EBI ZIMBABWE (PRIVATE) LIMITED
versus
OLD MUTUAL UNIT TRUSTS (PRIVATE) LIMITED
and
ADVOCATE J.C.J. LEWIS

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 19 March 2009 and 9 June 2009

Advocate Zhou, for the applicant
Advocate Fitches, for the 1st respondent

PATEL J: In May 2004 the applicant and the 1st respondent entered into a software licensing agreement. Following a dispute that arose between the parties in January 2006, the matter was referred to an arbitrator (the 2nd respondent) for arbitration.

On the 23rd of June 2008, the applicant challenged the impartiality of the arbitrator in terms of Article 13(2) of the First Schedule to the Arbitration Act [*Chapter 7:15*] (the Model Law). On the 28th of June 2008, the arbitrator rejected this challenge and his decision was communicated to the applicant on the 3rd of July 2008. The challenge was then referred to this Court for determination on the 1st of August 2008 in terms of Article 13(3) of the Model Law.

The Issues

The issues for determination in this matter are as follows:

1) The nature of the challenge before this Court.
2) Was the challenge before the arbitrator prescribed in terms of Article 13(2)?
3) Did the arbitrator fail to act impartially *in casu* and, if so, is his conduct such as to warrant his removal as arbitrator?

Challenge to Continuation of Arbitrator

Article 12 of the Model Law provides as follows:

> "(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
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> (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

Article 13 sets out the procedure for challenging an arbitrator in the following terms:

> "(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
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> (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
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> (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the *High Court* to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."

Nature of Challenge before the Court

Adv. Zhou for the applicant submits that the arbitrator *in casu* decided the challenge before him without any substantive submissions having been made by the 1st respondent. He therefore contends that the latter is now estopped from making fresh submissions though its opposing papers before this Court. In other

words, this Court must determine the challenge in the same form as was presented to the arbitrator, viz. without the benefit of any submissions from the 1st respondent.

Article 13(3) enjoins the Court "to decide on the challenge" referred to it by the challenging party, without elaborating the procedure to be followed. Be that as it may, I have no doubt that the Court is confined to determining the challenge on the grounds of challenge presented to the arbitrator and cannot entertain any fresh ground of challenge. However, I am not persuaded that Article 13(3) narrows the scrutiny of the Court, when examining and ventilating the issues before it, to the same submissions that were presented to the arbitrator.

I am not so persuaded for several reasons. Firstly, although the challenge before this Court may be likened to an appeal, it is not described as such and cannot therefore be regarded as an appeal *stricto sensu*. Even if it were to be so treated, it does not invariably follow that a party to an appeal cannot make fresh submissions on the grounds of appeal or the issues that constitute the subject-matter of the appeal. Secondly, Article 13(3) does not define or fetter the powers of the Court as to the procedure to be followed. In practice, the procedure that is adopted in the referral of arbitral matters to the Court is by way of ordinary application and there is nothing in the Rules of Court to preclude the filing of submissions by any party to the arbitration proceedings in question. Last but not least, to construe Article 13(3) in a restrictive manner would operate to constrict and offend the common law right to be heard which vests in every interested party – as embodied in the *audi alteram partem* rule – as well as the constitutional right to a fair hearing guaranteed by section 18(2) of the Constitution. For all of these reasons, I am satisfied that the procedure for challenge before this Court cannot be curtailed in the manner propounded by *Adv. Zhou*.

Prescription of Challenge before the Arbitrator

The applicant *in casu* challenged the arbitrator on the 23rd of June 2008. In this respect, *Adv. Fitches* for the 1st respondent submits that the applicant was precluded from challenging any conduct of the arbitrator that occurred at any stage before the 15 days preceding the date of challenge. He contends that Article 13(2) does not contemplate continuing conduct and that unless the challenge is raised within 15 days of the specific act complained of it must be treated as having prescribed and become technically otiose.

As against this, *Adv. Zhou* submits that the conduct giving rise to the challenge in the present case began on the 30th of May 2008 and continued until the 9th of June 2008. This continuing conduct displayed the arbitrator's partiality and the challenge thereto was filed timeously on the 23rd of June 2008, within the stipulated 15 day period.

I fully concur with the stance taken by *Adv. Zhou*. In terms of Article 13(2) as read with Article 12(2), the challenging party must raise his challenge within 15 days after becoming aware of any circumstance that gives rise to justifiable doubts as to the arbitrator's impartiality or independence. In my view, the partiality of an arbitrator may not always manifest itself immediately as a single act committed on one specific occasion. More often than not, it will be evinced by a series of acts at different times or continuing conduct which when pieced together demonstrates his lack of impartiality. In this context, the aggrieved party may only be in a position to form justifiable doubts as to the arbitrator's impartiality towards the end of such continuing conduct rather than at its inception.

The specific acts complained of *in casu* fall precisely into to the category of continuing conduct that I have described above. I accordingly take the view that the challenge before the arbitrator in this case was timeously lodged and has not prescribed as contended by *Adv. Fitches*.

Impartiality of the Arbitrator

It is generally accepted that in evaluating bias or partiality on the part of an arbitrator the test to be applied is an objective one. See *The Elissar* [1984] 2 Lloyd's Rep 84 at 89, where ACKNER LJ enunciated the test as follows:

> "Do there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine the relevant issue on the basis of the evidence and arguments to be adduced before him."

In *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 275, KORSAH JA stated that:

> "A common theme which runs through the authorities is, therefore, that the test to be applied is an objective one. One does not enquire into the mind of the person challenged to determine whether or not he was or would be actually biased. Thus the character, professionalism, experience or ability as to make it unlikely, despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration."

In *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H) at 549-550, SMITH J adopted the same objective approach:

> "In an application for recusal, the test to be applied is not easily defined since decided cases are not entirely consistent, with some judges favouring the view that the test is whether, as a matter of fact, there is a real likelihood of bias, whilst others accepted a reasonable belief that a real likelihood of bias existed as being sufficient. To my mind, however, there is no real difference between the two approaches since, unless there were a real likelihood of bias, a reasonable or right-thinking man would not believe that there was such likelihood."

The twofold nature of the test to be applied was elaborated by MUKHARJI J in a decision of the Supreme Court of India in

International Airport Authority of India v Bali & Anor [1988] LRC (Comm) 583 at 587-588:

> "It is well said that once the arbitrator enters into an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; the arbitrator must not do anything which is not in itself fair and impartial. .....
>
> It is well settled that there must be a real likelihood of bias and not mere suspicion of bias before the proceedings can be quashed on the ground that the person conducting the proceedings is disqualified by interest. ..... There must be reasonableness in the apprehension of bias in the mind of the party. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party. But we agree with the learned judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on the mere apprehension of any whimsical person."

Similarly, in a decision of the High Court of Singapore in *Koh Bros Building and Civil Engineering Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2003] 3 LRC 111 at 119-120, PRAKASH J observed as follows:

> "No actual bias or partiality need be shown as long as the court is satisfied from the conduct of the arbitrator, either by his words, his action or inaction or his handling of the proceedings, that he displayed a real likelihood that he might not be able to act judicially."

The Present Challenge

Turning to the instant case, the conduct that the applicant complains of herein – and which falls within the time limit stipulated by Article 13(2) of the Model Law – began towards the end of May

2008 and appears from various e-mail messages communicated by the arbitrator. More specifically, it is averred that:

- On the 30th of May, without first having heard the parties, he took the decision not to recuse himself.
- On the 3rd of June, he admitted to having communicated directly with the applicant rather than its legal representative in the arbitration.
- On the same date, his response to the applicant's legal representative's earlier query regarding the application of the so-called Old Mutual Implied Rate was somewhat sarcastic and made in bad taste.
- On the 3rd of June and again on the 9th of June, he unilaterally decided that if the additional costs fixed by him were not paid, he would dismiss the applicant's defence and counter-claim.
- From the 3rd to the 9th of June, even though he had been advised that the applicant's legal representative would be out of the country until the 9th of June, he insisted on hearing argument on the question of additional costs on the 11th of June.

The respondents dispute these allegations of impropriety and it is submitted on behalf of the arbitrator that:

- He declined to recuse himself, after having received written representations by e-mail from both parties, because this Court had already dismissed the applicant's previous challenge and in order to reach finality without further delays.
- In the context of the case, it was not partial or unfair for him to have communicated directly with the applicant in order to expedite the matter.
- There was nothing malicious or biased in his response concerning the Old Mutual Implied Rate inasmuch as that

rate had become part of daily commercial dealings in this country.

- He recalculated the security for costs which the applicant had been ordered to pay by this Court in Case No. HC 2597/07. He then invited the applicant, if it objected to the recalculation, to show cause why the security for costs should not be recalculated in the manner indicated and why the recalculated amount should not be paid by the 11th of June, and failing which why the applicant's defence and counterclaim should not be dismissed.
- Having regard to the fact that the applicant's legal representative was away, he rescheduled the dates of arbitration to the 16th to the 19th of June and fixed the 11th of June as the date for hearing the question of costs. These dates were flexibly fixed in order to accommodate the applicant and its legal representative.

On balance, taking a broad view of all the allegations of misconduct and the explanations proffered by the respondents, I am inclined to agree with the respondents' submissions. It seems to me that the arbitrator did not act in any manner indicative of partiality or bias in favour of the 1st respondent and as against the applicant. On the contrary, his robust approach in certain respects appears to have been necessitated by the dilatoriness of the applicant and its legal representative in bringing the matter to finality. I am of the view that his actions were not improper but generally designed to expedite the arbitral proceedings in accordance with his arbitral brief and, in particular, with the provisions of Article 25(d) of the Model Law, which empowers him to "give directions, with or without conditions, for the speedy determination of the claim".

In short, the applicant has failed to establish the existence of grounds from which a reasonable person would think that there was a real likelihood of bias and that the arbitrator could not or would

not fairly determine the issues before him. The applicant's challenge is flimsy and without any real substance. It cannot be sustained on the evidence before me. This application is accordingly dismissed with costs.

Mawere & Sibanda, applicant's legal practitioners
Scanlen & Holderness, 1st respondent's legal practitioners