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INTERNATIONAL COMMERCIAL LAWYERS

# RECENT DECISIONS IN ENGLISH COURTS ON ARBITRATOR BIAS

*Cofely Ltd v Bingham & Anor* [2016] EWHC 240 (Comm)
*W Ltd v M SDN BHD* [2016] EWHC 422 (Comm)

## Introduction

Two recent decisions have been handed down by the English High Court, in which the Commercial Court was required to consider matters of alleged arbitrator bias.

- *In Cofely Ltd v Bingham & Anor* [2016] EWHC 240 (Comm), the English High Court found (in a rare example of such a case) that a number of grounds put forward by the applicant raised the real possibility of apparent bias, and, on the basis that the applicant had made out the requisite grounds for removal of the arbitrator under section 24(1)(a) of the Arbitration Act 1996, an order for removal would be made if the arbitrator did not resign.
- *In contrast, in W Ltd v M SDN BHD* [2016] EWHC 422 (Comm), despite finding that the facts leading to alleged bias fell directly within the non-waivable red list set out I in the IBA Guidelines on Conflicts of Interest in International Arbitration, the learned judge dismissed a section 68 challenge and, with diffidence, concluded there were weaknesses in the IBA Guidelines.

## *Cofely Ltd v Bingham & Anor* [2016] EWHC 240 (Comm)

On 16 February 2016, the English High Court handed down a decision in Cofely Ltd v Bingham & Anor [2016] EWHC 240 (Comm) in which it found that the applicant had established that there were circumstances that gave rise to justifiable doubts as to an arbitrator's impartiality, and if the arbitrator did not resign, an order for removal would accordingly be made.

### Background

On 21 January 2013, Knowles Limited commenced arbitration against Cofely, alleging breaches of a success fee agreement entered into between the two parties. At the same time, Knowles applied to the Chartered Institute of Arbitrators for the appointment of an arbitrator. It was stated that it was preferable that the arbitrator had both quantity surveying and delay analysis experience and the appointment of Mr Bingham was sought. Despite objections made by Cofely (on the basis that quantity surveying experience was not necessary), the Chartered Institute of Arbitrators confirmed the appointment of Mr Bingham on 4 February 2013.

The arbitration proceeded, albeit with various periods of inactivity. Both parties made applications for partial awards (Knowles on 2 April 2013, Cofely on 11 November 2013) – whilst Knowles' application was dealt with promptly, Cofely's was not.

On 18 February 2015, Cofely wrote to Knowles requesting information in relation to its dealings with Mr Bingham in light of the decision of Mr Justice Ramsey in Eurocom Ltd v Siemens Plc [2014] EWHC 3710 (TCC) [2015] BLR in which judgment had been delivered on 7 November 2014. Cofely explained that it had concerns arising out of the Eurocom case and Mr Bingham's conduct of the referral to that time, and asked six questions seeking further information concerning the nature and extent of the professional relationship between Knowles and Mr Bingham.

Correspondence followed during February-April 2015 between Knowles and Cofely; and Knowles and Mr Bingham, in which Cofely sought further information on the relationship between the two. During this period, Mr Bingham failed to provide answers to the questions posed by Cofely; while Knowles answered in part.

On 17 April 2015, a hearing called for by Mr Bingham took place at Knowles' offices, which Cofely alleged involved hostile and aggressive questioning. Following that meeting, further correspondence took place between Knowles and Cofely; and Knowles and Mr Bingham. On 30 April 2015, Mr Bingham issued his "Arbitrator's Ruling" as to whether the tribunal was 'properly constituted' – concluding that it was and that he had no conflict of interest. Subsequently, following further correspondence, on 8 July 2015 Cofely's solicitors requested that Mr Bingham recuse himself (to which no answer was received).

On 22 July 2015, Cofely issued the present application seeking removal of Mr Bingham as arbitrator pursuant to section 24(1)(a) of the Arbitration Act 1996. It based its application on seven grounds, of which four were said to be sufficient to question the arbitrator's impartiality alone. Those grounds can be summarised as follows:

- Ground (1) - The Eurocom case – various conclusions were put forward in respect of this, including that Mr Bingham was clearly someone that Knowles were keen to appoint (several possible reasons were put forward for this, including alleged preferential treatment of Knowles by Mr Bingham);
- Ground (2) - Response to Cofely's requests for information - the way that Mr Bingham responded to Cofely's questioning would lead the fair minded observer to have increased concern regarding the possibility that he was biased;
- Ground (3) - The hearing - Mr Bingham's defensive approach to providing the requested information and, in particular, the hostile stance taken to Cofely's position also demonstrates, by itself, reasonable grounds to suspect a real possibility of bias;
- Ground (4) - The relevant relationship information – the repeated appointment of Mr Bingham by Knowles would lead a fair minded observer to conclude that Mr Bingham has or has an appearance of a significant financial dependence and/or interest in continuing to be appointed in cases involving Knowles and that therefore he may be unconsciously influenced to find in favour of Knowles as a result and/or not to fall out of favour with them;
- Ground (5) - Mr Bingham's witness statement (given as evidence to the Court) – which made positive statements in opposition to Cofely's application; failed to recognise the relevance of the information requested by Cofely; suggested that Cofely's requests for information amounted to aggressive and/or bullying behavior; and took sides in the arbitration;
- Ground (6) - Unilateral communications with Knowles;

- Ground (7) - General conduct of the Referral (in particular, the different treatment of the parties' applications for partial awards).

**Decision**

The High Court (Mr Justice Hamblen) held that the applicant had established the requisite grounds for removal of Mr Bingham as arbitrator under section 24(1)(a) of the Act, and if Mr Bingham did not resign, an order for removal would accordingly be made.

Mr Justice Hamblen set out the main principles drawn from the authorities relating to section 24 as follows:

1. The common law test for apparent bias is reflected in section 24;
2. The common law test under section 24 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";
3. Such a fair minded and informed observer, although not a lawyer, is assumed to be in possession of all the facts which bear on the question and expected to be aware of the way in which the legal profession operates in practice;
4. A "fair-minded" observer reserves judgment until he/she has seen and fully understood both sides of the argument: his/her approach must not be confused with that of the person who has brought the complaint, the assumptions made by the complainer are not to be attributed to the observer unless they can be justified objectively;
5. An "informed" observer takes a balanced approached and appreciates that context forms an important part of the material to be considered.

As to repeated appointments – which was one of the issues in the case - the fact that an arbitrator is regularly appointed or nominated by the same party/legal representative may be relevant to the issue of apparent bias, particularly if it raises questions of material financial dependence; and the tribunal's explanations as to his/her knowledge or appreciation of the relevant circumstances are also a factor which the fair minded observer may need to consider when reaching a view as to apparent bias.

Mr Justice Hamblen concluded that while Grounds (6) and (7) did not (either alone or with the other grounds) provide any basis for concluding that there was a real possibility of bias, Grounds (1) to (5) raised concerns of apparent bias. In particular, he observed:

- The starting point was the relationship between Mr Bingham and Knowles, which showed that over the last three years, 18% of Mr Bingham's appointments and 25% of his income as arbitrator/adjudicator derives from cases involving Knowles (although only 3 of the 25 cases involved Knowles as a party).
- The existence of Knowles' "blacklist" of arbitrators/adjudicators was of significance, as it would be important for anyone whose appointments and income are dependent on Knowles related cases to a material extent, as is the case for Mr Bingham.
- Mr Bingham acted inappropriate during the meeting on 17 April 2015, and was aggressive and hostile. It was not appropriate for Mr Bingham to issue a ruling following that meeting, given the nature of the issue and the lack of request for such by either party.
- Concerns as to apparent bias were further heightened by Mr Bingham's witness statement, which shows that even during the court proceedings, Mr Bingham did not recognise the

relevance of the relationship information or the need for any disclosure, or that his conduct of the April 2015 hearing was in any way inappropriate – this of awareness demonstrated a lack of objectivity and an increased risk of unconscious bias.
- Cofely's requests for information were reasonably made and expressed, but were not responded to in such a fashion.

Cumulatively, Grounds (1) to (5) raised the real possibility of apparent bias.

The judge concluded that while the case of apparent bias was made out, he also found that there was nothing untoward about the Partial Award or the conduct of the arbitration up until March 2015.

**W Ltd v M SDN BHD [2016] EWHC 422 (Comm)**

In *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm), the Claimant challenged two awards made by arbitrator David Haigh QC, on the grounds of section 68 of the Arbitration Act 1996. The Claimant also relied upon the fact that the conflict of interest in this case fell squarely within paragraph 1.4 of the Non-Waivable Red List within the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.

**Background**

Mr Haigh QC, a Canadian lawyer, was appointed sole arbitrator in arbitration between the parties and made two awards (dated 16 October 2014 and one dated 26 March 2015). The dispute arose from a project in Iraq, in respect of which the parties had contracted.

It was accepted by both parties that the alleged conflict fell within Paragraph 1.4 of the 2014 IBA Guidelines, as amended (although would not have done so before the paragraph was amended in 2014): "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."

In summary:

- Mr Haigh QC was a partner in a law firm.
- The firm earns substantial remuneration from providing legal services to a client company that has the same corporate parent as a company that is a party in the arbitration.
- The firm does not advise the parent, or the party.
- There was no suggestion the arbitrator does any of the work for the client company.

**Decision**

Mr Justice Knowles CBE held that the fair minded and informed observer would not conclude that there was a real possibility that the tribunal was biased, or lacked independence or impartiality.

In reaching this decision, he considered that the arbitrator, although a partner, operated effectively as a sole practitioner using the firm for secretarial and administrative assistance

for his work as an arbitrator. The arbitrator made other disclosures where, after checking, he had knowledge of his firm's involvement with the parties, and would have made a disclosure on the issues raised by the applicant if he had been alerted to the situation.

Mr Justice Knowles CBE also considered the impact of the IBA Guidelines on his decision (citing *Sierra Fishing Company and others v Farran and others* [2015] EWHC 140 (Comm); and *Cofely Limited v Anthony Bingham* [2016] EWHC 240 (Comm) for authority that while the Guidelines were not binding, they could be of assistance).

While noting the "*distinguished contribution*" of the IBA Guidelines, he identified what he perceived as "*weaknesses*" as exemplified in the present case:

- First, in treating compendiously (a) the arbitrator and his or her firm, and (b) a party and any affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived.
- Second, in this treatment occurring without reference to the question whether the particular facts could realistically have any effect on impartiality or independence (including where the facts were not known to the arbitrator).

In the present case, while it was "*valuable and appropriate to examine them at least as a check*", the Guidelines did not cause him to take a different view to that expressed above.

19th April 2016