Regional Arbitral Institutes Forum
Conference 2019

The Rizqun International Hotel
Brunei Darussalam
6 December 2019

New trends of challenges made against arbitrators

William Lye OAM QC [*]

What is perfume to one person may be regarded as poison to another.

- *Dr Colin Ong QC*

---

1. Introduction

It is a great honour to be asked to participate at the RAIF conference hosted by the Arbitration Association Brunei Darussalam, which I understand is the second International Arbitration Conference formally held by AABD on behalf of the RAIF.

I would like to thank Dr Colin Ong QC, the President of AABD, and the Council of AABD for extending to me their warm hospitality in Brunei. I would also like to acknowledge the presentations by my co-panellists, who bring a diverse perspective from their respective jurisdictions on this topic. This area is clear at times when the conduct of arbitrators falls neatly into the established zone of exclusion for conflict of interests but at other times, it raises deep controversy.

In the past few decades, there has been an increase in arbitral activities in the Asia-Pacific region [1] and within the wider South East Asian region, including in Brunei, Thailand, Indonesia, Malaysia, Vietnam, Philippines, South Korea, and Japan.

---

[*] M Ent Inn, LLM, BSc (Computers). Queen's Counsel at the Victorian Bar (Melbourne, Australia). I acknowledge the assistance of my legal assistant, Pippa Thorne, in the preparation of this paper.

[1] See Greenberg, S, Kee, C, and Weeramantry JR, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) at 33-43.

Parties have the freedom to choose their own representation in an arbitral proceeding, including the right to represent themselves. There are also no restrictions on foreign lawyers being appointed as arbitrators in Australia, consistent with the UNCITRAL Model Law.

Unlike the court system where there is no choice of the judge to be allocated in a case, the right to challenge the other side's chosen arbitrator is a feature of the arbitral system. An arbitrator can therefore be challenged if there are *justifiable doubts* as to the impartiality or independence of the person serving as an arbitrator.

As aptly stated by Dr Colin Ong QC,

> *The usual reasons that are given by the parties in the challenge process against one or more members of a tribunal is that the parties are concerned about protection of the parties' fundamental right to an impartial and independent tribunal. In any challenge, the parties will always start off with a speech on the need to guarantee a fair and unbiased arbitral proceeding.* [2]

When more litigation lawyers engage in arbitration, we can expect a legal brawl. There is a saying among lawyers that *when one is weak on the facts, argue the law*. Some would go even further by saying that *when one is weak on both the law and facts, challenge the arbitrator*.

The cynical view is that challenges against arbitrators serve as a delaying tactic rather than seeking neutrality and fairness in the arbitral process.

Experienced arbitrators and former judges who act as arbitrators regularly are likely to be more adept at observing the principle of neutrality. Nevertheless, arbitrator neutrality remains *sui generis* for any international commercial arbitration and *ipso facto* will continue to attract challenges against arbitrators. While the parties are entitled to pursue all their rights, they must do so within the boundary of the rules of arbitration and the national laws that apply in the seat of arbitration.

There is, however, no consistent approach in the standards for challenging arbitrators. The principal ground of challenge is often directed at the conduct of the arbitrator in circumstances where there are *justifiable doubts* as to the arbitrator's impartiality or independence.

---

[2] Ong, C, *Challenges of Arbitrators in Investment Treaty Arbitration*, The Investment Treaty Arbitration Review, 3rd edition, Chapter 13, p. 158, 160.

What constitutes *justifiable doubts* about an arbitrator's impartiality can be unclear. Should there be a restrictive or expansive interpretation? If it is the latter, will it lead to more challenges to the appointment of arbitrators?

These questions remain unsettled in Australia in the absence of an *opinio juris* of an arbitral code of conduct in Australia. New challenges against arbitrators are likely to occur but they rarely succeed.

2. Challenges against arbitrators rarely succeed

An analysis from the London Court of International Arbitration decisions on challenges to arbitrators between 1996 and 2017 found that challenges were rare and even more rarely successful. Challenges were made in less than 2% of the cases and were only successful approximately 23% of the time. [3]

Australia has made great strides since the mid 1970s to promote and develop international arbitration arising from the Commonwealth and State governments legislative frameworks for domestic and international arbitration; [4] a strong and supportive judiciary; [5] an active arbitral institution; [6] and the emergence of many more Australian arbitration practitioners. [7]

---

[3] See Clifford, P, Roos, H, and Scogings, E, Arbitrator challenges: the long view, *New Law Journal*, Issue 7797 at 15. It is a generally accepted view by arbitration practitioners that there is only a slim chance of success under the UNCITRAL Rules and even slimmer under the ICSID Rules. See Ong, C (n2) at p. 160-11.

[4] *International Arbitration Act 1974* (Cth) (the Act) is the exclusive law governing international commercial arbitrations in Australia. The Act implements domestically the UNCITRAL Model Law and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).*

[5] From an Australian perspective, the State and Territory Courts are vested with broad jurisdiction with respect to both domestic and international commercial arbitration. The Federal Court of Australia only has jurisdiction with respect to international arbitration. The Supreme Courts in Victoria and New South Wales have specialist arbitration lists. Australian courts are pro-arbitration as recently seen in the decision of the High Court of Australia in *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13. A significant decision relating to the enforcement of foreign arbitral awards in Australia is *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533. See also *Sanum Investments Limited v ST Group Co Ltd [2017] FCA 75 (8 February 2017); Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2)* [2016] FCA 1169 (29 September 2016).

[6] The Australian Centre for International Commercial Arbitration (ACICA), established in 1995, is Australia's international dispute resolution institution.

[7] Jones, D, *Arbitration in Australia – Rising to the Challenge*, speech delivered at the 18th Annual Clayton Utz International Arbitration Lecture in Brisbane on 20 November 2019. Viewed at https://dougjones.info/content/uploads/2017/07/Clayton-Utz-University-of-Sydney-Annual-Lecture-Doug-Jones.pdf.

Yet, the continuing challenge is that Australia, as a seat, is too far down under compared to the well-established seats in the Northern Hemisphere, such as London, Paris, Switzerland, and New York, or even closer to the equator in countries such as Singapore and Hong Kong.

Given the relatively few international arbitration disputes taking place in Australia, we hardly see any significant challenges made against arbitrators or any statistics that are even similar to that analysed by the LCIA or other institutions. [8]

It seems that we prefer to encourage international arbitrations conducted in Australia rather than take purely tactical challenges against arbitrators over their impartiality or independence.

3. Australian legislative framework

Most leading arbitration rules contain provisions dealing with the grounds for challenging arbitrators and the procedure to be followed. [9]

For example, the IBA Guidelines on Conflicts in International Arbitration provide that '*doubts are justifiable when a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision*'.

The IBA Guidelines, while not binding, has gained wide acceptance within the international arbitration community given its list of specific situations. [10] The list promotes greater consistency and serves as a useful guide by tribunals and parties

[8] For example, the Arbitration Institute of the Stockholm Chambers of Commerce (SCC) published a note on SCC Board decisions on challenges to arbitrators taken in 2016 to 2018. See https://sccinstitute.com/media/795278/scc-practice-note_scc-decisions-on-challenges-to-arbitrators-2016-2018.pdf. In the period January 2016 to December 2018, 551 arbitral proceedings were initiated at the SCC, and a total of 46 challenges to arbitrators were filed. Only 3 challenges resulted in the arbitrator stepping down voluntarily. This is compared to 26 challenges and 14 decisions in the previous three-year period.

[9] See the Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules 2016, Articles 17 and 18. By contrast, see the IBA Guidelines on Conflicts of Interest in International Arbitration with respect to appointments or challenges of arbitrators.

[10] The IBA Guidelines use a Red, Orange and Green list approach to help determine whether the particular facts give or might give rise to doubts as to an arbitrator's impartiality or independence. Red - per se doubt. Orange - reasonable doubt. The arbitrator has a duty to disclose such situations. Green - no conflict of interest. The arbitrator has no duty to disclose such situations.

to determine whether a conflict of interest between an arbitrator and a party arises and how it is to be dealt with.

Australia does not adopt a *traffic light* system akin to the IBA Guidelines, however the ACICA Arbitration Rules 2016 and the Expedited Arbitration Rules 2016 incorporate reference to the IBA Guidelines in relation to the appointment of and challenges to arbitrators. [11]

Reforms to the Australian *International Arbitration Act 1974* (Cth) have also made the conduct and enforcement of international arbitrations in Australia much more efficient, [12] particularly with the threshold test for establishing arbitrator bias being lifted.

The Act provides that the identity of an arbitrator may only be challenged where there are *justifiable doubts* as to the arbitrator's impartiality or independence, or if he or she does not possess any requisite qualification agreed to by the parties.

The test for whether there are *justifiable doubts* as to the impartiality or independence of an arbitrator is whether there is a *real danger of bias* on the part of the arbitrator. [13] This test provides a higher threshold than merely demonstrating a *reasonable apprehension of bias* and instead requires that party to demonstrate that there is a *real danger* that the arbitrator is biased.

In *R v Gough* [14] Lord Goff of Chieveley explained the *real danger of bias* test in these terms at p. 670:

> *I think it is possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators … Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly (or have unfairly regarded) with favour, or disfavour, the case of a party the issue under consideration by him.*

---

[11] See Article 11.4 of ACICA Arbitration Rules 2016 and Article 8.6 of the Expedited Arbitration Rules 2016.

[12] See Trakman, L, The Reform of Commercial Arbitration in Australia: Recent and Prospective Developments, In A Rayes and G Wexia (eds), *The Developing World of Arbitration,* Hart, 2018) Ch 12 [2018] UNSWLRS 17.

[13] Section 18A of the Act. See the 'real danger' test laid down by the House of Lords in *R v Gough* [1993] AC 646. Australia is the first country to adopt this test as part of the arbitration law.

[14] [1993] AC 646.

The traditional common law test for bias under Australian law, by contrast, is whether a fair-minded objective person would reasonably apprehend [15] that the arbitrator may not be impartial. It appears that section 18A of the Act is to be construed as a stricter test for impartiality or independence than the *reasonable apprehension of bias* test [16] applied by the Australian courts.

So, if challenges to arbitrators rarely succeed, is there a new trend towards challenges made against arbitrators in Australia and more generally elsewhere?

4. Challenges against arbitrators

Parties generally only become aware of the grounds of challenge after the appointment of an arbitrator has been made. Given the small number of international arbitrations conducted in Australia, there is unlikely to be any discernible trends of challenges against arbitrators.

Whether the motive for a challenge is well founded, or just simply tactical, any such challenge seems to be in the areas of conflict of interests and procedural failures. These challenges appear to fall within the following categories:

4.1. Arbitrator's *doctrinal predisposition* or *predetermined views* on legal issues. [17]

4.2. Arbitrator's connections and relationships with the parties giving rise to conflicts of interest.

Typical examples of challenges include:

- Arbitrators and counsel belonging to the same set of chambers. [18]

---

[15] See for example, *R v Webb* (1994) 181 CLR 41; *ICT Pty Ltd v Seat Containers Ltd* [2002] NSWSC 77; *Gascor v Ellicott & Ors* [1997] VR 332. See also *Disqualification of Judges for Bias* by the Hon. Justice JR Sackar delivered on 16 January 2018 at Faculty of Law, Oxford, UK. Viewed http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Sackar_20180116.pdf

[16] See approach adopted by the SVEA Supreme Court of Appeal in *China State Construction Engineering Corporation v CJSC Inteko and Misk Ltd* Case No. T2484011 (10 April 2013) where it is the appearance of bias and not actual bias that may trigger dismissal of the arbitrator. Viewed at https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=1973471&propId=1578.

[17] See Ong, C, (n2) at 164 where the author refers to challenges made on the allegation of issue conflicts.

[18] See *Hrvatska Elektroprivreda v Slovenia* (ICSID Case No ARB/05/24), a controversial ruling by the Tribunal to exclude a barrister from acting as counsel to one of the parties because of a potential conflict of interest with one of the arbitrators as members of the same set of chambers.

- Arbitrator's law firm acting for affiliated company of a party. [19]
- Arbitrator's non-disclosure of appointments by a party in other arbitral proceedings. [20]

4.3. Arbitrators' conduct during the arbitration proceeding.

The list of conduct is not exhaustive and includes, for example,

- Arbitrators deliberately violating the arbitration agreement. [21]
- Arbitrators failing to act fairly and impartially as between the parties. [22]
- Arbitrators failing to conduct or participate in the proceedings with due diligence, avoiding unnecessary delay [23] or expense.
- Arbitrators prejudging the issue in the procedural process thereby lacking impartiality. [24]
- Arbitrators improperly delegating their duties to the tribunal or administrative secretary. [25]

---

[19] See *W Ltd v M Sdn Bhd* [2016] EWHC 422 (Comm) where the English High Court declined to set aside the Award despite a relationship emerging between the sole arbitrator and one of the parties that fell within the *non-waivable red list* Guidelines that list situations where justifiable doubts necessarily exists as to the arbitrator's impartiality or independence. Knowles J casts into doubt the application and scope of the IBA Guidelines under English law.

[20] See *Halliburton Company v Chubb Bermuda Insurance Ltd & Ors* [2018] EWCA Civ 817 (19 April 2018) where the Court of Appeal held unanimously that while as a matter of good practice and, in the circumstances of the case as a matter of law, the arbitrator ought to have disclosed his appointments in overlapping references, *the fair minded and informed observer having considered the facts* would not conclude there was a real possibility that the arbitrator was actually biased. The Court agreed with the LCIA rules that disclosure is only required of facts and circumstances known to the arbitrator, without a duty of inquiry.

[21] See Clifford et al (n 3) at 15 where the authors found that challenges under Article 10.2 of the 1998 LCIA Arbitration Rules to be on the rise.

[22] Ibid.

[23] By contrast regarding delay in handing down an Award after the conclusion of an arbitration, see *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd* [2018] 2 CLJ 257, where the Malaysian Court of Appeal refused the set aside the Award despite the period taken from the commencement of arbitration proceedings to the delivery of the Award was about 10 years. The arbitrator took a period of 4 years from the close of submissions to issue the final Award.

[24] *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v Republic of Guinea* (ICSID Case No. ARB/14/22), Decision of 28 December 2016.

[25] See *P v Q, R, S and U* [2017] EWHC 194 (Comm) where the Court upheld an appeal from the LCIA Court that there had not been improper delegation; See also *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (PCA Case No. AA 226); *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No. AA 227); *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (PCA Case No. AA 228) Awards of 18 July 2014; See *Sacheri v Robotto, Corte di Cassazione*, 2765, 7 June 1989 where Italian Supreme Court annulled the Award as the arbitrators, who were construction specialists, had engaged a lawyer to draft the Award for them.

4.4. Arbitrators' repeated appointments

Repeat appointments of an arbitrator by the same party or law firm is another avenue of challenge. This is a controversial area. The LCIA Court and some ICSID tribunals [26] take a neutral position that repeat appointments do not, without more, necessarily compromise the impartiality or independence of an arbitrator.

In *Cofely Ltd v Bingham* [27] the claimant succeeded in its application for the removal of the arbitrator on the ground of apparent bias. Evidence showed that the arbitrator had received 18% of his appointments and 25% of his income from cases involving the other party. There was also evidence of manipulation of the institutional appointment process.

5. Conclusion

It is a fundamental legal right of a party to have a fair and unbiased arbitral proceeding. There will always be avenues for meritorious challenges to be determined robustly by the arbitral tribunal or the courts where a party believes that an arbitrator is likely to behave in a pre-determined way.

The rate of successful challenges, however, appears to remain relatively low, with majority of challenges relating to the arbitrators' impartiality or independence, and their conduct of or participation in the arbitration. A party may also seek to challenge an Award on the ground of improper delegated authority. Care needs to be taken by arbitrators when dealing with their research assistants or administrative secretaries by not having them perform the essential duties of an arbitrator.

Where such a challenge fails before an arbitral institution, courts in the common law jurisdictions are unlikely to interfere with the arbitral institution's judgment. [28] Generally, the arbitration community has adhered to the rules of engagement. It seems unlikely, for now, that there will be a spike in the rate of challenges against sole arbitrators or a three-member tribunal.

---

[26] See, for example, *Tidewater Inc. v The Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5); *Universal Compression International Holdings SLU v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/9); *OPIC Karimum Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/14).

[27] [2016] EWHC 240 (Comm).

[28] See *P v Q, R, S and U* (n 22).

About the Author

Mr William Lye OAM QC is a barrister practising at the Victorian Bar and is admitted to practice in all Australian States and Territories, having chambers in Melbourne and Darwin. His areas of legal practice include general commercial and corporate law, copyright and trademarks, computer and internet related matters, cross border disputes, mediation and international commercial arbitration.

Mr Lye has a Bachelor of Science (Computers), Bachelor of Laws and Master of Laws (specialising in Intellectual Property) from Monash University. He also has a Master of Entrepreneurship and Innovation from the Australian Graduate School of Entrepreneurship. He is currently Adjunct Professor of Law within the Faculty of Business and Law at Swinburne University of Technology, and an Adjunct Fellow of the Sir Zelman Cowen Centre.

He is an accredited mediator and an arbitrator on the foreign panel of the Shanghai International Arbitration Centre (SHIAC), which acts as an independent arbitration institute to resolve commercial disputes. He is also on the panel of arbitrators of the Czech Arbitration Centre (CAC) dealing with disputes under the Uniform Domain Name Disputes Resolution Policy (UDRP) established by the Internet Corporation for Assigned Names and Numbers (ICANN).

Mr Lye is currently the interim chair of the Australian Barristers International Mediation Association Limited (AUSBIMA), a collective of senior barristers in Australia who act regularly as mediators in the South East Asian region.

Mr Lye also serves as a national board member of The Order of Australia Association Limited and is also on the Victoria Branch of The Order of Australia Association.

He is a founding member and the Immediate Past National Vice President of the Asian Australian Lawyers Association. He is also one of the Patrons of the North American Australian Lawyers Alliance Incorporated.

On Australia Day 2017, Mr Lye was awarded the Order of Australia Medal for '*service to the law, to business, and to the promotion of cultural diversity*'. In the same year, at the 2017 Australian Law Awards, Mr Lye won the Barrister of the Year Award and the Lawyers Weekly Excellence Award.

Mr Lye is the first barrister of Malaysian Chinese descent appointed Queen's Counsel in Australia.

Chambers of William Lye OAM QC

Address: Level 18, Suite 2, Owen Dixon Chambers West, 525 Lonsdale Street, Melbourne VIC 3000 Australia

Telephone: (03) 9225 7777

Email: wemlye@vicbar.com.au

Web: http://www.williamlye.com