Mutual Confidence in Arbitrators: Independence and Impartiality

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1. Introduction

1.1 Mutual confidence in arbitrators is, must be, a fundamental premise in international construction arbitration. How should party-nominated arbitrators behave? Are party-nominated arbitrators different to those selected by Administering Institutions? Members of ARBRIX may well be familiar with Section 33 of the Arbitration Act 1996 which does not distinguish between party-nominated arbitrators and those appointed by Institutions – making it express that the general duty of the Tribunal is to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent"[1]. There is however a view that "it is not improper for a party-appointed arbitrator to ensure that the tribunal properly understands the case being advanced by that party". This 'concept'; the debate; and its impact on mutual confidence in arbitrators forms an important part of this discussion.

1.2 What is the extent of an arbitrator's obligation to disclose? Do the 2014 International Bar Association Guidelines on Conflict of Interest in International Arbitration, (the ***IBA Guidelines***) always apply to arbitrators – or can the law of the seat trump the IBA Guidelines? Are so-called 'Non-Waivable' conflicts actually waiveable? Justifiable doubts as to impartiality and serious irregularity grounded in a conflict of interest as discussed in recent case law will form another part of this discussion.

1.3 Finally, this note concludes by looking at the question of the most appropriate method to ensure greater mutual confidence in arbitrators? Are we at a turning point? Will

[1] Section 33 (2) goes on to make it clear that the tribunal "shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it" [emphasis added]

Institutions follow the ICC (who in late February issued further refined guidance on conflict disclosures by arbitrators)? What is the most appropriate method to ensure full and proper disclosure by Arbitrators?

2. The Impact of the Arbitration Act 1996

2.1 Mr. Justice Hamblen said: "*bias is not an issue to be raised lightly*"[2]. *Cofely Ltd* raises questions in respect of the nature of the bias; the safeguards that could be put in place; and whether arbitral / nominating bodies should take a more pro-active role in scrutinising the impartiality and independence of an arbitrator.

2.2 It is important to note the concluding paragraph of the judgment: "Although I have found that the case of apparent bias is made out, I have also found that there is nothing untoward about the Partial Award or the conduct of the arbitration up until March 2015"[3]. Notwithstanding that the Arbitrator was held not to be impartial, the Partial Award issued by the Arbitrator was not set-aside.

Cofely Ltd

2.3 The dispute was between: (i) Cofely Ltd, who agreed to design, build maintain and operate district energy services to the Olympic Park and the Westfield Shopping Centre in Stratford; and (ii) Knowles, Cofely's claim consultants, who advised on an extension of time application. The dispute centred on whether, pursuant to a Success Fee Agreement, Knowles was entitled to a success fee when Cofely Ltd settled its claim for an extension of time with its Employer. In the arbitration, Knowles was the Claimant and Cofely Limited was the Respondent.

2.4 In the Notice of Arbitration to the Chartered Institute of Arbitrators ("CIArb"), Knowles requested that the arbitrator have both quantity surveying and delay analysis experience (for reasons that are not explained) and nominated the Arbitrator in question. Cofely Ltd suggested that a barrister would be more appropriate and put

[2] *Cofely Ltd v Bingham & Knowles Ltd* [2016] EWHC 240 (Comm) at paragraph 117.
[3] Note 1 at paragraph 118

forward a different candidate.[4] CIArb appointed Knowles' candidate, the Arbitrator in question.

2.5 This is the first fact that may strike the reader as odd: larger arbitral institutions, such as the ICC, LCIA and DIAC, for example, would try and avoid, on a point of principle, the parties' preferred choice when appointing a **sole** arbitrator. Bias is not only a question a fact but a question of perception; not necessarily real bias but apparent bias. The test under English law is whether the fair minded and informed observer, having considered the facts, would conclude that there was a **real possibility** that the tribunal was biased.

2.6 The Arbitration proceeded and, in August 2013, the Arbitrator made a Partial Award in Knowles' favour in relation to defined sums pursuant to the Success Fee Agreement. In the months that followed, some correspondence was exchanged between the parties but, there was a long period of inactivity. Fortuitously for Cofely Ltd, in February 2015, it wrote to Knowles requesting information about its dealings with the Arbitrator, given the decision of Mr. Justice Ramsay in *Eurocom Ltd v Siemens Plc* [2014] EWHC 3710. In that case it came to light that Knowles frequently nominated adjudicators by putting forward candidates who were said to be conflicted and by naming one candidate who was not – in this particular instance, it was the Arbitrator in question who was appointed as the adjudicator.

2.7 Cofely Ltd then raised a number of questions with the Arbitrator, namely: (1) how many times in the last 3 years had he acted as an adjudicator or arbitrator, to which the response was 137; (2) How many of those related to appointments made in the last 3 years where Knowles was represented or was the claimant / referring party, to which the response was 25 (in which 3 of those, Knowles was a party); (3) what was the Arbitrator's total income in that period, to which the response was £1,146,939; and (4) how much of the Arbitrator's professional income was generated from the matters in which he acted, involving Knowles, to which the response was £284,593.75 (25%). Furthermore, in 18 of the 25 cases involving Knowles, the Arbitrator found in favour of Knowles.

[4] The barrister proposed by Cofely was at the same Chambers as Cofely's own Counsel.

2.8 To put this in context, the IBA Guidelines on Conflicts of Interest recommend that arbitrators should not be nominated more than three times in a three-year period by the same legal counsel. Furthermore, arbitrators should not be nominated on more than two occasions involving the same party in any three-year period. In this context, 25 appears striking.

2.9 The Arbitrator was reluctant to answer the questions and often relied on Knowles to provide the responses. He made no disclosure in respect of his previous matters involving Knowles. All of these facts were viewed to be of significance by Mr. Justice Hamblen, particularly his actions from March 2015 onwards.

2.10 Mr. Justice Hamblen held that there was a real possibility of bias, with reference to Section 24 (1) (a) of the Arbitration Act 1996:

> *(1) "A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds –*
>
> (a) *That circumstances exist that give rise to justifiable doubts as to his impartiality*".

2.11 Mr. Justice Hamblen suggests that the Arbitrator was only biased from the point at which Cofely Ltd became aware of the *Eurocom v Siemens* judgment, which may be debatable; the Arbitrator was either biased or he was not. He did not **become** biased because from the start of the Arbitration he had acted in 137 matters, 25 of which involved Knowles. However, the way in which the Arbitrator acted after March 2015 was the main factor, which influenced the decision:

> "*This was raised as a potential issue by both Mr Bingham and Knowles, although neither advanced a positive case as to its application. On my findings the issue of apparent bias does not arise out of the earlier conduct of the arbitration reference but only out of events from March 2015 onwards. From March until July 2015 Cofely was involved in an information gathering exercise which continued until the important information provided by Knowles in its 3 July letter. It was not in a position to decide whether there were*

grounds for objection until that information gathering was as complete as it was likely to be. Bias is not an issue to be raised lightly. Moreover, the only part it was playing in the proceedings during this period was in pursuing its information requests. In all the circumstances I am satisfied that section 73 has no application in this case".

2.12 The emphasis that Mr. Justice Hamblen placed on the conduct of the Arbitrator from March 2015 is significant when viewed in the context of *Sierra Fishing Company & Ors v Farran & Ors [2015] EWHC 140 (Comm)*, in which the claimants objected to the appointment of the sole arbitrator on the ground that he had a social and commercial relationship with the first and second defendants. He was also related to the first defendant's legal counsel, which was not disclosed before he accepted the appointment. In particular:

- The arbitrator drew criticism from the content and tone of his communications with the parties once the dispute as to his impartiality and jurisdiction had arisen and regarding his communications with the court; and

- At the time of any challenge, an arbitrator must not appear to take sides whereas in Popplewell J's view, the content and tone of his communications was not impartial. They were argumentative and advanced arguments on behalf of the first and second defendants that they had not advanced for themselves. He acted as if he had "*descended into the arena and taken up the battle*" on behalf of the defendants and had ultimately lost the necessary objectivity required to determine the merits of the claim.

Sierra Fishing Company

2.13 The decision of *Sierra Fishing Company & Ors v Farran & Ors [2015] EWHC 140 (Comm)* also considered if the claimant in the arbitration had lost its right to object pursuant to Article 73 of the Arbitration Act 1996. Notably:

- A request or agreement to put the arbitration process on hold does not, of itself, seek to invoke the tribunal's jurisdiction. Similarly, an agreement to revive the process could not amount to taking part. Mere silence and inactivity in the face of

a revival of the process by another party was equally incapable of amounting to taking part;

- Requests or agreements to adjourn procedural hearings, of themselves, do not amount to initially taking part (although they could amount to continuing to take part where the party had already taken part by invoking the tribunal's jurisdiction). They merely sought to preserve the opportunity to participate or object at the hearing where the postponement was sought or agreed;

- The claimants' indication that they would be appointing their own arbitrator did not amount to taking part because it could not amount to invoking the jurisdiction of a tribunal that had not been constituted; and

- Accordingly the claimants had not lost the right to object under Article 73 of the Arbitration Act 1996.

The IBA Guidelines

2.14 The IBA Guidelines provide a common set of principles to prevent arbitrators from different jurisdictions applying different standards of disclosure. The key sections of the IBA Guidelines set out, on a sliding scale, instances that are deemed acceptable to those that should not be waived. Specifically:

- The “Green List” provides a list of examples which are not considered to be conflicts of interest and which do not need to be disclosed by arbitrators;

- The “Orange List” is a non-exhaustive list of examples which an arbitrator should disclose and which may give rise to justifiable doubts as to the arbitrator’s independence or impartiality;

- The “Waivable Red List” lists situations which could lead to disqualification, however, this can be avoided with the consent of the parties; and

- The “Non-Waivable Red List” will not enable an arbitrator to act. By way of example, Article 1.4 of the “Non-Waivable” Red List states the following: “*The 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 words "*his or her firm*" were incorporated in 2014).

2.15 The IBA Guidelines were addressed in the decision of *W Limited v M SDN BHD* [2016] EWHC 422 (Comm), in which the Claimant, unsuccessfully, alleged that the Arbitrator had a conflict of interest. Specifically, Mr David Haigh QC, was a partner in the Canadian law firm Burnet, Duckworth & Palmer LLP (Burnet) which, during the course of the arbitration in question, provided "*substantial*" legal services to an affiliated company of the defendant and derived "*substantial remuneration*" from the instructions. Mr Haigh QC stated that he had no knowledge of the conflict during the course of the arbitration. The conflict of interest was only discovered shortly after the final award and, according to Mr Haigh, his firm had failed to identify and bring to his attention the conflict during the searches carried out prior to his appointment

2.16 The High Court confirmed that it would not be bound by the IBA Guidelines, which state that they do not over-rule any applicable or national law. Furthermore, it was noted that the IBA Guidelines have certain weaknesses because Article 1.4, in particular, does not apply to a situation in which a firm may advise a party but where an arbitrator from that firm has no conflict of interest. (This is an issue that only came into being with the amendments to the IBA Guidelines in 2014). Therefore, it may not be appropriate to uphold certain items on the "*Non-Waivable Red List*" and the IBA Guidelines should be interpreted on a case by case basis.

2.17 M's defence to the claim relied on a straightforward application of the common law test for apparent bias. As with the test itself, it was common ground between the parties that the fair minded and informed observer was "*neither complacent nor unduly suspicious*" (as per Kirby J in *Johnson v Johnson* (2000) 201 CLR 488 at [53]). Bearing this in mind, M's position was that, whilst any inquiry into the Arbitrator's actual knowledge was to be avoided, if the fair minded and informed observer would accept the Arbitrator's statement as to his lack of knowledge of the alleged conflict, then there could be no real possibility of apparent bias: see *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451, as interpreted in Helow v *Secretary of State for the Home Dept* [2008] UKHL 62, especially at [39]. For no fair minded and

informed observer would conclude that any tribunal could be biased by something that (*ex hypothesi*) it did not know about.

The ICC Court of Arbitration's Guidance Note

2.18 The ICC Court of Arbitration published a Guidance Note for the disclosure of conflicts by arbitrators, adopted on 22nd Febrary 2016, which lists the following situations that should be considered by arbitrators in assessing their independence and impartiality:

- The arbitrator or prospective arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates;
- The arbitrator or prospective arbitrator or his or her law firm acts or has acted against one of the parties or one of its affiliates;
- The arbitrator or prospective arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute;
- The arbitrator or prospective arbitrator or his or her law firm acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise;
- The arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality;
- The arbitrator or prospective arbitrator has a professional or close personal relationship with counsel for one of the parties or its law firm;
- The arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliate;
- The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case; and / or

- The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel for one of the parties or its law firm.

2.19 Of significance, Articles 24 and 28 of the Guidance stipulate the following:

> "*24. […] Arbitrators should in each case* ***consider*** *disclosing relationships with another arbitrator or counsel who is a member of the same barristers' chambers. Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a part for the award, should also be considered in the circumstances of each case*".
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> "*28. Consistent with that policy and unless otherwise agreed by the parties, the Court will publish on its website, for arbitrations registered from 1st January 2016, the following information: (i) the names of the arbitrators, (ii) their nationality, (iii) their role within the a tribunal, (iv) the method of their appointment, and (v) whether the arbitration is pending or closed. The arbitration reference number and the names of the parties and of their counsel will not be published*".

Party-Nominated Arbitrators

2.20 Let us take the issue of bias and arbitral tribunals a step further and consider these in a slightly different context: in respect of the composition of a three-person tribunal, is it appropriate for any of those members to be from the same chambers? This could become a particular issue if the Chairperson and one other member are from the same chambers and the third person is not. This situation is common and yet may not lead to mutual confidence. As discussed above this information may now need to be disclosed pursuant to the ICC's Guidance Note.

2.21 Equally, how many Independent Expert Witnesses are appointed by the same law firms over and over again? Is this specific ever put under scrutiny and if their income was assessed, would they appear as "independent" as they ought to? The ability to cross-examine may be a compelling factor.

2.22 In "*Moral Hazard in International Dispute Resolution*", 2010, Professor Jan Paulsson advocated that institutional arbitral bodies should be responsible for the appointment of tribunals: […] "*an institutional requirement that appointments be made from a pre-existing list of qualified arbitrators. When composed judiciously by a reputable and inclusive, international body, with in-built mechanisms of monitoring and renewal, such a restricted list may have undeniable advantages as a fairly intelligent compromise. Parties may freely select any one of a number of arbitrators but each potential nominee has been vetted by the institution and is less likely to be beholden to the appointing party*".

2.23 Albert Jan van den Berg, in "*Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*" believes that the way in which arbitrators are appointed may reduce the number of dissenting decisions. Van den Berg's thesis resonates with that of Professor Jan Paulsson's: "*In an insightful contribution on the subject, Jan Paulsson proposes replacing the method of party-appointed arbitrators with a list-procedure*". Perhaps this is the way forward (provided that the arbitral institutions act with independence and impartiality) whereby:

- The parties request an arbitral institution to provide them with a list of candidates;
- Each party then strikes a certain number of candidates and ranks the remaining candidates;
- The candidate with the best ranking is appointed or, if two or more candidates have the same ranking, the arbitral institution selects one of them; and
- The appointed arbitrators do not know who nominated them.

2.24 The opposing view is put forward by Charles N. Brower and Charles B. Rosenberg in their essay, "The Death of the Two-Headed Nightingale: Why the Paulsson-Van Den Berg Presumption that Party – Appointed Arbitrators are Untrustworthy is Wrongheaded", who advocate that party-appointed arbitrators and dissenting judgments are a fundamental aspect of arbitration and should not be restricted or discouraged. Specifically, "A party's right to appoint an arbitrator and the ability of an arbitrator to dissent are significant elements of perceived legitimacy. And

eliminating them would impede the further development of the field. To put it simply, "If it ain't broke, don't fix it"".

2.25 Professor John Uff CBE QC in *Party-Appointed Arbitrators: What Is Their Proper Role?* suggests "There is little chance of the long-established contractual right for each party to appoint an arbitrator falling out of use; and any Arbitral Institution that sought to override that right would soon find its business being taken over by others prepared to uphold it." Uff is ostensibly happy that part-nominated arbitrators can be impartial and independent but that they do "[have] a duty to have regard to the case advanced by the appointing party and in terms of the need for the tribunal, if possible, to agree a single award in the interests of finality as well as clarity." Uff does not appear to go as far as the view advanced in Redfern & Hunter, at para. 9.184 of the 5th Edition, that "it is not improper for a party-appointed arbitrator to ensure that the tribunal properly understands the case being advanced by that party".

3. Conclusion

3.1 Is mutual confidence in arbitrators achievable or it is more likely that international parties with differing views on the systems of law will always have residual concerns? Put another way could be said that bias is impossible to eradicate entirely?

3.2 Perhaps the answer is gleaned from the debate between Jan Paulson/Albert Jan van den Berg and Charles N. Brower/Charles B. Rosenberg: The Institutions appoint, regulate and manage arbitrators but the parties are allowed to submit ranked lists – a screened selection process. That way the arbitrator(s) do not know who has appointed them or favoured them the most. Equally, the parties ought to have a greater level of mutual confidence in the selection process.