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BY SAM LUTTRELL



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Bias Challenges in International Commercial Arbitration

The Need for a 'Real Danger' Test

Sam Luttrell



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Bias Challenges in International Commercial Arbitration

International Arbitration Law Library

Series Editor Dr. Julian D.M. Lew QC

In the series International Arbitration Law Library this book, Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test is the Twentieth title

The titles published in this series are listed at the end of this volume

Foreword

If an evil gremlin sought to bring international arbitration into disrepute, two starkly different routes would present themselves. One course would allow service by biased arbitrators, thus tarnishing the neutrality of the arbitral process. An alternate path to shipwreck would establish unrealistic standards for independence and impartiality, permitting spurious challenges intended to derail proceedings and abusive annulment motions aimed at vitiating the arbitrator's decision.

To reduce the risk of either pernicious or precarious arbitrators, ethical standards have been established through a multitude of mechanisms, including treaty, statute, court decisions, institutional rules, professional guidelines and the simple folklore of practice. Representing both hard law and soft, these standards implicate a tightrope walk between two rival goals: (i) avoiding unprincipled sabotage and dilatory maneuvers and (ii) enhancing prospects that arbitrators will exercise independent judgment.

Few topics carry more significance to the health of private dispute resolution. Integrity is to arbitration what location is to the price of real estate. Without it, few other things matters very much, if at all.

Luttrell tackles the problem from a daring perspective. In essence, he argues for what might seem to be lower standards. The concern is not to permit actual prejudgment or lack of independence, but to attack abuses with respect to what is sometimes called 'apparent' or 'perceived' bias.

A somewhat vague category, articulated according to different formulations in different legal systems, apparent bias is often said to exist when there is either a 'reasonable apprehension' or a 'real danger' of partiality. Luttrell suggests that the current law rewards the saboteurs. In his view, accusations of apparent bias have become too easy, leading to destabilization of the process. Bucking much of the trend in academic literature, the author argues that some formulations for ethical standards in arbitration may actually decrease its aggregate social and economic benefits.

x Foreword

Regardless of whether one accepts the thesis (and some observers feel that the jury is still out on this matter) readers will appreciate the book's freshness of perspective, rigor of research and passion of argument. All of us should admire the courage to take what today seems a minority view. After all, who wants to be accused of being soft on tainted proceedings? But if scholars did nothing but follow each other like sheep in a meadow, the world would indeed be a poorer place.

Luttrell is one of a growing army of thinkers for whom arbitration has become an intellectual and philosophic passion, not just an academic discipline to be taught to students or to serve as fodder for law review articles. His book will contribute to both the substance of the practical debate and the enjoyment of the academic dialogue among connoisseurs and debutants alike.

William W. Park Professor of Law, Boston University

^{1.} Perhaps the most visible manifestation of this trend can be found in Emmanuel Gaillard, Aspects Philosophiques du droit de l'arbitrage international (Livre de poche, 2008), originally presented in 2007 as lectures at The Hague Academy and published that year in the Recueil des cours de l'Académie Internationale de La Haye. For an intriguing commentary on the work and the subject, see Eric Loquin, *A Propos de l'ouvrage d'Emmanuel Gaillard*, 2009 Revue de l'arbitrage 317.

Preface

My first experience with arbitration was as an articled clerk in a construction dispute in Perth, Western Australia, in 2004. The arbitrator was a very fair man, and the proceedings were conducted efficiently and without incident. To me, the only appearance was one of complete impartiality and fairness. This prompted me to ask myself what if the arbitrator was not impartial, and what would I need to show the court if I wanted to challenge him? When I looked at the statutes and case law, I found that the 'reasonable apprehension' test would be decisive of such an application, but that different tests had been used in other countries, namely England. As my curiosity grew, I found that bias challenges were in fact quite common in arbitration, particularly international commercial arbitration. When I asked why, I saw that many of the countries in which international arbitrations are held use the 'reasonable apprehension' test which, it seemed to me, set the bar fairly low. This then led me to ask myself whether the 'reasonable apprehension' makes it too easy to challenge an arbitrator. My conclusion in this book is that it does, and that a higher threshold for the appearance of bias should be used for international commercial arbitration.

What follows is an adaptation of the PhD thesis I presented at Murdoch University in September 2008. It is an indictment of the 'reasonable apprehension' test in so far as it applies to international arbitrators in certain states. This thesis is *not* an argument against use of the 'reasonable apprehension' test in public law contexts, where the presumption of innocence and the policy imperative of public confidence undeniably justify its use. This book is about international commercial arbitration. It is intended to be a mixed theoretical and practical response to the procedural problem of tactical bias challenges in international commercial arbitration. I hope that it goes some way to achieving these objectives.

This book is dedicated to my wonderful parents Kevin and Sally, whose love and support has made everything possible. xii Preface

I would like to thank my PhD supervisor and dear friend, Professor Gabriël Moens, Dean of Law at Murdoch University, for introducing me to international commercial arbitration and guiding me in my studies. I would also like to thank Professor Phil Evans for leading me to academia by offering me my first teaching job, without which offer I am sure I would never have undertaken a PhD or written this book. Finally, I am grateful to Professor Peter Gillies (Macquarie University), Professor Doug Jones AM, The Hon. Neil Brown QC, A. A. de Fina OAM and Professor Derek Roebuck for their advice and encouragement over the last four years.

Sam Luttrell 30 July 2009

Table of Abbreviations

Institutions and Organisations

AAA American Arbitration Association

ABA American Bar Association

ACICA Australian Centre for International Commercial

Arbitration

AIA Italian Arbitration Association

APRAG Asia Pacific Regional Arbitration Group

ASA Swiss Arbitration Association

CAMCA Commercial Arbitration and Mediation Centre for the

Americas

CAS Court of Arbitration for Sport

CCPIT China Council for the Promotion of International Trade CEPANI Centre belge pour l'etude et la pratique de l'arbitrage

national et international

CIArb Chartered Institute of Arbitrators

CIETAC China International Economic and Trade Arbitration

Commission

CMEA Council for Mutual Economic Assistance (Eastern

Europe)

CMI Comité Maritime International

CRCICA Cairo Regional Centre for International Commercial

Arbitration

CRT Claims Resolution Tribunal for Dormant Accounts in

Switzerland

DIFC Dubai International Finance Centre
DIS German Institute of Arbitration

EBCC East Berlin Chamber of Commerce

EC **European Community**

ECAFE United Nations Economic Commission for Asia and the

Far East

United Nations Economic and Social Council **ECOSOC FIDIC** Fédération Internationale des Ingénieurs-Conseils

GAFTA Grain and Feed Trade Association

HKIAC Hong Kong International Arbitration Centre

Inter-American Commercial Arbitration Commission **IACAC** IAMA Institute of Arbitrators and Mediators Australia

IBA International Bar Association

Moscow International Commercial Arbitration Court **ICAC ICANN** Internet Corporation for Assigned Names and Numbers

ICC International Chamber of Commerce

ICCA International Council for Commercial Arbitration **ICDR** American Arbitration Association International Centre

for Dispute Resolution

ICSID International Centre for the Settlement of Investment

Disputes

IFCAI International Federation of Commercial Arbitration

Institutions

IMF International Monetary Fund

ICAA Japan Commercial Arbitration Association **KLRCA** Kuala Lumpur Regional Centre for Arbitration London Court of International Arbitration LCIA LMAA London Maritime Arbitration Association

LME London Metal Exchange

Multilateral Investment Guarantee Agency MIGA

NAI Netherlands Arbitration Institute

NASD National Association of Securities Dealers of the United

NOFOTA Netherlands Oil, Fats and Oilseeds Trade Association

OECD Organisation for Economic Cooperation and

Development

PCA Permanent Court of Arbitration at The Hague

SCC Stockholm Chamber of Commerce

SIAC Singapore International Arbitration Centre UNCC **United Nations Compensation Commission**

UNCITRAL United Nations Commission for International Trade Law **UNECE** United Nations Economic Commission for Europe UNIDROIT

The International Institute for the Unification of

Private Law

VIAC Vienna International Arbitration Centre

Western Australian Institute of Dispute Management WAIDM

WIPO World Intellectual Property Organisation

General Abbreviations

AAA/ABA Code AAA/ABA Code of Ethics for Arbitrators in Commercial

Disputes (1977, revised 2004)

AAA International AAA International Arbitration Rules (1997)

Rules

ACCP Austrian Code of Civil Procedure

Additional Facility the mechanism which allows for NAFTA Chapter 11

arbitrations involving non-ICSID member states to be

administered by ICSID

ADR Alternative Dispute Resolution
All ER All England Law Reports
ALQ Arab Law Quarterly
AO Arbitration Ordinance

Arb Arbitration (Chartered Institute of Arbitrators)

Arb J Arbitration Journal

Art Article

ADRLJ Arbitration and Dispute Resolution Law Journal

ALR Australian Law Review

Am J Comp L American Journal of Comparative Law
Am J Int L American Journal of International Law
Am Rev Int Arb American Revue of International Arbitration

Arb Int Arbitration International

ASA Bull Swiss Arbitration Association Bulletin

ASM Shipping apparent bias by reason of familiarity of arbitrator with

familiarity representatives of a party

Assn Association

BG bundesgericht (Swiss Supreme Court)
BGG Swiss Federal Supreme Court Act 2007
BGH bundesgerichtshof (German Supreme Court)

BJC Belgian Judicial Code
BLR Building Law Reports
CA Court of Appeal

Cal Energy bias apparent bias by reason of arbitrator's personal pro-

arbitration policy

Catalina bias actual bias for reasons of nationality

CCP Code of Civil Procedure

CCCP California Code of Civil Procedure

ChD Chancery Division

CISG United Nations Convention on Contracts for the

International Sale of Goods (1980)

Comm Commercial

Concordat Swiss Inter-Cantonal Arbitration Convention

Con LR Construction Law Reports

Co Company

Corp Corporation

CPR Civil Procedure Rules

DAA Dutch Arbitration Act (1986)
DAB Dispute Adjudication Board
DAC Departmental Advisory Committee
DCCP Dutch Code of Civil Procedure
Dis Res J Dispute Resolution Journal

ECHR European Convention on Human Rights
ECJ Court of Justice of the European Communities

EDNY Eastern District of New York
EDF European Development Fund
EEC European Economic Community
EFTA European Free Trade Area

ER English Reports
EU European Union

EWCA
 FAA
 F 2d
 F 3d
 England and Wales Court of Appeal
US Federal Arbitration Act (1925)
 US Federal Reporter Second Series
 US Federal Reporter Third Series

F Supp Federal Supplement

FALCA Fast and Low Cost Arbitration GCCP German Code of Civil Procedure

Geneva Convention Geneva Convention on the Execution of Foreign Arbitral

Awards (1927)

Geneva Protocol Geneva Protocol on Arbitration Clauses (1923)

Global Arb Rev Global Arbitration Review

Gough 'real danger' test for apparent bias

Green List the part of the IBA Guidelines that identifies situations

where no conflict of interest exists and the arbitrator

can act

Harv Int LJ Harvard International Law Journal

HKHC High Court of Hong Kong HKLJ Hong Kong Law Journal

HL House of Lords HL Cas House of Lords Cases

Hrvatska conflict challenge to counsel on the basis that they share chambers

with the arbitrator

IAA International Arbitration Act

Commercial Arbitration (2004)

IBA Rules of Ethics IBA Rules of Ethics for International Arbitrators (1987)
IBA Rules of Taking of Evidence in International

Evidence Commercial Arbitration (1999)
ICA International Commercial Arbitration

ICAS International Council of Arbitration for Sport

ICCA International Council for Commercial Arbitration

ICJ International Court of Justice

ICLQ International Comparative Law Quarterly

ICSID Rev ICSID Review/Foreign Investment Law Journal

ICSID Rules ICSID Arbitration Rules (2006)

IBRD International Bank for Reconstruction and Development

(the World Bank)

ILA Rep International Law Association Reporter

ILM International Legal Materials

Int ALR International Arbitration Law Review

ISA Investor-State Arbitration

IUSCTR Iran-United States Claims Tribunal

IUSCT Rep Iran-United States Claims Tribunal Reports

J Justice

JBL Journal of Business Law

J Int Arb Journal of International Arbitration
J Mar L & Com Journal of Maritime Law and Commerce

J World Inv Journal of World Investment

KB King's Bench

Laker Airways apparent bias by reason of the fact that arbitrator and counsel for a party are from the same chambers

LCJ Lord Chief Justice
LJ Lord Justice

Lloyd's Rep Lloyd's Law Reports

LMCLQ Lloyd's Maritime and Commercial Law Quarterly

Ltd Limited

Mealey's IAR Mealey's International Arbitration Reports

MERCOSUR Common Market of the Southern Cone of South America

Mitsubishi doctrine pro-arbitrability/pro-arbitration doctrine

Model Law UNCITRAL Model Law on International Commercial

Arbitration (1985)

Model Law 2006 UNCITRAL Model Law on International Commercial

Arbitration (1985) as amended in 2006

MR Master of the Rolls

NAFTA North American Free Trade Agreement NCCP French New Code of Civil Procedure

ND Cal US District Court for the Northern District of California New York New York Convention on the Recognition and Enforce-

Convention ment of Foreign Arbitral Awards (1958)

NYAD New York Appellate Division

NYC New York Convention

NSWLR New South Wales Law Reports

OG Swiss Federal Judicial Organization Act
OLG oberlandesgericht (German Court of Appeal)

Orange List the part of the IBA Guidelines that identifies situations

where a conflict of interest could exist in the eyes of the

parties and best practice is to give disclosure

Panama Convention Inter-American Convention on International Commercial

Arbitration (1975)

PC Privy Council

PCIJ Permanent Court of International Justice
PECL Principles of European Contract Law (1998)
Pinochet bias breach of the Rule in Dimes by reason of political

persuasion

Porter v. Magill 'real possibility' test for apparent bias

Pty Ltd Proprietary Limited
QBD Queen's Bench Division

QC Queen's Counsel

Red Book FIDIC Conditions of Contract for Construction (1987)
Red List the part of the IBA Guidelines that identifies situations

where a conflict of interest exists and the arbitrator

cannot act

Rev Arb Revue de l'arbitrage

RUAA Revised Uniform Arbitration Act (2000)

Rustal Trading familiarity arising from prior dealings between arbitrator

familiarity and a party

Saudi Cable bias breach of the Rule in Dimes by reason of the fact that the

arbitrator has commercial interests which are aligned with

those of a party

S Section

SC Senior Counsel

S Ct Supreme Court of the United States SDNY Southern District of New York

SLR Singapore Law Reports

SPIL Swiss Private International Law (1987)

Strasbourg the jurisprudence of the European Court of Human Rights

jurisprudence

Sussex Justices 'reasonable apprehension' test for apparent bias

TCPRC Texas Civil Practice and Remedies Code

Telekom Malaysia apparent bias by reason of the arbitrator's prior

bias determination of an unrelated matter factually or legally

similar to the case before them

UAE United Arab Emirates

UCP 500 ICC Uniform Customs and Practices for Documentary

Credits (1994)

UDHR Universal Declaration of Human Rights (1948)

UN United Nations

UNCITRAL United Nations Commission on International Trade Law

UNCITRAL Rules UNCITRAL Arbitration Rules (1976)

UNCTAD United Nations Conference on Trade and Development
UMLEC UNCITRAL Model Law on Electronic Commerce (1996)
UPICC UNIDROIT Principles of International Commercial

Contracts (1994)

WAMR World Arbitration and Mediation Report

WAR Western Australia Reports

Washington Convention on the Settlement of Investment Convention Disputes Between States and Nationals of Other States

(1965)

WTAM World Trade and Arbitration Report

World Bank International Bank for Reconstruction and Development

Yale LJ Yale Law Journal

YCA Yearbook of Commercial Arbitration

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