The Role of the Judge in Commercial Arbitration

Anselmo Reyes*

Ladies and gentlemen:-

1. I am delighted and honoured to have been invited to speak at this international conference.

2. It was suggested that I should speak on "The Role of the Judge in Commercial Arbitration". That has occasioned much soul-searching on what (if anything) I could say on this subject that has not already been said many times before by more eloquent speakers.

3. It is easy to say what the role of the judge should be in relation to commercial (and here I focus on "international commercial") arbitration. A judge should be fully supportive of commercial arbitration. In other words, the judge should not interfere with the enforcement of an arbitration agreement, unless the agreement is inapplicable to the relevant dispute or is null and void. In respect of enforcement of an award, the judge should essentially be pro-enforcement, unless there has been some blatant lack of due process in the making of the award or the award is repugnant to the Court's fundamental conceptions of arbitrability, morality and justice.

* Anselmo Reyes has been Professor of Legal Practice at Hong Kong University since October 2012. He was a judge of the High Court of Hong Kong from 2003-12. In April 2013 he became Representative of the Asia-Pacific Regional Office of the Hague Conference on Private International Law. In January 2015 he was appointed as an International Judge of the Singapore International Commercial Court.

4. So much is apparent from the New York Convention, which I take to be the international standard to which all jurisdictions should aspire, whether or not they are actually parties to the treaty.

5. But what does all that mean in practice? More specifically, what considerations should be going through a judge's mind when faced with an application for the enforcement of an arbitration agreement or an arbitral award? How does a judge, who may never had significant first-hand experience with arbitration before his or her appointment, get a practical feel as to how he or she should be handling Court applications relating to commercial arbitration?

6. I believe that I can usefully say something today in answer to the questions just posed. I can do so by reference to my experience as the judge in charge of the Arbitration List in Hong Kong from 2004 to 2008 and on my experience as an arbitrator since stepping down from the Hong Kong Judiciary in 2012.

7. Before becoming a judge, I had been counsel in a number of commercial arbitrations. I therefore thought that I knew it all so that, when appointed as Arbitration List judge, I was confident that I had a solid foundation for my decisions. However, since my retirement from the Hong Kong Judiciary, I have had occasion to read more widely into arbitration in connection with my work as a professor and arbitrator. The result of all this has been humbling. In short, had I known then what I know now, I would have decided many of my cases differently.

8. In the time that remains, I propose to explain why. I will frame my confessions around 3 Hong Kong cases (two decided after I left the Judiciary). For today's purposes, I am not interested in the actual reasoning or outcome of the 3 cases to which I will refer. I do not necessarily think that the 3 cases were wrongly decided. I simply use the facts of the cases as starting points for reflections on what it means for a judge to be truly supportive of commercial arbitration.

9. The first case is S v B (Construction and Arbitration Proceedings Nos.12 & 16 of 2013) decided on 24 July 2014. S alleged that certain disputes with B did not fall within the scope of an arbitration agreement. The Arbitral Tribunal ruled that the disputes fell within the arbitration agreement and ordered S to pay an amount to B in respect of those disputes. S unsuccessfully challenged the tribunal's jurisdictional ruling in Court.

10. Much of the Court's judgment is taken up with a consideration of the Court's approach to jurisdictional challenges: Are such proceedings before the Court supposed to be a complete re-hearing or merely a review of the Tribunal's ruling on jurisdiction? Following a long line of Commonwealth authority, the Court decided (quoting (among others) Lord Mance's well-known dictum in Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763 (HL), §30) that "[t]he tribunal's own view of its jurisdiction has no legal or evidential value when the issue is whether the tribunal had any legitimate authority in relation to the Government at all".

11. The Court's view reflects what I understood the position to be when I was a judge. There can be little doubt that, as a matter of strict common law, the principle is as the Court stated to be. However, that begs the question whether the common law position is correct.

12. Since stepping down from the Hong Kong Judiciary, I have been much influenced by the discussion of competence-competence in works such as Professor Jan Paulsson's The Idea of Arbitration (Oxford, 2014).

13. At the risk of over-simplifying the more nuanced arguments of Professor Paulsson and others, one might roughly identify 4 general situations of jurisdictional challenge:-

(1) a denial that there ever was an arbitration agreement;

(2) an acceptance that there is a valid arbitration agreement, but a denial that a

dispute falls within its terms;

(3) an acceptance that there is a valid arbitration agreement and that a dispute could fall within its terms, but a denial that a condition precedent to the start of arbitration has been met; and,

(4) an acceptance that there was at one time an arbitration agreement, but an allegation that as a result of some vitiating factor (illegality, fraud, the happening of a condition subsequent, etc) the agreement has become null, void or unenforceable.

14. The proposition is that it should only be in situation (1) that a Court should engage in a complete re-hearing. Otherwise, in situations (2) to (4), since the parties apparently initially agreed to arbitrate, the Court should defer to an arbitral tribunal's views as to whether the agreement has or has not ceased to be operative in relation to a particular dispute.

15. A judge might believe that an arbitral tribunal's analysis of jurisdiction in situations (2) to (4) is flawed in some way. However, judicial support of arbitration means that the Court should refrain from interference, even where the tribunal has possibly reached a wrong conclusion on jurisdiction. Thus, I am suggesting that, even in the area of competence-competence, the Court should exercise judicial restraint. Depending on the type of jurisdictional challenge, a Court should think twice before embarking on a complete re-hearing of the challenge.

16. The second case is Astro Nusantara International BV v PT Ayunda Prima Mitra (Construction and Arbitration Proceedings No.45 of 2010) decided on 17 February 2015. First Media applied for an extension of the time in which to set aside a Court order making a Singapore award enforceable.

17. First Media had not applied to set aside the original award in Singapore within the time allowed there for so doing. However, when the relevant parties applied to enforce the award in Singapore, First Media successfully resisted enforcement on

the ground that there was no arbitration agreement between the relevant parties and First Media. The Singapore Court of Appeal ruled that the arbitral tribunal had no jurisdiction to make the award against First Media.

18. First Media had originally not applied to set aside the Hong Kong order recognising the Singapore award, because First Media was under the mistaken impression that it had no assets in Hong Kong. When it realised its error, it belatedly decided to apply to set aside the Hong Kong order. But it had to apply for an extension of the time in which it could do so. At the time of the hearing of First Media's application for an extension, the Singapore Court of Appeal had refused enforcement of the award in Singapore. There was also a pending application by First Media in Singapore to set aside the award in Singapore.

19. My focus is on a remark made by a Hong Kong judge in the course of granting a stay of proceedings to enforce the award in Hong Kong, pending the hearing of First Media's application for an extension of time in which to set aside the Hong Kong order permitting enforcement. The judge observed: "[I]t will indeed be remarkable if, despite the Singapore Court of Appeal judgment on the invalidity of [the] arbitration awards, Astro will still be able to enforce a judgment here based on the same arbitration awards that were made without jurisdiction."

20. Now was the Hong Kong judge right? Would it really be all that "remarkable" if the Singapore award could still be enforced in Hong Kong, notwithstanding the Court of Appeal having held that the award was made without jurisdiction? At first blush, the question would appear to be obtuse and contrary to commonsense. Although not yet formally set aside, the Singapore award must surely be regarded as a nullity, since it was to all intents and purposes declared to be so in Singapore enforcement proceedings. I would have had no doubt on the matter as a judge.

21. But I am not so sure now, having been recently exposed to the theories of Professor Emmanuel Gaillard in his Aspects philosophiques du droit de l'arbitrage

international (Martinus Nijhoff, 2008). The answer depends (Professor Gaillard would argue) on what one regards as the juridical basis of international arbitration.

22. Thus, if a judge believes that it is the law of the arbitral seat that validates an award, then a declaration by such law that the award is invalid will turn it into an unenforceable nullity.

23. On the other hand, if the judge takes the view that an award derives its validity from recognition by an enforcing state, then it is for each enforcing state to decide (usually within the limits agreed under the New York Convention) whether or not an award is operative within the enforcing state. The fact that the Court of the arbitral seat has declared an award to be invalid may be a factor for an enforcing state to take into account in deciding whether or not to enforce an arbitral award. But the view of the arbitral seat will not necessarily be conclusive on the question of validity.

24. Finally, Professor Gaillard advances his preferred view that international arbitration derives its basis from an "ordre juridique arbitral" ("arbitral juridical order"). If the judge takes this view, then the declaration of invalidity by the arbitral seat would have weight only insofar as the Court there has correctly applied transnational principles of law (for example, good faith in the conclusion of contracts) in concluding that an award is invalid.

25. It is only if one accepts the first theory, based on the primacy of the law of the arbitral seat that it would be "remarkable" for the award against First Media to be enforceable in Hong Kong despite the Singapore Court's determination. It seems to me that a judge who is supportive of arbitration must evaluate the strengths, weaknesses and consequences of each of the 3 competing theories and make an informed choice from among them. It is a regret that, as Arbitration List judge, I was strongly wedded to the first view (which is the common law orthodoxy). In fact, I was blissfully unaware of any other views and the ways in which those options might impact upon my judgments.

26. The third case is one that I have written about in the past: Gao Haiyan v Keeneye Holdings Ltd (Civil Appeal No.79 of 2011) decided by the Court of Appeal on 2 December 2011. The case involved an instance of arb-med-arb. The dispute in the arbitration was whether a share transfer agreement was or was not valid.

27. In the course of the arbitration, a mediation took place over dinner at a Xian Shangri-la hotel. There were 3 mediators. One of the mediators was an arbitrator hearing the dispute. The parties to the arbitration were not present at the mediation. Instead, a friend of Keeneye had been invited to attend the dinner mediation.

28. The mediators suggested to the friend that Keeneye pay RMB 250 million to the other side to settle the dispute. The mediators further suggested that the friend "work on" ("zuo gongzuo") Keeneye to accept the settlement proposal. The mediators had not consulted the other side about the figure of RMB 250 million. To the contrary, the evidence was that the other side had told the arbitral tribunal that it was not prepared to settle the dispute for RMB 250 million.

29. Keeneye did not accept the mediators' proposal and so the arbitration proceeded. The resultant final award dismissed Keeneye's case and revoked the share transfer agreement. Curiously, the final award also "recommended" (but did not direct) that the winning side pay RMB 50 million to Keeneye as "economic compensation".

30. Keeneye applied to the Xian Court to set aside the award on account of "favouritism". The Xian Court rejected Keeneye's setting aside application.

31.The winning side sought to enforce the award in Hong Kong insofar as it revoked the share transfer agreement. Keeneye argued that enforcement should be refused. At first instance I heard Keeneye's application for refusal of enforcement.

32. I held in Keeneye's favour and refused enforcement. For this, I invoked the public policy ground for refusing enforcement found in Article V(2)(b) of the New York Convention. I did not think that there was enough evidence to conclude that the arbitrator who participated in the mediation had been actually biased. But I thought that there was enough to hold that this was at least a situation of apparent bias. I said (at §§99-101):-

> [I]t would … be wrong to uphold an award tainted by an appearance of bias. Upholding such an award will have the consequence that justice would not be seen to be done. Enforcement of such award would be an affront to this Court's sense of justice….
>
> If a Hong Kong award were tainted by the appearance of bias, I have no doubt that, purely as a matter of justice and fairness, the Court should refuse enforcement of the same. In other words, as a matter of Hong Kong public policy, the … consideration which I have just described must override the [consideration that there be finality to litigation]. Otherwise, it would bring justice into disrepute if the Court were to allow an award with the appearance of bias to be enforced in the same way as a judgment of the Court. The Court's judgments (including awards enforced as such) must always be (and be seen to be) impartial.
>
> In general terms, I do not think that it should make a difference to the principle just stated where an award is that of a foreign tribunal (whether of the Mainland or elsewhere). In the absence of good reason, the award of a foreign tribunal should normally receive no more favourable treatment (as far as public policy is considered) than that accorded to a Hong Kong arbitration award by the Hong Kong Court."

33. I was rather proud of the ringing words that I incorporated into the passage just quoted. Unfortunately, the Court of Appeal disagreed with me and overturned my decision. In relation to apparent bias, the Court of Appeal said (at §102):-

> "With respect, although one might share the learned Judge's unease about the way in which the mediation was conducted because mediation is normally

> conducted differently in Hong Kong, whether that would give rise to an apprehension of apparent bias, may depend also on an understanding of how mediation is normally conducted in the place where it was conducted. In this context, O believe due weight must be given to the decision of the Xian Court refusing to set aside the award."

34. As a judge, I was puzzled by the last sentence of the Court of Appeal's reasoning in the foregoing paragraph. The New York Convention is clear that the public policy ground depends on the enforcing Court's assessment of its own public policy, not the public policy of the arbitral seat. If that is the case, why should the opinion of the Xian Court on whether or not there has been favouritism or the appearance of favouritism be relevant?

35. Having reflected more on the question, I think the answer hinges on a distinction between the grounds for refusing enforcement under Article V(1) of the New York Convention and the grounds for refusing enforcement under Article V(2). The grounds in Article V(1) involve the law of the arbitral seat and (if one accepts Professor Gaillard's notion of an arbitral juridical order) transnational principles of law. In contrast, the grounds in Article V(2) (concerning arbitrability and public policy) refer to the law or public policy of the jurisdiction in which an award is sought to be enforced. I did not sufficiently focus on this distinction in my first instance decision in Gao Haiyan.

36. The test for apparent bias is whether a hypothetical fair-minded observer would conclude that there was a reasonable possibility of bias in the way in which an adjudicating body reached a decision. See Porter v. Magill [2001] UKHL 67 (Lord Hope at §§102-105). The hypothetical observer is taken to be a reasonable person, who adopts a balanced approach and is neither complacent nor unduly sensitive or suspicious. Further, the observer is treated as being fully informed about all publicly known facts in relation to a decision-making process. See Lawal v. Northern Spirit Ltd. [2003] UKHL 35 (Lord Steyn at §14); Johnson v. Johnson (2000) 201 CLR 448 (Kirby J at §53).

37. There may be differences in the definition of apparent bias in different jurisdictions. But I suspect the differences are more matters of emphasis than anything else. The test for apparent bias is (I suggest) akin to a transnational legal principle. That is because apparent bias is a theoretical construct based on a consideration of what a reasonable and fair-minded observer might think. Whether or not there is actual bias is irrelevant to such construct.

38. The Court of Appeal in Gao Haiyan was pointing out that use of apparent bias as a basis for refusing enforcement of an award is governed by Article V(1) rather than Article V(2). If the Court in the arbitral seat has determined that there is no apparent bias, an enforcing Court should attach significant weight to that assessment. In particular, the enforcing Court should defer to the arbitral seat, if the latter's conclusion on the question of apparent bias is one that a Court might reasonably reach. It is irrelevant that the enforcing Court, in applying the test for apparent bias, takes a different view of the facts. Different courts may reasonably disagree on the interpretation of identical facts. The mere existence of differing, but equally reasonable assessments on apparent bias, cannot be regarded as so repugnant to a Court's fundamental conceptions of morality and justice as to justify invocation of the public policy ground to refuse enforcement.

39. Let me summarise the practical lessons which I draw from my reflections this morning:-

(1)The first is the value of judicial education. Judicial support of commercial arbitration requires that judges continue to learn about and update their knowledge on the subject. Even where (as in my case) one has had substantial prior experience of arbitration-related matters, the benefits of a continuing education in arbitration practice (including the benefits of regular attendance at international conferences such as the present one) cannot be over-emphasised.

(2) The second is the need for judicial restraint. A judge should interfere as little as possible in the arbitral process. He or she should defer as much as possible

to the views of an arbitral tribunal or a supervising court, including in situations where as judge one might have decided a question differently from the tribunal. I have tried to articulate some areas where, contrary to the position I took as a judge, I wonder if greater deference to a tribunal's views was warranted. The temptation for a judge to interfere is often great. But all the more the temptation may need to be resisted.

(3)The third is the need to be brave. Orthodoxy may point to interference by the Court as the clear and obvious course to take in a particular case. But an examination of one's underlying assumptions will often lead to a different conclusion. The "plain and simple" is often not as "plain and simple" as first impression might lead one to believe. If upon mature reflection one reaches a conclusion that does not accord with prevailing orthodoxy, one should not hesitate to act in accordance with the view one has reached.

40. Finally, let me say a few words about the responsibilities of a commercial arbitrator.

41. The cynical among you may think that it is all very well for me to have changed my mind on what judicial support of arbitration truly demands. It may be suggested that, when I was a judge, I regularly intervened in relation to the enforcement of arbitration agreements and awards. But now that I am a commercial arbitrator, I would of course (according to the cynics) prefer judges to interfere as little as possible (if at all) with my awards. So naturally my message today (the cynics would say) would essentially be "hands off!".

42. Happily, I do not have to decide whether the cynics are right or wrong. I can leave that decision to this audience.

43. All that I will say is that each of the lessons I have sought to draw corresponds to a duty on the part of commercial arbitrators. The judicial support that I have described would, if implemented, bestow tremendous power upon arbitrators. The

exercise of that power will only be curtailed by judicial interference in exceptional circumstances. Borrowing from the "Spiderman" movies, one might say that with "great power comes great responsibility".

44. If judges are to be supportive by educating themselves in the latest developments and thinking in commercial arbitration practice, arbitrators have a duty to do likewise. There is little point in judges being knowledgeable about arbitration, if arbitrators do not themselves actively and constantly strive to improve their own skills and knowledge.

45. If judges are to exercise restraint, it is incumbent upon arbitrators to be fair and rigorous in the procedures and analyses leading up to their awards. Judicial restraint implies a corresponding duty upon arbitrators to get things right in terms of fairness, procedure, law and fact. Otherwise, judicial restraint may easily degenerate into a licence for arbitrators to do just about whatever they want. That would lead to arbitration losing its credibility as a means of international commercial dispute resolution.

46. If judges are to be brave and robust, then so must arbitrators be brave and robust. Arbitrators must not simply go for easy, obvious answers without carefully examining underlying premises. If rigorous analysis leads to some not so obvious or even unpopular conclusion, the arbitrator must not be afraid to follow his or her principles. In so acting, the arbitrator will find that one is never alone. On the contrary, the arbitrator will have the unwavering support of the judge.

Thank you.