues which may call into question their impartiality and/or independence
- of practical influence only as the Guidelines have not been uniformly implemented or applied by courts or by the institutions

England – courts have referenced the IBA Guidelines but do not rely upon them in ruling on challenge applications – return to the test in Porter v Magill – Guidelines will only be used where they complement the common law analysis and not to contradict the existing precedent

ASM Shipping Ltd. v. TMMI Ltd. – prior critical comments made by the arbitrator when serving as counsel in an unrelated arbitration against the principal witness would cause an independent observer to have feelings of discomfort and to conclude there was a real possibility of bias – the test in Porter v. Magill was met and the fact that this is not a matter under the IBA Red List is irrelevant

A & Ors v. B and X (2011) – very late (just prior to the release of the award) disclosure by the arbitrator that he had been instructed as counsel for the respondent's solicitors in an ongoing but unrelated matter was not sufficient to cause the fair minded and informed observer to consider there was a real possibility of bias – applying the common law test, there was no finding of apparent or unconscious bias and nothing in the IBA Guidelines could alter that finding

Interprods Ltd. v. De La Rue International (2014) decision rejected a challenge to an arbitral award and held that the presence of counsel from the same firm in other arbitrations before the arbitrator (who was appointed by the LCIA) would appear as bias only to the most suspicious observer – the fair minded and informed observer is not inherently or unduly suspicious

- multiple appointments by the same counsel on behalf of different parties ought not in and of itself give rise to justifiable doubts as to an arbitrator's independence and impartiality (contrast this to the provisions of the IBA Orange List which suggests that two appointments within three years is the limit before questions should be raised as to impartiality)

Ontario – the Superior Court decision in *Telesat Canada v. Boeing Satellite Systems International* quoted extensively from the IBA Guidelines when considering the challenge to remove the Chairperson for a reasonable apprehension of bias which arose during the course of an arbitration – viewed the Guidelines as being instructive in that they shed light on the matter from the perspective of the arbitration community; however, the court ultimately reached its decision to remove the Chairperson on an analysis and application of the law

- appears the Guidelines were used to lend international credibility to the decision which was being taken in a significant international commercial arbitration

International Centre for the Settlement of Investment Disputes (ICSID) – challenges have often referenced the IBA Guidelines with mixed results

- **Ukraine** – attending university with counsel for one of the parties – this issue is not listed on the Red or Orange List and therefore no disclosure obligation exists – parties must carry out basic internet research at early stages in the proceeding to unearth personal connections
    - ABA Ethics Standards – now a matter of professional competence for attorneys to search the internet and investigate social networking sites
- **Gabonese Republic** – appointment challenged on the basis that the arbitrator had been the president of another tribunal which had made an award against the party (Orange List matter) – the submission was rejected on the basis that the Guidelines are of indicative value only

- **Venezuela** – failure to disclose numerous prior appointments (Orange List) – challenge rejected as the failure to disclose was not in itself sufficiently serious to warrant disqualification particularly because this non-disclosure was based on an honest exercise of judgment and the prior appointments were in the public domain; Guidelines could be no more than a "rule of thumb" and the legal standard set by the Convention must be followed
    - appears as though the economic significance of the prior appointments is an influential factor
- **Spain** – managing partner of the law firm acting for one of the parties was an intern for the arbitrator 30 years earlier and the arbitrator had dedicated a book to that individual; the arbitrator also maintained friendships with many employees from the firm – none of this was disclosed until the arbitrator was specifically questioned and the court found that this failure to disclose case doubts on the arbitrator's independence and impartiality.
    - IBA Guidelines were noted but ignored on the basis that the domestic laws and arbitration rules were so clear, they provided adequate means to determine the issue – there was a strict obligation on the arbitrator to disclose and he ought to resign for failing to do so.
- **Spain** – *same year, same court* – suggestion that it was the parties, and not the arbitrator to blame if there is a lack of transparency in the disclosure process – the information was in the public domain and available if appropriate enquiries were made
- **California** – *Mt. Holyoke Homes v. Jeffer Mangels Butler & Mitchell* – sole arbitrator failed to disclose that a partner of the defendant law firm was listed as a reference on the arbitrator's decade-old, online resume – did disclose a prior working relationship as well as personal acquaintances with members of the firm but omitted to mention the reference, which had never been called upon. The Court of Appeal refused to accept the resume's easy availability on the internet as an excuse for failing to disclose its existence and held that it could cause an objective observer to doubt the arbitrator's impartiality – the award was vacated

Lessons

- the introduction of the Guidelines has not ended the debate on "full disclosure"
- divergent approaches are being taken all over the world
- it is unclear where the disclosure burden lies – is it squarely with the arbitrator or do the parties have an independent duty to fully investigate?

The duty to disclose vs. the duty to fully investigate is an important question as we consider the impact of social media on disclosure obligations.

To put this issue into context, the IBA Guidelines were introduced in May 2004 – at the time, LinkedIn was celebrating its first anniversary, Mark Zuckerberg had launched the predecessor to Facebook from his Harvard dorm room just two months earlier, and Twitter would not send its first tweet for another two years.

- By June 2013, LinkedIn had 259 million users in over 200 countries.
- At the end of 2013, Facebook had 1.23 billion users.
- Twitter now boasts over one billion registered users who send over 500 million tweets per day – with over 35 million of those Twitter users residing in China.

The explosion of these virtual relationships will, without question, give rise to challenges for justifiable doubts as to arbitrator impartiality. The relationships are now highly visible, leaving a public record of contacts between counsel and arbitrators. How do we best address this concern?

1. *Refuse to use any form of social media*:

- realistic only for those arbitrators who are in the sunset years of their career (or those who have no friends)
- not a viable solution for the any other professional, and particularly not for the current and future generation of counsel and arbitrators

2. *Limit "friends" to truly social contacts* –
    - easier for those who started legal careers before the internet and before social media – more able to distinguish between personal friends and professional contacts – Facebook for the former, LinkedIn for the latter
    - do you limit your LinkedIn connections to fellow arbitrators, arbitration practitioners, legal professionals?
    - do you simply accept every invitation to connect regardless of the "closeness" of the connection?
    - I know people in both camps – each believing their strategy is best for the avoidance of any claims of impartiality
    - for the younger generation, it may be too late – connections have already been made in every facet of their lives, both personal and professional – two of my sons, both young lawyers, have 550 and 896 Facebook friends; my 16 year old has 743 friends (as compared to my 61)
    - how does this generation address disclosure obligations for the future? Do you "unfriend" or "disconnect" people with whom you may at some time in the future have professional dealings so as not to create a possibility of bias? How could you ever know and how could you ever accomplish this undertaking without being branded a jerk? Is it a reasonable solution?
    - Florida Judicial Ethics Committee has just issued a direction to all Florida judges that they may not be "friends" on any social networking site with any counsel who might appear before them as it creates the appearance of a conflict.
3. *Increase your privacy settings* – restrict the information you share with others
    - your friends or connections must equally filter their information or this will not solve the issue

- you may be inundated with posts and photos from casual acquaintances which suggest a more intimate relationship than actually exists between you – I have "friends" with whom I have not seen nor directly spoken to in several years but I receive daily reports on their every whereabouts and the various activities of their children – to an outsider, it would appear our relationship is much more significant than it is in reality

4. *Restrict access* – if you are already friends or connected with someone where a reasonable apprehension of bias may be construed, restrict all access to your social media accounts throughout the arbitration and perhaps completely remove the individual(s) from your list of friends
5. *broad social media disclaimer* – include one in your disclosure report to the parties
    - invite the parties to search you (and your firm) on the Internet
    - advise parties to specifically look at your social media sites (Facebook, LinkedIn, Twitter, Instagram)
    - inform parties that you typically accept (or do not accept) requests from professionals who request to be associated with you on social media sites
    - include a statement that you do not consider such "friend" or "link" connections to be a matter for disclosure
    - where there are more meaningful or significant connections, you will disclose those relationships
    - advise counsel that any concerns respecting connections ought to be brought to your attention for further consideration and perhaps supplemental disclosure
    - include a statement that if the parties have any difficulties accessing your social media sites, you will provide the information

Providing such a broad disclosure with an invitation to counsel to request further information may, but only just may, head off any challenges for bias arising from social media connections. It may be time for the IBA to update its Guidelines to specifically address this issue.

In closing, I turn to the wise words of that great philosopher, Yogi Berra – “the future ain’t what it used to be”. The internet and social media have made us all closer to one another and for better or for worse; they will inevitably lead to an increasing number of arbitrator challenges in the future.

Endnotes

"*International Approaches to the Independence and Impartiality of Arbitrators*" (Hausmann & Barker, www.squiresanders.com 30 Dec 2011)

"*Challenges to Arbitrators*" (www.practicallaw.com/5-501-6994)

"*Duty of Disclosure and Challenge of Arbitrators: the Standard Applicable under the New IBA Guidelines on Conflicts of Interest and the German Approach"* (Hoffman A.K., Arbitration International, Vol. 21 No. 3, LCIA ©2005)

"Conceptual Framework of Arbitrators' Impartiality and Independence" (Chung K.L., 80 Arbitration, Issue 1, Chartered Institute of Arbitrators ©2014)

"LCIA Court Decisions on Challenges to Arbitrators: An Introduction" (Walsh & Teitelbaum, Arbitration International, Vol. 27 No. 3, LCIA ©2011)

"*Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*" (Whitesell A.M., Special Supplement 2007 Independence of Arbitrators, ICC Dispute Resolution Library ©2008)

"*The Impact of Social Media on Evidence: What Arbitrators Need to Know*" (Arrington & Vogel, ICDR Webinar held May 7, 2014, American Arbitration Association ©2014)

"*Social Media and Arbitration Conflicts of Interest: A Challenge for the 21st Century*" (Kalicki & Silberman, Kluwer Arbitration Blog ©2014)

Interprods Ltd. v. De La Rue International Ltd. [2014], EWHC 68

Telesat Canada v. Boeing Satellite Systems International, 2010 ONSC 4023 (CanLII)