ARBITRATOR CHALLENGES

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It had not occurred to me that the practice of arbitration in the resolution of international commercial disputes has such a long history. Amongst the oldest institutions in the area is the London Court of International Arbitration, established in 1892 as the London Chamber of Arbitration.[1] At the time of its founding, it was said "with a rhetoric that no doubt exceeded the reality":[2]

> This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer-up of strife.[3]

It is also surprising to me that, more than a century ago, there already appeared entrenched a general dissatisfaction with the conventional litigation process as a means of resolving disputes. While perhaps overly optimistic, Lord Bramwell's sentiments were likely meant to convey a hope that arbitration would provide an expeditious, cheap and simple alternative.

Much as with the common law and its application, which has evolved over hundreds of years and has become increasingly complex in the process, it would appear that the practice of arbitration has similarly become increasingly complex (albeit not to the same extent). While one of arbitration's most attractive features is that parties may craft the manner in which they choose to resolve their disputes, there remain rules to apply, jurisdictional and other challenges that may necessitate the involvement of state

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[1] Redfern, Alan and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell Limited, London: 2004) (hereinafter "Redfern"), page 5.
[2] Redfern, supra, page 5.
[3] Redfern, supra, page 5, citing Manson (1893) IX L.Q.R. 86, in turn cited by Veeder and Dye, *Lord Bramwell's Arbitration Code*, (1992) 8 Arbitration International 330.

courts, discovery procedures and impediments that may frustrate or delay the process. One may ask whether, in light of this, arbitration has become a process not unlike litigation, with its attendant intrigues, ploys and grandstanding.

Amongst the procedures inherent in the arbitration process is one for the challenge of arbitrators on the basis that they are not impartial or independent. Such challenges appear to be increasingly common. Redfern and Hunter write:

> Challenges of arbitrators were at one time a rare event. If a vacancy occurred, it was usually because of the death or resignation of an arbitrator. However, modern commercial arbitrations often involve vast sums of money, and the parties have become more inclined to engage specialist lawyers, who are expert in manoeuvres designed to obtain a tactical advantage, or at least to minimize a potential disadvantage.[4]

The authors go on to state, however:

> This is not to say that all challenges are unmeritorious. On the contrary, in the past there was probably too great an acceptance by the parties of manifestly dependent or biased arbitrators nominated by their opponents. Furthermore, challenge is not merely a tactic employed by respondents to cause delay and disruption for the claimant; it is a matter that must be considered seriously by claimants, notwithstanding the inevitable delay, where the arbitral tribunal may be constituted in a manifestly inappropriate form. Challenges of a presiding arbitrator are rare, but not unknown; they are usually based upon some prior connection with one of the parties that gives rise to doubts as to the appointee's independence.[5]

The manner in which an arbitrator may be challenged, and the mechanisms for doing so, are codified in the various sets of arbitration rules that may be used and to which parties may resort. For instance, the ADR Institute of Canada, Inc.'s *National Arbitration Rules* provide[6]:

> An Arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality, or if he or she does not possess the qualifications agreed upon by the parties.
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> A party who intends to challenge an Arbitrator shall, within 7 days after becoming aware of the appointment, or after becoming aware of any circumstances referred to in this Rule, send a written statement of the challenge and the reasons for the challenge to the Tribunal, if it has been fully constituted, and to the Institute. If the challenged Arbitrator withdraws or the other party agrees to the challenge, the mandate of the Arbitrator terminates.

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[4] Redfern, supra, page 245.
[5] Redfern, supra, page 245.
[6] Rule 18, ADR Institute of Canada, Inc., *National Arbitration Rules* (amended October, 2008). Emphasis added.

In the case of an arbitration with a single Arbitrator, if the Arbitrator challenged does not withdraw and the other party does not agree to the challenge, the single arbitrator shall decide on the challenge. If there is a three-person panel the Chair, if he or she is not challenged, shall decide the challenge. If the Chair is challenged, all the Arbitrators may decide the challenge.

Also, the often cited and used UNCITRAL Arbitration Rules provide[7]:

Article 9

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

   (a) When the initial appointment was made by an appointing authority, by that authority;

   (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

[7] United Nations Commission on International Trade Law (UNICITRAL), General Assembly Resolution 31/98.

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

In essence, the aforementioned rules set out two, perhaps three, grounds upon which an arbitrator may be effectively challenged: a lack of impartiality; a lack of independence; or a lack of competence (as defined by the parties) in the subject matter of the arbitration. Arguably, a lack of impartiality and an absence of independence are interrelated and may result in what may be referred to simply as "bias".

As is evident from the ADR Institute of Canada's Rules, a challenge is to be determined by the arbitral tribunal itself, whether comprised of one or three arbitrators. The UNCITRAL Rules contemplate that a challenge is to be determined by an "appointing authority" that is presumably impartial.

Short of the third factor listed above, the grounds for challenge are not unlike those that would disqualify a judge sitting in a court of law, where it is asserted that there may be a "reasonable apprehension of bias" should the challenged judge preside over a certain matter before her.

Indeed, arbitration is seen as a judicial or quasi-judicial process. That is not surprising, given its form and objective, and the general recognition it has attained as a viable means of settling disputes outside of the traditional court system. In *Szilard* v. *Szasz* the Supreme Court of Canada held that:

> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their functions not as advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular

> they must be untrammeled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to.[8]

After reviewing a number of authorities, the Court went on to state:

> These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who sit in judgment on him and his affairs.[9]
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> ….
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> Nor is it that we must be able to infer that the arbitrator "would not act in an entirely impartial manner"; it is sufficient if there is a basis for a reasonable apprehension of so acting.[10]

The challenge procedure varies. Depending on the law of the jurisdiction under which the arbitration takes place and the arbitration rules agreed upon by the parties, a challenge may be determined by the courts, the arbitral tribunal or by the arbitral institution in question.[11] Redfern and Hunter write:

> Most national laws provide for a challenge to an arbitrator to be made during the course of the arbitration as well as on an application to set aside the award. Delays are often minimized by provisions that restrict challenges to objections founded on information which has recently come to the attention of the challenging party, prohibit any appeal from the initial ruling on the challenge, and permit the arbitration to proceed while the challenge is pending.[12]

The question has been raised, not unreasonably in my view, of the satisfactory disposition of a challenge by the arbitrator challenged or the panel of which he forms part. The Newfoundland and Labrador Court of Appeal dealt with that question as late as 2008 in *C.E.P., Local 60N* v. *Abitibi Consolidated Inc.*[13] At issue was the impartiality of an arbitrator selected by the employer to sit on an arbitration board empanelled to determine a union grievance. The union claimed there was a reasonable apprehension of bias on the part of the employer's selection. Notwithstanding the employer's protest that

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[8] 1954 CarswellOnt 143 (hereinafter "*Szilard*") at paragraph 2.
[9] *Szilard*, supra, at paragraph 16.
[10] *Szilard*, supra, at paragraph 17. Emphasis added.
[11] Redfern, supra, page 248.
[12] Redfern, supra, page 248.
[13] *C.E.P., Local 60N* v. *Abitibi Consolidated Inc.*, 2008 CarswellNfld 10 (hereinafter "*C.E.P.*").

the arbitration board had no jurisdiction to determine the challenge, the board determined that it did and proceeded to disqualify the employer's choice of arbitrator. On application to the courts for judicial review of the board's determination of the challenge and to set aside the arbitral award, the court held in favour of the employer. On the originating application, the court held:

> … A major principle in the establishment of an extrajudicial procedure for resolution of labour disputes by arbitration was that the procedure would be both summary and expeditious. The passage of time has layered upon these processes many of the trappings of a full judicial proceeding thereby militating against the cost efficient and expeditious process initially envisaged by submitting such matters to arbitration. There is, as Mahoney J.A. correctly points out[14], a risk of the paralysis of tribunals at the whim of anyone willing to allege bias. This is perhaps a greater risk at the Arbitration Board level where the same mechanisms as exist at the Court level are not available to punish frivolous objectors by awards of costs.
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> Similarly, I am empathetic to the notion expressed by Jones and de Villars[15] … that perhaps the choice of whether or not to proceed with a ruling of bias should be left to the Board and that the Board may make its decision based upon a weighing of the availability, costs and delays inherent in each option, together with any statutory requirements about quorum and representation.
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> However these realistic and practical considerations cannot, in my view, overcome the principles set out in *Szilard* v. *Szasz* ….[16]

The judge at first instance came to what may be seen to be the reasonable conclusion that an arbitrator ought not to rule on a challenge to his own standing on the basis of bias. To do so would be to ignore the reasonable principles enunciated in *Szilard*, which sought to maintain the impartiality, independence and integrity of the arbitration process.

The Newfoundland and Labrador Court of Appeal, however, came to a different conclusion. The Court agreed that arbitrations are subject to the principles of fundamental justice and that an arbitral tribunal should be both independent and seen to be independent, failing which a party ought not to be compelled to submit to its

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[14] In *Flamborough* v. *National Energy Board, Interprovincial Pipelines Ltd. and Canada* (1984), 55 N.R. (Fed. C.A.) cited in *C.E.P.*, supra, at paragraph 14.
[15] Jones, Q.C. and de Villars, Q.C., Principles of Administrative Law (Third Edition) (Carswell, 1999).
[16] *C.E.P.*, supra, at paragraph 9.

jurisdiction.[17] The Court stated the objective test for reasonable apprehension of bias set out by the Supreme Court of Canada[18], as follows:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.

The Supreme Court also held "that the apprehension of bias must also be substantial".[19]

While the principle and the applicable test are clear, the Court concluded that "[w]hat is not clear is who should apply them in the first instance."[20] The Court approached the matter from what may be called a practical and deferential approach. Following a review of authorities on the subject and the conclusion that there was nothing conclusive to glean from them, the Court found that "[o]bliged recourse to the court as soon as an allegation of bias is raised would have the effect of causing long and unnecessary delays."[21] A question of bias should first be addressed to the person against whom the challenge is made. While the "theoretical problems" raised by the judge of first instance (presumably being those associated with a party adjudicating as to his or her own impartiality and independence) may be significant, they are trumped by the "the practical considerations of efficiency and speedy resolution of employee/employer grievances."[22] No doubt similar considerations apply in the context of other types of disputes. The Court went on to conclude:

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[17] *C.E.P.*, supra, at paragraph 13.
[18] In *Committee for Justice & Liberty* v. *Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at page 394 cited in *C.E.P.*, supra, at paragraph 14.
[19] *C.E.P.*, supra, at paragraph 14.
[20] *C.E.P.*, supra, at paragraph 15.
[21] *C.E.P.*, supra, at paragraph 35.
[22] *C.E.P.*, supra, at paragraph 35.

> There are also advantages … of respect for the tribunal and the prevention of unnecessary interference by the court, cost savings and the tempering effect of having to confront the board member with an allegation of bias, thereby also placing on the record the facts relevant to the bias application. Most allegations of bias or reasonable apprehension of bias will resolve themselves either by the party alleging bias being satisfied with the explanation given, or by the person challenged recusing himself or herself. If, however, the person challenged decides there is no good reason for recusal and the party alleging bias is not satisfied, the bias issue can be dealt with by the court by way of judicial review after the arbitration has been heard and a decision filed, together with, if relevant, a judicial review of the decision on its merits. Proceeding in this way fosters timeliness in the resolution of grievances while ensuring that the allegation of bias or reasonable apprehension of bias can, if necessary, be dealt with ultimately by an impartial judiciary.[23]

The most expedient process, in other words, is to complete the arbitration with the impugned member sitting (assuming that she has not recused herself and the challenging party is not satisfied with the explanation given for not doing so) and resort to the Court only then. At that point, the Court can adjudicate on the basis of a complete record as to the issue of bias and the substantive decision of the arbitral tribunal. In preferring this approach, however, one might ask whether, if the Court determines that there was bias or a reasonable apprehension of bias present, does that not in itself render the arbitral decision unsatisfactory and, if so, does not fairness and expedience dictate that the issue of bias should be determined and dealt with early on, with the court's intervention, if necessary?

Perhaps the preferred approach is one such as is provided for by the Rules of the International Chamber of Commerce, or ICC, which has its own internal "court" charged with ensuring the application of the ICC Rules.[24] Article 11 of the ICC Rules provides as follows:

> 11(1) A challenge to an arbitrator, whether for an alleged lack of independence or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
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> 11(2) For a challenge to be admissible, it must be sent by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the

[23] *C.E.P.*, supra, at paragraph 36.

[24] International Chamber of Commerce, International Court of Arbitration, *Rules of Arbitration*, Article 1.2.

> 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.
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> 11(3) The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the Arbitral Tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.[25]

Reference in the ICC Rules to "the Court" is to that institution's own internal "court", comprised of members that are not part of the impugned arbitral tribunal, and which determines the merits of the challenge. This may well be a preferable approach and a means of avoiding the delay that is associated with early resort to the state's courts. It may also be a means of ensuring, to an extent at least, that the principles of fairness and due process, and a party's entitlement to a fair and impartial hearing, are respected.

As it stands, there is a general recognition that arbitration in resolution of disputes is a recognized and entrenched mechanism for the resolution of disputes. That is consistent with the trend towards greater reliance on alternative dispute resolution, as opposed to the over-taxed and under-resourced judicial court system, as a means of dealing with disputants and their disputes in a relatively speedy, effective and equitable manner.

Notwithstanding the basic principles enunciated in cases such as *Szilard*, namely the necessity of impartiality and fairness in the conduct of arbitral proceedings, it seems that more recent trends point toward a recognition that the arbitral process is meant to effective and efficient and that the courts ought to recognize that. Indeed, a case such as *C.E.P.* does not purport to suggest that basic principles of justice ought to be dispensed

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[25] International Chamber of Commerce, International Court of Arbitration, *Rules of Arbitration*, Article 11. Emphasis added.

with, but only that courts ought to be the last resort in circumstances where parties have agreed to resolve disputes by alternative means.

It would seem, perhaps to repeat what has been alluded to above, that, if the arbitral process as a whole was able to devise a credible mechanism for the resolution of its own procedural complications, such as arbitrator challenges, in a manner that is independent and transparently impartial, the process would require less recourse to the conventional courts.

TABLE OF CASES

1. *Szilard* v. *Szasz*, 1954 CarswellOnt 143.

2. *C.E.P., Local 60N* v. *Abitibi Consolidated Inc.*, 2008 CarswellNfld 10.

TEXTS

1. Redfern, Alan and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell Limited, London: 2004).

OTHER SOURCES

1. ADR Institute of Canada, Inc., *National Arbitration Rules* (amended October, 2008).

2. International Chamber of Commerce, International Court of Arbitration, *Rules of Arbitration*.

3. United Nations Commission on International Trade Law (UNICITRAL), General Assembly Resolution 31/98, *UNCITRAL Arbitration Rules*.