Notes from a Level Twenty Seven Chambers Seminar

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International arbitration requires Australian practitioners to appear against opponents from other jurisdictions with different procedures and ethical rules. What would be unethical witness coaching by a Queensland barrister is good practice for a New York attorney, although undoubtedly some behaviour, memorably described in a 2013 book 'Guerrilla Tactics in International Arbitration', should be indefensible everywhere.

There is an old joke, how does a 400-pound gorilla behave? Any way it wants to. The club of very senior, very experienced, and very-often-appointed arbitrators arguably are in the same position, although happily they generally behave well.

I will discuss two recent cases. The first deals with arbitrators' obligation to make disclosure of other appointments. The second deals with the use of so-called 'guerrilla tactics'.

The Deepwater Horizon Case - Arbitrator's Duty of Disclosure

This was an application to remove 'M', the tribunal president in a London seated arbitration. The reference was between Halliburton and its insurer Chubb in relation to Halliburton's claim in relation to its share of liability for the accident on the 'Deepwater Horizon' oil rig.

M was described as 'a well-known and highly respected international arbitrator' who 'enjoys a reputation as an international arbitrator of the highest quality and integrity'. When appointed, M disclosed he had previously acted in a number of arbitrations with Chubb as a party, including appointments on behalf of Chubb. Subsequently, M accepted another appointment by Chubb, in relation to an insurance claim made by Transocean against Chubb which also arose out of the Deepwater Horizon accident. M failed to disclose the new appointment to Halliburton, which learned of it subsequently.

Popplewell J in *H v L* [2017] 1 WLR 2280 held that the English *Arbitration Act* test of 'circumstances that give rise to justifiable doubts as to the arbitrator's impartiality' was not made out. (This is the same test as under Articles 12 and 13 of the UNCITRAL Model Law, which applies in Australia.) Popplewell J found it to be irrelevant whether the IBA Guidelines on Conflicts of Interest in International Arbitration were breached by the arbitrator's failure to comply with his ongoing obligation to disclose (the circumstances fell squarely within category 3.1.5 on the Orange List, i.e. currently serving as arbitrator in another arbitration involving one of the parties).

The Court of Appeal (*Halliburton Co v Chubb Bermuda Insurance Ltd* [2018] 1 WLR 3361) found that it would have been 'best practice' for M to have disclosed the subsequent appointment, and so as a matter of law disclosure should have been made, however the Court agreed with Popplewell J that apparent bias had not been made out.

An appeal to the Supreme Court was heard on 12 and 13 November 2019, with judgment currently reserved. The appeal was notable for the Court allowing various arbitration institutions to intervene. The Chartered Institute of Arbitrators, the ICC, and the LCIA argued that the Court of Appeal had not imposed a high enough standard for disclosure, and that this would be detrimental to the reputation of London international arbitration. GAFTA and the London Maritime Arbitrators' Association were concerned for the implications of arbitration in specialist sectors, if repeat appointments necessarily gave rise to apparent bias. The Court of Appeal had recorded as 'telling' a concession by Chubb's counsel that ten appointments for one party might objectively give rise to justifiable doubts as to impartiality, and this raised the question whether there is a 'magic number' of too many appointments.

The Jaguar Case - Unethical Abuse of the Law or Rules

In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2018] SGHC 101, Kannan Ramesh J dismissed an application under Article 34 of the Model Law to set aside the award made against CMNE, whose contract to build a coal-fired power generation plant for Jaguar, an electricity supplier in Guatemala, had been terminated by Jaguar.

The case is notable for accusations of 'guerrilla tactics' on both sides, and Kannan Ramesh J's reference to the taxonomy adopted by the authors of 'Guerrilla Tactics in International Arbitration'. These were described as violation or unethical abuse of the law or rules as a conscious tactical decision with the aim to obstruct, delay, derail or sabotage the arbitral proceeding. Three categories were distinguished: (1) 'extreme' guerrilla tactics such as violence or threats of violence or the blatant abuse of state power by such methods as arbitrary detention or malicious prosecution; (2) 'common' guerrilla tactics such as bribery, intimidation and harassment of arbitrators and witnesses, phone-tapping and other surveillance, fraud, delay tactics and frivolous challenges; and (3) 'rough riding' which does not amount to a 'guerrilla tactic' but violates the spirit of international arbitration, and includes withholding evidence, and ambushing opponents with evidence.

Jaguar alleged CMNE had interfered with its completion of the project after terminating CMNE's contract, offering money to suppliers and contractors not to work for Jaguar, and engaging in physical intimidation of contractors, suppliers and employees. As a result Jaguar obtained an 'Attorneys' eyes only' order from the tribunal with regard to certain documents. Kannan Ramesh J held this order was not a breach of the principles of natural justice.

CMNE complained about Jaguar having seized the construction site area and documents, and alleged Jaguar had disclosed documents in a deliberately disordered and delayed manner. Kannan Rakesh J held that if there was an implied duty to arbitrate in good faith, Jaguar had

not breached it because its termination had been contractually valid, and any difficulties in relation to disclosure resulted from the pressure of an expedited hearing timetable and CMNE's own delay in setting up the data room.

Current Guidelines

Current relevant guidelines, some of which provide for sanctions upon parties and counsel, include the IBA Guidelines on Party Representation 2013, the Annex to the LCIA Rules 2014, the SIArb Guidelines on Party-Representative Ethics 2018 and the ICC Note to Parties 2019.

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During a legal career of over twenty-five years, Shane has practised in national and international commercial dispute resolution as a solicitor and barrister, as well as an academic.

Shane's practice encompasses cases concerning building & construction and contractual disputes; corporations law; insolvency; professional indemnity claims; real property; restraint of trade, securities and trade practices. Shane also acts in succession matters, tort claims and has specialist experience in public and private international law. More recently, Shane has built a sizeable practice in class action matters and was listed in this area by the Australian Financial Review's *Best Lawyers*® 2020.

A highly experienced, adaptable and approachable lawyer Shane is adept at assisting at all stages of dispute resolution. His experience, both led and unled, includes matters in the Supreme, Federal and High Courts of Australia. He also represents parties in mediations and all forms of ADR.

Shane is a national councillor and the Queensland convenor for the Chartered Institute of Arbitrators, Australian branch.

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