FAIR PLAY - BIAS I AND ADJUDICATIO

"According to the fair play of the world, Let me have audience." William

Whilst Shakespeare's words echo in English law and legal practice, what fair play actually looks like in our modern, complicated and interconnected world has been the subject of debate of late. Specifically, the topic of bias in arbitration has been put under the microscope by two noteworthy judgments of the English High Court and new International Chamber of Commerce (ICC) guidance on the subject.

At the risk of losing the reader's attention in the second paragraph, whilst interesting and instructive, these developments have not fundamentally altered the status quo. The two cases reaffirm the supremacy of the well established English common law 'fair observer test' as the touchstone by which any accusation of apparent bias will be judged in this jurisdiction. The cases, however, do offer some lessons on how to deal with potential apparent bias and conflict situations which are likely to be of interest to those involved on the ground in arbitrations and adjudications (although we refer to arbitration throughout this article, many of the same principles will apply in adjudication). The updated ICC guidelines are a welcome initiative, but their usefulness is, obviously, limited only to ICC governed arbitrations. This article considers these developments in detail and offers some practical tips to avoid getting caught out.

Test for Apparent Bias

In the already much discussed case of *Cofely Ltd v Bingham & Knowles Limited* (2016) EWHC 240, Hamblen J considered an application under section 24 of the Arbitration Act 1996 for the removal of an arbitrator, Anthony Bingham, for alleged bias. While the facts of the case may have caught the imagination of those in the industry, the principles applied by Hamblen J are not new. Specifically, Hamblen J affirmed the primacy of the fair observer test for apparent bias from *Porter v Magill* (2002) AC 357 of whether "the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

Cofely, a major construction company, and Knowles, a well known firm of construction claims consultants, were parties to an arbitration which started in early 2013. Mr Bingham was the arbitrator, having been appointed by the Chartered Institute of Arbitrators. The trouble started in late 2014 when the judgment in *Eurocom Ltd v Siemens Plc* (2014) EWHC 3710 came out. In that case, Ramsey J had refused to enforce an adjudication award rendered by Mr Bingham on the basis that Siemens had a real prospect of establishing that Mr Bingham had no jurisdiction because of circumstances surrounding his appointment, in which Knowles had been heavily involved. It emerged from that judgment that Mr Bingham had been repeatedly appointed by Knowles, or on behalf of clients of Knowles in cases in which Knowles was involved. He had not declared this prior to or after his arbitral appointment in the Cofely case. Cofely, through its legal advisors, therefore asked a series of questions of Mr Bingham in order to obtain the information it believed necessary to decide whether to raise a formal objection to Mr Bingham continuing as

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whether to raise a formal objection to Mr Bingham continuing as arbitrator. Mr Bingham did not fully answer the questions and then, of his own volition, called a hearing and issued a ruling that there was no conflict or apparent bias. This prompted Cofely to make its section 24 application.

On the facts, Hamblen J considered that five of the seven grounds put forward by Cofely did indeed raise the possibility of apparent bias by Mr Bingham. These grounds were:

> i. The admissions made by Knowles in the *Eurocom v Siemens* case about how it sought to influence the appointment of arbitrators so that Mr Bingham was appointed and other arbitrators were excluded.
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> ii. Mr Bingham's evasive and defensive response to questions from Cofely.
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> iii. Mr Bingham's calling of an unrequested hearing to consider Cofely's request for information on his relationship with Knowles during which he 'descended into the arena', that is, acted unprofessionally.
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> iv. The information which eventually emerged that, over the previous three years, Mr Bingham had been appointed as arbitrator in cases which involved Knowles 25 times, out of a total of 137 appointments in that time period. Those 25 cases reflected 25% of his income. He had held in favour of Knowles, or the party with which Knowles was involved, on 18 of those 25 occasions (72%).
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> v. The overly defensive and aggressive approach Mr Bingham took in his witness statement in the court proceedings, and the fact that he had 'taken sides'.

The judge placed significant weight on the frequency of the appointments and the percentage of income that Mr Bingham had received from Knowles. The fact that an arbitrator is frequently appointed by the same party has been previously found to be a relevant issue when considering apparent bias, especially if there is an element of material financial dependence. He also emphasised that an 'unapologetic' or 'aggressive' reaction to questions on the arbitrator's independence has also previously been found to make apparent bias more, rather than less, evident — as it has been concluded that such actions indicate that the arbitrator realises something has gone wrong and that attack is the best form of defence.

Another important point was the 'no conflicts' declaration in the CIArb form signed by Mr Bingham on the acceptance of his nomination. Notably, Mr Bingham had left blank the answer to the following question, despite his clear previous involvement with Knowles: "If you are aware of any involvement, however remote, but in particular an involvement you or your firm has (or has had in the last five years) with either party to the dispute please disclose." Notwithstanding the oversight by the CIArb in allowing the appointment of Mr Bingham to go ahead when he had not filled in all of the nomination form, Mr Bingham's carefree approach to the CIArb conflict rules and corresponding nomination form was used as further evidence to demonstrate his apparent bias. On the basis of all of the above, the application was granted.

This case is clearly a high profile and helpful restatement of the fair observer test and a useful example of the application of that test on some interesting facts. Mr Bingham fell foul of one of the foundational rules of arbitration. Alongside the interest of justice requirement, the reasons why conflict disclosures are critical in arbitrations is to prevent any ground arising in which a losing party may challenge the arbitral award. This is a cornerstone of the arbitration process.

IBA Guidelines – Flawed?

In *W Limited v M SDN BHD* (2016) EWHC 422 (Comm), W brought a challenge to an arbitral award under section 68 of the Arbitration Act 1996 alleging serious irregularity arising out of the apparent bias of the arbitrator, an Alberta-based QC, who was appointed to resolve a dispute in relation to a project in Iraq. The challenge centred around the fact that the Canadian law firm from which the arbitrator conducted his practice as arbitrator had, unbeknownst to the arbitrator, regularly represented an affiliate of M.

Like Hamblen J in Cofely, Knowles J applied the fair observer test from *Porter v Magill* when assessing whether, on the facts, there was any apparent bias. So far, so uneventful. Why this case is interesting, however, is because it applied that test with nuance and also poured judicial criticism on one part of the 2014 edition of the International Bar Association's (IBA) Guidelines on Conflicts of Interest in International Arbitration.

The main thrust of W's argument was that the arbitrator was in breach of paragraph 1.4 of the non-waiverable red list in the IBA guidelines as his law firm regularly advised an affiliate of W. Paragraph 1.4 of the IBA guidelines states as non-waiverable a situation where: "[t]he arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom." The judge held that it was "hard to understand" why this situation should be included in the non-waiverable list as it pertains to a "situation where the advice is to an affiliate and the arbitrator is not involved in the advice." Knowles J stated that this type of situation is "classically appropriate for a case-specific judgment." Knowles J thought that parties should be able to use their discretion in assessing the potential conflict scenario in circumstances where an arbitrator is aware of this relationship and has disclosed it to the parties. Knowles J asked "why should the parties not, at least on occasion, be able to accept the situation by waiver?"

On this basis, Knowles J refused to follow the IBA guidelines. Whilst the IBA guidelines have become widely accepted, *W Limited v M SDN BHD* is a reminder that they do not, of course, supersede local law or the rules chosen for the arbitration (unless written into the arbitration agreement as binding). Applying the fair observer test, Knowles J concluded that despite the arbitrator's firm having previously acted for an affiliate of W (contrary to paragraph 1.4 of the nonwaiverable red list in the IBA guidelines) there was no apparent bias. This was because:

i. The arbitrator had not personally acted for that client.

ii. He effectively operated as a sole practitioner just using the firm for administrative support for his work as an arbitrator.

iii. The arbitrator had made other disclosures of potential conflicts of interest and "would have made a disclosure here if he has been alerted to the situation."

Knowles J therefore held that no fair minded and informed observer would conclude that the arbitrator was biased or lack any independence or impartiality. As such, whilst *W Limited v M SDN BHD* highlights the distinguished contribution of the IBA guidelines in the field of international arbitration, it also provides important judicial commentary on their

commentary on their application, at least under English law.

ICC Update: Disclosures and Third Party Funding

In February this year, the ICC issued new guidance on conflict disclosures by arbitrators, which has been incorporated into its broader note to arbitrators and parties. The ICC guidelines now place a considerable burden on any arbitrator being appointed in a case under the ICC arbitration rules to disclose: "Any circumstance that might be of such a nature as to call into question his or her independence in the eyes of any of the parties or give rise to reasonable doubts as to his or her impartiality."

The ICC guidelines also require all arbitrators to complete and sign a statement of acceptance, availability, impartiality and independence in a bid to ensure those qualities of arbitrators in ICC cases. The ICC guidelines list a host of circumstances that must be considered (but not necessarily disclosed), including whether the arbitrator or their law firm represents or advises one of the parties or one of its affiliates. This is similar to the requirement in the IBA guidelines at the heart of *W Limited v M SDN BHD.*

However, in the ICC guidelines, this is a circumstance for an arbitrator to consider upon deciding whether to make a disclosure; it is not a non-waiverable disclosure as it is in the IBA guidelines. Interestingly, the ICC guidelines state that such a disclosure does not imply, in and of itself, the existence of a conflict, which is similar to the view expressed by Knowles J in *W Limited v M SDN BHD*. Conversely, the ICC guidelines also state that whilst a failure to disclose is not automatically a ground for disqualification, that failure will be considered when assessing whether there are grounds to refuse an appointment. In the spirit of increasing transparency in the arbitration process even further, the ICC guidelines also attempt to introduce wider business/funding relationships into conflicts considerations. The ICC guidelines state that an arbitrator should consider whether they or their firm has any business relationship with one of the parties or an affiliate, or has a personal interest in the outcome of the dispute. Further, the ICC guidelines state that an arbitrator should consider whether they or their firm have a "relationship with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award." Whilst this approach is already adopted by the IBA guidelines, its incorporation – word-for-word – in the ICC guidelines is a helpful addition, given the growth of third party funding arrangements.

The ICC guidelines are helpful, clarifying and progressive. The transparent approach to conflict disclosures they foster will hopefully create a more open culture in conflict disclosure conversations. Further, the update in respect of third party funding and other business relationships reflects changes to the industry and as such is welcome. However, the impact these changes will have is obviously limited to the ICC universe and it remains to be seen whether other arbitral institutions will follow suit.

Impact on the Legal Landscape?

Whilst you could be forgiven for thinking that the cumulative impact of the two recent High Court decisions, including judicial criticism of the IBA guidelines, and the new ICC guidelines could be a development of the law surrounding arbitration bias, the bottom line is that it has not changed the status quo; this is a case of plus ca change, plus c'est la meme chose.

The two High Court cases affirm the primacy, as far as English law is concerned, of the common law and the fair observer test when deciding upon apparent bias applications. The court's refusal to follow the IBA guidelines, whilst worthy of note, should not be overstated. Whilst heavily influential, the IBA guidelines are only non-binding guidelines and, as such, the court was not bound by them. Further, the

criticism given amounted to only one granular aspect of them; not the IBA guidelines generally. The ICC guidelines are a helpful clarifying tool in respect of an arbitrator's disclosure obligations in ICC arbitrations; especially in respect of third party funding. However, none of this represents anything akin to a seismic shift in how to approach conflicts.

One prevailing theme from the cases and the ICC guidance update is the need for arbitrators to lead an open and honest conflict disclosure process. At the heart of any arbitral appointment is the trust that the parties have in the arbitrator's integrity and judgment. Factors bearing down on an arbitrator not to disclose any potential conflicts should be resisted and a long-term view should be adopted. The arbitration community is relatively small and if an arbitrator does not disclose a conflict which subsequently emerges, then that arbitrator's reputation will be undermined. As unfortunate as it may be to lose an appointment, it would be more unfortunate to never be appointed again. The general rule for arbitrators still stands; if in doubt, disclose.

In the circumstance where a party does challenge an arbitrator's independence, it is key that the arbitrator must try to avoid descending into the arena as their continued credibility relies upon it. This can be difficult, especially if there are suggestions of dishonesty and improper conduct at play in the heat of the arbitration, but it is essential in order that the issues can be fairly heard, the arbitrator retains credibility and the process can run smoothly through to its natural conclusion with the least disruption as possible.

There are lessons to be learnt here for arbitrating parties as well. Whilst it is often commentated on that parties try things in arbitrations that they would not dream of doing in litigation, parties should still act as reasonably and transparently as possible. For a party to use allegations of an arbitrator's conflict when they do not believe things are going their way is at the very least distasteful, and, at most, an abuse of process. If a party has any concerns in respect of an arbitrator it is before, it should raise them in good time and as courteously as possible, remembering always that the arbitrator is not its adversary.

Finally, arbitral institutions must also ensure they play the appropriate role in trying to prevent issues of conflict or bias from arising in the first place. Perhaps most importantly, they should ensure that the declarations and forms they ask arbitrators to complete are, in fact, completed in full (and then properly considered) before each arbitrator is appointed.

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Author Profile

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