"IF IN DOUBT, DISCLOSE?": ARBITRATOR CONFLICTS, CHALLENGES AND REPERCUSSIONS

Robert S. Pé[*]

Abstract

In view of the increase in challenges being raised against arbitrators, this note examines two real-life case studies with opposite outcomes to consider their differences in context and to explore the importance of disclosure.

I. Introduction

Challenges against arbitrators are on the increase. Without doubt, a successful challenge can have a devastating impact. This note considers two recent real-life case studies in which the parties, counsel, and Tribunal members have been anonymised and the facts adjusted very slightly for anonymity and simplicity. In one, the arbitrator eventually stood down in the face of a compelling challenge and in the other, the arbitrator resisted and prevailed. This note identifies the key differences and the common themes that emerged in these two cases.

II. Case Study I

A. The factual background

The arbitration was seated in Singapore and conducted under the 2012 International Chamber of Commerce ["**ICC**"] Rules of Arbitration ["**ICC Rules**"]. It arose from a shareholders' agreement relating to the business of setting up and operating a luxury hotel project. Under the shareholders' agreement, the Claimant was entitled to various rights including a right to exercise a put option should certain default events take place, including, *inter alia*, failure to complete construction of the hotel project by a specific date.

The Claimant commenced the arbitration in 2016 and a three-member tribunal was constituted. The Claimant was represented by, among others, a leading international law firm ["**ILF**"]. A merits hearing took place in 2018 and the Tribunal rendered a Partial Award in April 2019. The Tribunal found in favour of the Claimant and ordered the Respondents to pay damages. The Tribunal reserved various matters, including interest and costs, to a future award.

In June 2019, after rendering of the Partial Award, the co-arbitrator designated by the Respondents made a disclosure to the parties. He informed them that earlier in 2019, he had been instructed to act as local counsel for a consortium in connection with the enforcement of an interim award in a wholly unrelated dispute between a sovereign government on the one hand and the consortium on the other ["**local enforcement proceedings**"]. The partner of ILF, who had been acting as lead counsel for the Claimant in the arbitration, also served as international counsel to the consortium in the unrelated enforcement proceedings.

---

* Robert S. Pé is a fellow of the Chartered Institute of Arbitrators and a member of Arbitration Chambers in Hong Kong, London and New York. He is the member for Myanmar of the ICC's International Court of Arbitration and Co-Chair of the ICC's Belt and Road Commission, and he previously served two full terms on the Council of the Hong Kong International Arbitration Centre. He was in private practice with major international law firms for over two decades and the Chambers legal directory described him as a "*Top-flight*" lawyer, who commands "*the highest levels of respect in the market*". The Financial Times ranked him as one of the most innovative lawyers in Asia. He gained his MBA from the London Business School and his LL.B. from the London School of Economics and Political Science.

Following the disclosure, the Respondents asked the co-arbitrator a series of questions. In his responses, he indicated, among other things, that the enforcement proceedings had been listed in March 2019 and that he had also been approached by the consortium to represent them in related arbitration proceedings ["**other arbitration proceedings**"]. He understood that ILF were appearing in those other arbitration proceedings on behalf of one of the companies that was part of the consortium.

B. The Challenge

The Respondents brought a challenge against the co-arbitrator in July 2019 under Article 14 of the ICC Rules. The co-arbitrator initially rejected the challenge, as did the Claimant, which filed detailed submissions through ILF. An interesting feature of this challenge is that it was made by the Respondents against the co-arbitrator whom they had designated.

C. The Respondents' position

The Respondents' challenge against the co-arbitrator was based on two main grounds, namely the "*ongoing professional relationship with Claimant's counsel*" and the "*lack of disclosure*". By accepting his role as local counsel in the enforcement proceedings, the co-arbitrator had assumed a co-counsel relationship with ILF. He compounded the conflict of interest by also acting as co-counsel with ILF in the other arbitration proceedings. The Respondents stated that it was a serious conflict of interest for the co-arbitrator to be acting together with ILF on two significant mandates while also serving as co-arbitrator in the arbitration. These circumstances cast doubt on his impartiality and called into question his independence.

The Respondents stated that if they had been aware of this co-counsel relationship between the co-arbitrator and ILF at the start of the arbitration, they would never have nominated him as arbitrator or accepted his appointment. They observed that his acceptance of instructions as co-counsel with ILF in the other arbitration proceedings took place just six weeks after the Tribunal in the first arbitration had rendered the Partial Award in favour of the Claimant. The Respondents observed that it could reasonably be assumed that the co-arbitrator's acceptance of the co-counsel relationship in the other arbitration proceedings must have been under discussion for a significant period of time beforehand and the co-arbitrator's lack of disclosure had deprived them of a chance to object to his continuing role in their arbitration. The Respondents further stated that the fact that the co-arbitrator had a relationship with ILF before the Partial Award had been rendered and the fact that the Partial Award was overwhelmingly in favour of the Claimant may have had some bearing on his being instructed in the other arbitration proceedings. All of the above circumstances called into question the co-arbitrator's independence in the eyes of any fair-minded observer and gave rise to reasonable doubts as to his impartiality.

The Respondents stated that the co-arbitrator's failure to disclose his relationship with ILF since at least March 2019 was a violation of Article 12(1) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"], which provides as follows:[1]

[1] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, art. 12(1), G.A. Res. 40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

> "*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.*"

The Respondents indicated that arbitrators have a responsibility to avoid situations that may lead to a conflict of interest. Therefore, the co-arbitrator was under an on-going duty to disclose any potential conflict, and he should have disclosed the conflict immediately. They further stated that the appropriate time to disclose this information was on or before March 2019, by when he had been engaged by the consortium for the enforcement proceedings.

In light of the above, the Respondents invited the co-arbitrator to step down immediately, failing which they invited the ICC International Court of Arbitration ["**ICC Court**"] to remove him.

D. The Claimant's position

The Claimant stated that the challenge was unsustainable and asserted that ILF had virtually no professional contact, let alone *relationship*, with the co-arbitrator prior to the initiation of the arbitration. The Claimant stated that ILF had had prior contact with the co-arbitrator on only two occasions: (i) in 2003 when they had engaged him as a local law expert for a different arbitration with a completely different set of ILF lawyers; and (ii) several years ago when ILF had acted against the co-arbitrator in a different arbitration. ILF had never nominated the co-arbitrator for appointment as arbitrator and had never worked with him as counsel except for the then current co-counsel role in connection with the other arbitration proceedings. The Claimant stated that the terms of that engagement were finalised only in July 2019, after the Partial Award had been rendered and only five days prior to the Respondents' challenge. The Claimant disputed the assertion that the relationship between ILF and the co-arbitrator in the enforcement proceedings was that of co-counsel. It further stated that ILF had not had an active role in the co-arbitrator's engagement in the enforcement proceedings or the other arbitration proceedings – both the engagements had been initiated by the underlying client.

In light of the above, the Claimant stated that there was no failure by the co-arbitrator to make disclosure and no delay in his doing so.

E. Admissibility of the Challenge

For a challenge to be admissible in the context of an ICC arbitration, it must be filed by a party "*either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification*".[2]

The challenge was based on the co-arbitrator's additional disclosure of June 2019. The Respondents submitted the challenge in July 2019, one day before the 30-day time limit expired. The challenge was, therefore, admissible.

---

2 International Chamber of Commerce (ICC), Rules of Arbitration 2012, art. 14(2).

F. The justifiable doubts test

Given that the arbitration was seated in Singapore, the parties agreed that the applicable test was the justifiable doubts test. This has been summarised as follows:

> "*The arbitrator's appointment may be challenged only if circumstances exist which give rise to justifiable doubts as to his impartiality or independence or he does not possess the qualifications agreed to by the parties. Such circumstances include a personal, business or professional relationship with the parties to the dispute, or an interest in the outcome of the dispute. The standard of bias or partiality that has been applied by the Singapore courts is whether a reasonable and fair-minded person sitting in court and knowing all the facts would have a reasonable suspicion that a fair trial for the applicant would not be possible*".[3]

Under this test, the relevant question is whether a reasonable and fair-minded person would entertain a reasonable suspicion that the relevant circumstances might result in the arbitral proceedings being affected by apparent bias if the arbitrator was not removed or view the relevant circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it. The assumption is that the reasonable and fair-minded person possesses all the relevant facts available to the decision-maker at the time of the determination of the challenge and not merely the facts known to the party bringing the challenge.

G. Analysis and outcome

The relationship between the co-arbitrator and ILF can be summarised as follows:

1. The local enforcement proceedings related to the enforcement of a partial award issued in unrelated arbitration proceedings;

2. The co-arbitrator had been and was representing the consortium in the local enforcement proceedings but was not being instructed by ILF in those proceedings;

3. ILF was representing that same party—the consortium—in the other arbitration proceedings;

4. The co-arbitrator had recently agreed to serve as lead counsel in the same other arbitration proceedings and that he would take instructions from ILF; and

5. The co-arbitrator's agreement to serve as lead counsel in the other arbitration proceedings occurred after he had made the additional disclosure in the first arbitration.

There was disagreement between the co-arbitrator and the Respondents as to whether there had been, and was, a co-counsel relationship between the co-arbitrator and ILF in the local enforcement proceedings. Despite the disagreement as to the nature of the relationship in the local enforcement proceedings, it was not disputed that the co-arbitrator and ILF were now representing the same client in proceedings related to the local enforcement proceedings, namely the other arbitration proceedings.

Regardless of whether the co-arbitrator and ILF had a co-counsel relationship in the enforcement proceedings, it was clear that the co-arbitrator was aware by some point in March

[3] Lawrence Boo, *International and Domestic Arbitration in Singapore*, *in* ARTICLES ON SINGAPORE LAW ¶ 4.2.11 (2005).

2019 of ILF's involvement in the aforementioned proceedings. He chose to make disclosure only in June 2019 i.e. around 3 months after his involvement started and shortly after the Tribunal in the arbitration had rendered its Partial Award. Even if there was no failure to disclose, there was at least a delay in making the disclosure. The ICC Court has in the past accepted challenges where it found that the relationship between an arbitrator and a law firm is current and on-going.[4] It is, therefore, not surprising that, on the eve of the Court's consideration of the challenge, the co-arbitrator resigned of his own accord. He really had no choice at that stage; the repercussions were likely to be very substantial. The Respondents had initiated setting aside proceedings against the Partial Award, and the co-arbitrator's resignation in the face of their challenge would have greatly bolstered the prospects of the award being set aside.

III. Case Study II

A. The factual background

There were two connected arbitrations, both seated in Hong Kong and both pursuant to the 2018 Hong Kong International Arbitration Centre ["**HKIAC**"] Administered Arbitration Rules ["**HKIAC Rules**"]. The first arose out of a guarantee in respect of an International Swaps and Derivatives Association, Inc. ["**ISDA**"] Master Agreement and the second arose out of the Master Agreement itself.

The Claimant was a company incorporated in England and Wales and was represented in the two arbitrations by a major international law firm and a major law firm from the People's Republic of China ["**PRC**"]. In the first of the two arbitrations, the Respondent was a PRC company, and in the second, the Respondent was a Hong Kong company. The Respondents were represented by a Hong Kong solicitors' firm in both arbitrations.

In its Notices of Arbitration, the Claimant designated an English barrister as the first arbitrator. In their Answers, the Respondents designated a PRC lawyer as the second arbitrator. After adopting a list-procedure, the co-arbitrators designated a Hong Kong Senior Counsel as the Presiding Arbitrator. The designee did not make any kind of disclosure in his Declaration of Acceptance and Statement of Availability, Impartiality and Independence. In the absence of any objections from the parties, the HKIAC confirmed the candidate as the Presiding Arbitrator, thereby constituting the arbitral tribunal.

The Claimant filed an application in the first arbitration for interim anti-suit relief in relation to the proceedings commenced by the Respondents against the Claimant and an affiliate of the Claimant before an Intermediate People's Court in the PRC. When the Respondents filed their submissions in opposition to the Claimant's application for anti-suit relief, it became clear that their legal team included not only the solicitors' firm but also two barristers from outside that firm, namely a Senior Counsel and a Junior Counsel from the same barristers' chambers as the Presiding Arbitrator. The Claimant noted from public sources that the Presiding Arbitrator and the Respondents' Junior Counsel had acted as co-counsel in a number of cases and had co-presented two seminars, including one on anti-suit relief given to the solicitors' firm that was now representing the Respondents. The Claimant also noted that both the Presiding Arbitrator and the Respondents' Senior Counsel were on the Pupillage Committee of their chambers. The

[4] *Challenge and Disqualification on the Ground of Independence Issues*, *in* 24 KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 299–301 (2012).

Claimant sought further details from the Presiding Arbitrator in relation to each of those matters as well as the nature and extent of his relationship and interaction with the Respondents' Senior and Junior Counsel over the past five years.

The Presiding Arbitrator responded to the Claimant's request for information and confirmed that the Respondents' Senior and Junior Counsel were members of the same chambers as him, disclosed copies of the materials used in the two seminars, and provided further information regarding his relationship and interaction with the Respondents' Senior and Junior Counsel. The Claimant requested that the Respondents confirm certain details of their engagement of the Senior and Junior Counsel in both arbitrations and certain other information relating to the seminar on anti-suit relief they had given to the solicitors' firm that was now representing the Respondents. The Respondents confirmed that they intended to instruct the Senior and Junior Counsel to appear at the hearing of the anti-suit injunction application in the first arbitration and to advise on matters relating to both arbitrations. The Respondents provided some of the information requested by the Claimant about the above seminar.

B. The Challenge

On September 18, 2019, the Claimant filed a Notice of Challenge against the Presiding Arbitrator on the basis that there were justifiable doubts as to his impartiality and independence. The Presiding Arbitrator indicated that he would not withdraw from the Arbitral Tribunal unless the Respondents agreed with the Challenge. The Respondents indicated that they did not agree with the Challenge and filed an Answer to the Notice of Challenge.

C. The Claimant's position

The Claimant relied on the following facts in support of its Challenge:

1. The Presiding Arbitrator and the Respondents' Junior Counsel had given a seminar to the Respondents' solicitors two months before the appointment of the Presiding Arbitrator in the two arbitrations. Based on a report available on the website of the barristers' chambers, the seminar was a closed-door event, attended by a few people from the solicitors' firm, including the lead partner on the Respondents' legal team. The seminar included a discussion of a Hong Kong case which was of direct relevance to the Claimant's anti-suit injunction application.

2. The Presiding Arbitrator had a close relationship with the Respondents' Senior and Junior Counsel. In the case of the Senior Counsel, this was supported by the fact that he and the Presiding Arbitrator both sat on their chambers' Pupillage Committee. In the case of the Junior Counsel, this was supported by the fact that she had spent three months of her pupillage with the Presiding Arbitrator, they had acted as co-counsel in four cases in the past three years, and they had co-presented at the two seminars.

3. The Presiding Arbitrator had failed to make disclosures on three occasions: *first*, prior to or at the time of his appointment on April 25, 2019; *second*, when the Claimant submitted its anti-suit injunction application in the first arbitration on July 23, 2019; and *lastly*, when the Respondents submitted their opposition to the Claimant's application on August 16, 2019 making the involvement of the Respondents' Senior and Junior Counsel apparent.

The Claimant submitted that the above facts had *cumulatively* given rise to justifiable doubts as to the impartiality and independence of the Presiding Arbitrator in the eyes of an objective, fair-minded, and informed observer. The Claimant also contended that the Presiding Arbitrator's answers to the Claimant's enquiries had been inadequate and incomplete.

D. The Respondents' position

The Respondents submitted that the Challenge should be dismissed at the outset. Their primary position was that the Challenge was made out of time. The Claimant became aware of the circumstances giving rise to the Challenge on at least August 16, 2019 (when the Respondents in the first arbitration filed their submissions in response to the anti-suit injunction application, thereby identifying their Senior and Junior Counsel) or at the latest by August 31, 2019 (when the Claimant first made enquiries about the Presiding Arbitrator's impartiality and independence). The Notice of Challenge should have been submitted on August 31, 2019 or at the latest by September 15, 2019.[5] There was no reason to justify any extension of time for the submission of the Notice of Challenge on September 18, 2019.[6]

In the event that the HKIAC decided that the Challenge was made in time or that the time limit for submitting the Challenge should be extended, the Respondents referred to *Laker Airways Inc.* v. *F.L.S. Aerospace Ltd.* ["**Laker Airways**"] in which the English Commercial Court had dismissed a party's application to remove an arbitrator on the basis that the arbitrator and the barrister representing a party came from the same barristers' chambers.[7] The Respondents also referred to the IBA Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"].[8] The parties were not bound by the IBA Guidelines and merely used them for reference. The Guidelines are not legal provisions and do not represent the position under Hong Kong law but they have found broad acceptance among the international arbitration community. The Respondents relied on paragraph 4.3.4, which lists the following circumstance on the Green List:[9]

> "*[t]he arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.*"

The Respondents submitted that such a circumstance could never lead to disqualification or require disclosure under the objective test in General Standard 2 of the IBA Guidelines.[10]

---

5 Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, art. 11.7 [*hereinafter* "HKIAC Arbitration Rules"].

6 *Id.* art. 21.2 (which permits the tribunal to extend time limits in certain cases).

7 Laker Airways Inc. v. F.L.S. Aerospace Ltd. [2000] 1 WLR 113 (Eng.).

8 International Bar Association (IBA), IBA Guidelines on Conflicts of Interest in International Arbitration 2014 [*hereinafter* "IBA Guidelines"].

9 The IBA Guidelines set out various potential circumstances and allocate them to a Non-Waivable Red List, a Waivable Red List, an Orange List and a Green List. A circumstance on the Green List does not require disclosure and does not preclude an individual from serving as arbitrator.

10 IBA Guidelines, *supra* note 8, Gen. Stand. 2(c) (which provides that "[d]oubts are justifiable if 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").

E. The Presiding Arbitrator's position

The Presiding Arbitrator considered that, as a matter of principle, there were no good grounds to support a perception of lack of impartiality. He indicated that he had adjudicated both as Deputy High Court Judge and arbitrator in numerous cases in which members of his chambers had appeared. He did not consider that his impartiality and independence were in any way affected. He pointed out that the position should be reviewed in the context of these two arbitrations, which involved sophisticated and professional parties and lawyers. Participating at seminars and in legal discourse on any particular topic, whether or not arbitration-related, was not a ground to support a perception of bias.

F. Admissibility of the Challenge

The HKIAC Rules provide that:[11]

> "*A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after the confirmation or appointment of that arbitrator has been communicated to the challenging party or within 15 days after that party became aware of the circumstances mentioned in Article 11.6*."

An HKIAC Practice Note on Challenges to Arbitrators ["**HKIAC Practice Note**"] sets out the procedure for submitting and determining a challenge to an arbitrator and provides that:[12]

> "*A party wishing to challenge an arbitrator shall submit, within 15 days… after the party became aware of the circumstances giving rise to the challenge, a Notice of Challenge…*"

The Claimant's letter dated August 31, 2019 raised reasonable enquiries with the Presiding Arbitrator, and it was appropriate for the Claimant to await a response from him before reaching a decision on launching a Challenge based on cumulative factors. The 15-day period under the HKIAC Practice Note, therefore, ran from the date of the Presiding Arbitrator's response to the enquiries of the Claimant i.e. from September 3, 2019. The Claimant's Notice of Challenge dated September 18, 2019 was hence submitted within time. Even if the Claimant were out of time, it would have been appropriate to allow an extension because any delay was minimal and not such as to cause undue prejudice to the Respondents.

G. The justifiable doubts test

The HKIAC Rules provide as follows:[13]

> "*Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties, or if the arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay. A party may challenge the arbitrator designated by it or in whose appointment it has participated only for reasons of which it becomes aware after the designation has been made.*"

To assess "*if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence*," the test in Hong Kong is that stated by the Hong Kong Court of First Instance in

11 HKIAC Arbitration Rules, *supra* note 5, art. 11.7.
12 HKIAC, Practice Note on Challenges to Arbitrators 2019, ¶ 2.1.
13 HKIAC Arbitration Rules, *supra* note 5, art. 11.6.

Jung Science Information Technology Co., Ltd v. *ZTE Corporation*, which 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*".[14]

H. Analysis and outcome

The applicable test referred to above represents a high threshold. The first of the three cumulative factors on which the Claimant relied was the seminar given by the Presiding Arbitrator and the Respondents' Junior Counsel to the lawyers from the Respondents' solicitors' firm. It is normal for barristers and solicitors to hold such private events at which they discuss recent developments in the law. The fact that someone says something at one of these private events on a particular issue of law does not commit that person to decide a future case in a particular way, and participants are aware of this fact. Such discussions are beneficial for the development of law, and if challenges were allowed based on this ground, it would have an unhelpful chilling effect.

The second factor on which the Claimant relied was that the Respondents' barristers were members of the same chambers as the Presiding Arbitrator and had a close relationship with him. The Claimant had sought to distinguish the *Laker Airways* case[15] in which the challenge was based merely on the fact that the arbitrator and the counsel of one of the parties belonged to the same chambers, and not on any particular/specific facts related to their relationship. This had, in fact, prompted the court to declare that barristers are "*independent self-employed practitioners*" and that there are too many of them within the same chambers to have even basic interaction. Finally, the Court held that there can be no presumed imputation of knowledge between them to justify the removal of the arbitrator. The Claimant submitted that, unlike the challenge in that case, the Claimant's Challenge in this case was based on various specific features of the Presiding Arbitrator's relationship with the Respondents' Senior and Junior Counsel. The specific features were that the Presiding Arbitrator and the Respondents' Senior Counsel sat together on their chambers' Pupillage Committee and that the Junior Counsel had done three months of pupillage with him, acted as his co-counsel on four recent cases and delivered the seminar with him (and another member of their chambers). However, it appeared that the Presiding Arbitrator was not currently acting as co-counsel with either of the Respondents' counsel on any cases. His relationship with each of them appeared typical of that shared by members of the same barristers' chambers and entirely proper and appropriate.

The Claimant had cited, among other authorities, International Commercial Arbitration by Gary B. Born, in which Mr. Born states as follows:[16]

> "…*In recent years, this structure and setting has significantly evolved, with barristers' chambers increasingly engaging in common promotional, training and other professional activities comparable to those of law firms. As a consequence, conclusions regarding barristers' independence must be reexamined in light of the realities of contemporary practice. That reexamination has occurred in several recent cases, with some authorities now holding that, at least in international cases, the relationship between members*

[14] Jung Sci. Info. Tech. Co., Ltd. v. ZTE Corp., [2008] 4 H.K.L.R.D. 776, ¶ 50 (C.F.I.) (H.K.).
[15] Laker Airways Inc. v. F.L.S. Aerospace Ltd. & Anr. [2000] 1 WLR 113 (Eng.).
[16] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1894 (2d ed. 2014).

> *of a barristers' chambers are relevant to an arbitrators' independence in much the same manner that relationships within law firms are relevant.*"

The aforementioned text is accompanied by a footnote in the book consisting of several cases – one of which,[17] an ICSID case, had also been cited by the Claimant in its submissions. However, the said case was clearly not on all fours with the situation in the two arbitrations. The same footnote continued to refer to another case as follows:[18]

> "*…But see Decision in LCIA Ref. No. UN97/X11 of 5 June 1997, 27 Arb. Int'l 320 (2011) (dismissing challenge based on respondent's counsel and arbitrator being from same chambers, noting that claimant and its counsel were familiar with organization of barristers' chambers in England).*"

In the current case, the Claimant's counsel were clearly familiar with the organisation of barristers' chambers in Hong Kong. The Claimant itself was domiciled in England and Wales and one would expect it to be familiar with the organisation of barristers' chambers there and also in Hong Kong.

The third of the three cumulative factors on which the Claimant relied was that the Presiding Arbitrator had failed to disclose the first two factors and had failed to address the reason for the non-disclosure and to adequately explain the circumstances around the first and second factors. However, neither of those factors appeared in the IBA Guidelines' Non-Waivable Red List or Waivable Red List. These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. An example of a situation on the Non-Waivable Red List is where "*[t]he arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom*".[19] An example of a situation on the Waivable Red List is where the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.[20]

Looking at all three factors, they were clearly not sufficient individually or cumulatively to justify a successful challenge, and the Challenge was thus rightly rejected.

IV. Conclusion: if in doubt, disclose?

Challenges to arbitrators must be decided on their own individual facts, and as the above case studies demonstrate, fact patterns can be complex and nuanced. Fine distinctions can make the difference between allowing a challenge and rejecting it. In the first of these two case studies, it was clear that the co-arbitrator and the Claimant's counsel had been acting for a common client in a local enforcement proceedings and that there was now an on-going co-counsel relationship in the other arbitration proceedings. In the second case study, the Presiding Arbitrator had, in the past, acted as co-counsel with the Respondents' Junior Counsel, but was not currently doing so. This was a key difference between the two cases, but common questions arose around the duty of arbitrators to disclose matters that might be viewed as giving rise to conflicts of interest.

---

17 *Hrvatska Elektroprivreda d.d. v. Republic of Slovn.,* ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel (May 6, 2008).

18 BORN, *supra* note 16, n.1389.

19 IBA Guidelines, *supra* note 8, Non-Waivable Red List, ¶ 1.4.

20 IBA Guidelines, *supra* note 8, Waivable Red List, ¶ 2.3.1.

In this context, although the IBA Guidelines are non-binding in nature, unless otherwise agreed by the parties, they provide helpful guiding principles. In the second case study, the private nature of the seminar given by the Presiding Arbitrator and the Respondents' Junior Counsel meant that it was unclear whether or not it fell within the IBA Guidelines' Green List, which reads as follows:[21]

> "*The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation with another arbitrator or counsel to the parties*."

Arguably, it would have been prudent for the Presiding Arbitrator to disclose the details of the seminar once he became aware of the involvement of the Respondents' Junior Counsel in the two arbitrations.

The Presiding Arbitrator's relationship with the Respondents' Junior Counsel fell within the IBA Guidelines' Orange List, which provides that:[22]

> "*The arbitrator and another arbitrator or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.*"

According to the IBA Guidelines, the Presiding Arbitrator, therefore, had a duty to disclose his relationship with the Respondents' Junior Counsel once he became aware of her involvement in these two arbitrations. Arguably, he did not discharge that duty or did not discharge it sufficiently promptly.

However, the 'Practical Application of the General Standards' of the IBA Guidelines provides that:[23]

> "*[…] a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award…non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.*"

Notwithstanding this, the maxim "*if in doubt, disclose*" can sometimes be helpful if it causes arbitrators to apply their minds so as to avoid embarrassment or far worse.

---

21 IBA Guidelines, *supra* note 8, ¶ 4.3.4.
22 *Id.* ¶ 3.3.9.
23 *Id.* pt. II, ¶ 5.