Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: GAR Live Debate on Arbitrator Challenges

Edern Coënt (Kim & Chang) · Friday, October 23rd, 2020

For its 10th anniversary, GAR Live Hong Kong took place on day four of the 2020 Hong Kong Arbitration Week.[1)] Held in full virtual format, the conference was rebranded "*GAR Interactive*" for the occasion. The final session featured the classic GAR Live debate adopting the Oxford Union style on the motion: "*this house believes that there is no such thing as a bad challenge*".

The debate was judged by **Doug Jones** of Atkin Chambers with:

- **Judith Levine**; and
- **Robert Wachter** of Lee & Ko

For the motion, and

- **Meg Utterback** of King & Wood Mallesons; and
- **Ing Loong Yang** of Latham & Watkins

Against the motion.

Submissions

As the first speaker for the motion, **Ms Levine** introduced her team's main argument, that there is no such thing as a bad challenge since all challenges, even the rejected ones, can bring about positive systemic change by clarifying certain issues. Ms Levine presented four examples of such issues.

1. *The case of "the overbooked arbitrator", where a challenge was brought before the PCA as the challenged arbitrator's schedule was deemed so busy as to constitute a de facto incapacity to perform her mission:* Although the challenge was rejected, it put the spotlight on an issue that indeed has become a cause of both concern and attention over the years. Positive change occurred as a result, with the obligation of every nominated or otherwise considered arbitrators to fill out a two-year calendar as part of their statement of acceptance in ICC arbitration cited as an example.
2. *The case of "the delegator", where an arbitrator was challenged for not reading the submissions*

or drafting the award himself or herself – an issue often linked to the one above: The use of administrative secretaries, for instance, has become a common practice, but the implementation of such practice has attracted increased scrutiny since Russia brought its infamous challenge in the *Yukos* case. However unjustified, such challenges have flagged a sensitive issue and have indeed led to positive systemic change, with the HKIAC Guidelines on Use of Secretary to Arbitral Tribunal being a prime example thereof.

3. *The case of "the bully", where a challenge was brought against an arbitrator who banged her fist on the table to interrupt counsel:* Although the challenge was rejected and the arbitrator was found to have acted within the scope of her mandate and power to conduct the proceedings, this type of instance has also led to the publication of new guidelines, such as the recent ICCA guidelines on standards of practice.
4. *"The nuclear option", a rarely deployed strategy of challenging the whole tribunal:* Here, a party challenged the whole tribunal after it decided to hold, over that party's objection, the hearing by videoconference. The challenge was rejected, as the PCA found that the tribunal's general power to conduct the proceedings included the power to decide that the hearing should be virtual despite one party's objection to that solution, and that such decision provided no basis for an appearance of bias. Here again, this particular challenge helped clarify a significant and most timely issue.

Ms Levine concluded that none of the above challenges, despite being rejected, were not "bad" challenges since they raised topical issues and helped clarify them.

As the first speaker against the motion, **Mr Yang** immediately pointed out the fact that, based on available statistics, bad challenges far outnumber good ones. Mr Yang stated that, at the heart of arbitration, there is a need to strike a balance between a party's right to a fair arbitration and a party's right to select its arbitrator. Three points were developed against the motion.

First, what is a bad challenge? As illustrated by the previous session of GAR Interactive of the same day, the "*GAR decision time*", there are a number of scenarios where parties, in-house counsel and external counsel have had to consider whether a challenge should be brought. Parties have to consider their chances of success in challenging an arbitrator – "*if you shoot the king, make sure you do not miss*" or "*shoot to kill*" were some of the phrases used to illustrate that point – but also the potential ramifications for the case after the decision on the challenge is received, particularly if it fails. In other words, a challenge is not always a good option.

Second, in practice, the majority of challenges do fail. The heavy and advertised filtering of challenges by institutions suggests that bad challenges do exist. Looking at Article 11.6 of the HKIAC Rules for instance, the use of the term "*justifiable*" means that the challenging party will have to evaluate whether its challenge is good or bad.

Third, a bad challenge is not always one brought to intimidate the arbitrator or simply because an adverse decision has been rendered. Even a meritorious challenge may bring about undesired effects, and, in that sense, it may constitute a bad challenge, in that it could undermine the confidence of other arbitrators or derail the proceedings.

Mr Yang concluded by reminding the audience that before an arbitrator is confirmed, she must declare her independence, impartiality and availability. This declaration constitutes a cornerstone of arbitration and should not be sullied by bad challenges.

Speaking second in support of the motion, **Mr Wachter** asked: what is good for arbitration?

Parties should not be afraid to make their rights heard. Mr Wachter submitted that all members of the arbitration community, counsel, arbitrators and institutions, are in service to the parties. User confidence is the most important, and the right to challenge is essential to the overall process. With that foundation in mind, such a right would be meaningless if it could not be exercised without fear. Mr Wachter submitted that, as a community, arbitration practitioners should push against the sentiment that if the challenge fails, the Tribunal will hold a grudge for the duration of the case, or indeed forever. He argued that the approach to challenges has been too conservative, putting too much emphasis on the assurance of success.

Mr Wachter also submitted that there are too few challenges, and he cited the LCIA statistics which show that challenges are only introduced in 2% of the cases. Mr Wachter stressed how useful the publication by the LCIA of its data on 60 anonymized cases of challenges has been to him, and submitted that everyone would benefit from more challenges.

Mr Wachter concluded by noting that, in actual practice, challenges do not really cause delay, as a number of institutions issue their decisions within two weeks, so there is no need to consider that challenges are bad. Self-regulation being the best regulation, we will be stronger if we accept that there is no such thing as a bad challenge.

Speaking last and against the motion, **Ms Utterback** stressed at the outset that the premise of the debate was that there is no such thing as a bad challenge and clarified that she and Mr Yang did not submit that there should be no challenges, but that they should be valid and appropriate.

On systemic change, Ms Utterback submitted that we should turn to our community and discuss these issues in fora such as GAR. The bad challenges that we are considering here, Ms Utterback submitted, are the black arts, challenges brought about to gain an advantage, or pretending that a disclosure leads to a justified challenge. These can be identified and discussed.

Against the proponents of the motion, Ms Utterback also submitted that bad challenges do not create beneficial or useful case law. They are introduced in bad faith and we learn nothing from their rejection. Referencing the IBA guidelines, Ms Utterback stated that "*unless you're in the red, careful where you thread*", and procedural challenges also almost always fail, with little to learn from that. Statistics from various institutions such as the LCIA, the ICC or the HKIAC indeed show that challenges in general rarely succeed, because most of them are bad challenges.

A bad challenge, Ms Utterback submitted, is when a challenge is brought for reasons other than removing the arbitrator, such as to disrupt, delay or intimidate. There is a high risk for a bad challenge to backfire. A bad challenge, if brought simply because an unfavorable decision was issued, can also reinforce an adverse ruling.

Both sides made rebuttals.

Vote

Speaking after both teams had concluded their submissions and before the audience was asked to vote – per the interactive and virtual format adopted this year – on whether or not the motion should be accepted, **Professor Jones** immediately remarked that today's debate had been the most substantive contribution to the subject he had ever heard and that this is indeed a very important issue.

The fate of the motion was put to a poll, and the results were 36% for and 64% against. Professor Jones noted that this was a very close run for a debate that was not so easy to run.

Conclusion

Indeed, the result of the interactive decision by the audience was quite surprising. It may well be that the vote mostly recognized the quality of the submissions made for the motion, rather than an actual opinion that there is no such thing as a bad challenge. As most practitioners having had unfortunate experiences with challenges would recognize, the first reaction that would come to mind when seeing the motion proposed today would be that bad challenges indeed do exist. These can be challenges brought for tactical reasons, challenges brought simply to cause delay or disruption, or maybe challenges brought out of spite or a lack of experience.

The proponents of the motion, however, approached it from a different and more systemic angle, suggesting that challenges are in fact always good in that even their rejection clarifies issues and can bring about positive change. In that sense, the interactive vote may also have sent a different message: that despite constant and positive evolution, there is still a need for more transparency in international arbitration.

Most institutions have in recent years taken steps towards greater transparency, and in particular with respect to arbitrators' disclosure and challenges. The IBA Guidelines are most often referred to by counsel but other and sometimes more specific standards have been laid out so as to provide further guidance. One can think of the developments found in the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration for instance. It would appear, at least judging from the audience's reaction to today's debate, that this is still not enough. Publication of statistics by institutions does not appear very useful without providing actual details of the challenges themselves and the reasoning of the deciding body, which can easily be done in anonymized formats, as was argued today.

By way of example, Professor Jones mentioned arbitrators who were successfully challenged for defending other members of the tribunal who had been the target of an unmeritorious challenge. The same sometimes is true for the challenged arbitrator herself, who responds too strongly to what she perceived as an unjustified or hostile tactic. Whether this type of challenge should be accepted would of course be heavily dependent on the circumstances of the case, but the arbitration community could also do more so that such situations do not arise in the first place. That may be achieved through different means, and the unwavering stance against unmeritorious challenges is one of them. Clarity on what does constitute a bad challenge and how parties, counsel, arbitrators and institutions should approach them, is also necessary, and today's debate certainly contributed to the discussion on arbitration's path towards more transparency.

This concludes our coverage of Hong Kong Arbitration Week 2020. More coverage from Hong Kong Arbitration Week is available here.

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References

?1 The views expressed in this article are those of the author's and should not be attributed to Kim & Chang.

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