CASE UPDATE - JUDICIAL/ARBITRATOR BIAS AND CONFLICTS OF INTEREST

Introduction

In a number of recent cases, the English courts and Privy Council have been required to consider issues of bias and conflicts, in the context of both litigation and arbitration. These cases once again highlight the importance – for both parties and decision makers – to be alight to issues of not only actual bias and conflicts, but also apparent bias and conflicts. In addition, the Court confirmed that, absent clear evidence of the intention of the parties, an overly rigid approach was not permissible in terms of appointment of arbitrators and their qualifications. The importance of full/continuing disclosure by judges/arbitrators of any potential grounds for conflict of interest, and avoiding any appearance of pre-judgment/unilateral communications with one party were emphasized.

- *Almazeedi v Penner* [2018] UKPC 3 (26 February 2018): the Privy Council upheld the decision of the Cayman Court of Appeal that it was inappropriate for a judge to not disclose his connection to Qatar and sit in winding up proceedings where he had failed to disclose his position as a Supplementary Judge of the Civil and Commercial Court, Qatar Financial Centre.
- In *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB 12/20 (Decision on the Proposal to Disqualify Álvaro Castellanos Howell (Spanish), 2 March 2018)* and *Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23 (Decision on the Proposal to Disqualify Mr. Gary B. Born, 16 March 2018)*, the remaining members of an ICSID Ad Hoc Committee and ICSID Tribunal, respectively, rejected proposals for the disqualification of the other member of the Committee/Tribunal.
- *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 (13 March 2018): the Court of Appeal held, in the case of a judge who had (wrongly) communicated privately with counsel appearing in a case before him as to the merits of each side's case, that in the circumstances a fair-minded and informed observer would not have concluded that there was a real possibility that the judge was biased.
- *Allianz Insurance Plc (formerly Cornhill Insurance Plc) v Tonicstar Ltd* [2018] EWCA Civ 434 (14 March 2018): the Court of Appeal overturned a decision of the High Court, holding that a Queen's Counsel who has practised as a barrister

specialising in the field of insurance and reinsurance for more than 10 years satisfied the requirement for an arbitrator who had "not less than 10 years' experience of "insurance or reinsurance"".

- In *Halliburton Co v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 (19 April 2018), the Court of Appeal considered whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias; and whether and to what extent he may do so without disclosure.

***Almazeedi v Penner* [2018] UKPC 3 (26 February 2018)**

Following his retirement as a judge of the Commercial Court in England, Sir Peter Cresswell ("the Judge") became an additional judge of the Cayman Islands' Grand Court and, in 2011, also a supplementary judge of the QICDRC. In the period November 2011–September 2014, the Judge was assigned to winding-up proceedings in the Cayman Islands in respect of a company ("BTU") whose preference shareholders included several persons or entities connected to the State of Qatar, including Qatar National Bank. Qatar National Bank's Chief Executive Officer was (from 2006) H.E. Ali Sharif Al-Emadi and its Chairman was H.E. Yousef Hussain Kamal Al-Emadi (the Qatari Finance Minister from 1998-2013).

Mr. Almazeedi was a former director of BTU and remained the controlling shareholder of BTU's management company. On 26 June 2013, H.E. Ali Sharif Al-Emadi succeeded H.E. Yousef Hussain Kamal Al-Emadi as the Qatari Finance Minister and as the Chairman of Qatar National Bank. As Finance Minister, he had responsibility relating to the appointment of judges in the QICDRC (which fell under the remit of the Qatar Financial Centre). After Mr. Almazeedi discovered this, he filed an application on 5 November 2014, inter alia, for the proceedings before the Judge to be set aside.

The Cayman Islands' Court of Appeal rejected Mr. Almazeedi's challenge in respect of the period up until 26 June 2013 but allowed the challenge for the period after 26 June 2013.

Mr. Almazeedi appealed to the UK Privy Council contending that the Cayman Islands' Court of Appeal should have held that the Judge lacked the required independence from the beginning of his involvement in the case. The respondents (the company's joint liquidators) cross-appealed to the Privy Council contending that the Cayman Islands' Court of Appeal was wrong to find that the Judge lacked independence for the period after 26 June 2013.

By a majority of 4:1, the UK Privy Council allowed Mr. Almazeedi's appeal and dismissed the joint liquidators' cross-appeal. Lord Sumption dissented.

For the majority, Lord Mance considered that the applicable test was whether the fair-minded and informed observer would see a real possibility that the Judge would be influenced (albeit sub-consciously) by the circumstances of his concurrent appointments. The issue was not merely a matter of the winding-up proceedings concerning disputes between investors connected to the State of Qatar and Mr. Almazeedi. It was the fact that the persons who represented the Qatari interests were also closely concerned (to an extent which remained opaque in the view of the Privy Council) in some aspects of the arrangements by which the Judge was in the process of becoming a part-time QICDRC judge in 2011.

The Privy Council therefore held that the Cayman Islands' Court of Appeal was correct to find that it had been inappropriate for the Judge to sit in judgment on the winding-up proceedings without giving any disclosure of his position in the QICDRC for the period after 26 June 2013 and that the non-disclosure had amounted to a flaw in the Judge's apparent independence.

However, the Privy Council considered that the Cayman Islands' Court of Appeal had erred in treating the period before 26 June 2013 differently. Absent any disclosure of his position as a QICDRC judge, a fair-minded and informed observer would regard the Judge as unsuitable to hear the winding-up proceedings from at least January 2012 (before the hearing of the winding-up proceedings), which is when the Judge became aware of various aspects in dispute between Mr. Almazeedi and Qatar National Bank.

Lord Sumption, dissenting, considered that the test required the notional fair-minded and informed observer to be satisfied of a "real risk" of bias after consideration of all relevant facts. In the absence of any allegation that the Judge had actually done anything that could have raised doubts about his independence, the case boiled down to consideration of whether the Judge might be consciously or unconsciously affected by a hypothetical possibility of adverse consequences to him in Qatar as a result of any decision in the winding-up proceedings contrary to the interests of the relevant Qatari persons. Such a hypothetical and unsubstantiated possibility could not form the basis of a realistic bias challenge. There had been no suggestion that the Qatari Finance Minister was able to influence the assignment of work to QICDRC judges, and the suggestion that the Judge might be affected by the possibility that, if he gave a conclusion contrary to the relevant Qatari interests, his term as a QICDRC judge might not be renewed (or its terms negatively impacted), "*lay at the outer extreme of implausibility*".

***Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20 (Decision on the Proposal to Disqualify Álvaro Castellanos Howell (Spanish), 2 March 2018)**

On August 11, 2017, Blue Bank filed an Application for Annulment of the Award issued on April 26, 2017 by the Arbitral Tribunal. On November 13, 2017, ICSID informed the Parties about the intention of the ICSID General Secretary to propose to the President of the ICSID Administrative Council the appointment of Mr. Álvaro Castellanos Howell, national of Guatemala, as Chairman of the Ad Hoc Committee, and the appointment of Mr. Felipe Bulnes Serrano and Mr. Carlos Urrutia Valenzuela as the other members of the Ad Hoc Committee. On January 4, 2018, ICSID informed the Parties that it would proceed with the constitution of the ad hoc Committee on the proposed basis, despite the objections of Venezuela.

On January 8, 2018, Venezuela presented a Disqualification Proposal against the Mr. Castellanos under Article 57 of the ICSID Convention and Rules 9 and 53 of the Arbitration Rules. Venezuela drew attention to a column authored by Mr Castellanos in the Guatemalan newspaper El Periódico, and based its disqualification challenge on, inter alia, (a) the lack of impartiality of Mr. Castellanos as shown by the column; (b) the repeated appointments of Mr. Castellanos in annulment procedures involving Venezuela; and (c) the decision of Mr Castellanos to accept the position knowing that Venezuela opposed his appointment.

The proposal for disqualification was rejected. Broadly:

- Nothing said by Mr. Castellanos in his column seemed to condition or compromise his ability to assume its role as a member of the Committee and to analyze in a impartial and independent, with absolute objectivity and legal rigor, matters submitted to the decision of the Committee.
- Having considered both the IBA Guidelines and previous decision of ICSID Tribunals, and taking into account that the appointments of Mr Castellanos had been made not by the same party/parties but by the President of the Administrative Council of ICSID, the other members of the Tribunal rejected the request for disqualification based on repeated appointments.
- The disqualification of an arbitrator or member of an ad hoc committee should be founded in circumstances that leave manifestly in view of his apparent lack of impartiality or independence – merely being aware that a party was opposed to his appointment was insufficient, and therefore that ground for disqualification was also rejected.

Allianz Insurance Plc (formerly Cornhill Insurance Plc) v Tonicstar Ltd [2018] EWCA Civ 434

In *Allianz Insurance Plc (formerly Cornhill Insurance Plc) v Tonicstar Ltd* [2018] EWCA Civ 434 (13 March 2018), the parties had entered into a reinsurance contract incorporating the "Joint Excess Loss Committee, Excess Loss Clauses", Clause 15 of which provided for each party to appoint an arbitrator (with Clause 15.5 providing that the arbitral tribunal should consist of persons with not less than 10 years' experience of "insurance or reinsurance").

Following a dispute between the parties, the respondents nominated as arbitrator a barrister with considerably more than 10 years' experience of insurance and reinsurance law. The claimant applied under Section 24 of the Arbitration Act 1996 for the removal of that arbitrator on grounds of lack of qualification because experience of the law of insurance/reinsurance did not amount to experience of insurance/reinsurance within the meaning of the arbitration agreement.

The High Court (Teare J) upheld the claimant's challenge to the arbitrator. In Company X v Company Y (Unreported), Morison J had held that a QC with considerable experience as a lawyer in insurance/reinsurance disputes was not qualified to act as an arbitrator within the meaning of Clause 15.5. Morison J's rationale was that, in adopting Clause 15.5 parties intended to have a "trade arbitration" where the tribunal consisted of persons from the business of insurance or reinsurance. Since Morison J's decision was not obviously wrong, it was the court's duty to follow it.

Upon appeal, the Court of Appeal (Sir Brian Leveson, Lord Justice Underhill and Lord Justice Leggatt) reversed this decision.

Leggatt LJ, giving the decision of the Court of Appeal, highlighted that the issue for the Court of Appeal was whether a Queen's Counsel who has practised as a barrister specialising in the field of insurance and reinsurance for more than 10 years satisfies the requirement set out in Clause 15.5. Leggatt LJ held that such a person did, considering, inter alia:

- first, that there is no such thing as insurance or reinsurance "itself" which is separate and distinct from the law of insurance and reinsurance
- second, that, unless the parties had some special reason for wishing to exclude lawyers from the pool of candidates eligible for appointment, a person who has practised as a barrister specialising in the field of insurance and reinsurance for more than 10 years would naturally be regarded as qualified for appointment as an arbitrator. Reasonable parties who incorporated the JELC Clauses into their contract of excess of loss reinsurance would understand such a barrister to have the requisite experience of "insurance or reinsurance" within the natural meaning of those words. If the intention were to restrict the parties' freedom of choice by excluding such a person from eligibility, a clear expression of that intention (not found in the present clause) would be needed.

Bubbles & Wine Ltd v Lusha **[2018] EWCA Civ 468**

In *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 (14 March 2018), the issue for the Court was whether the judge showed apparent bias by reason of a conversation held in private with one party's counsel alone during a trial.

The case between the parties concerned building works, with Mr Lusha claiming for unpaid invoices and B&W bringing a counter claim. In summary, the basis of the allegation of apparent bias was a conversation that the judge had in private with Mr Lusha's counsel in which he said that (1) the counterclaim seemed weak; and (2) the claimant's case had several evidential gaps, and asked him to pass this information on to B&W's counsel. The judge, in a later email, invited counsel's thoughts on whether he should recuse himself but ultimately decided against this and handed down judgment in which he found for Mr Lusha and dismissed the counterclaim.

B&W appealed against the decision, the main ground of appeal being that the trial judge ought to have recused himself by reason of actual or apparent bias. The appeal was dismissed as was a paper application for permission to appeal; however, following an oral hearing B&W was given permission to pursue a further appeal to the Court of Appeal solely on the issue of bias (B&W emphasizing that the appeal was based solely on the ground of apparent bias and not actual bias).

The Court of Appeal (Leggatt and Flaux LJJ) dismissed the appeal.

At the outset, Leggatt LJ, giving the judgment of the Court of Appeal, identified the test for apparent bias as being a two-stage process: the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased; and it must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased.

Leggatt LJ highlighted that in their handling of cases, judges need to be scrupulous not merely to refrain from conduct which will result in their recusal but to avoid creating a situation in which concerns about their impartiality can reasonably be raised at all.

In the present case, the trial judge had made a number of errors – including requesting a private conversation with counsel for one of the parties in the absence of the other while the

case was continuing; and, worse, not to confine his private conversation with the claimant's counsel to personal matters but to talk about the case and, more than that, to express views about the merits of the parties' respective cases.

However, in the circumstances, Leggatt LJ was satisfied that the fair-minded and informed observer would not conclude that there was a real possibility that the judge was biased. In giving his reasons, Leggatt LJ drew attention to, inter alia, the following points:

- Based on the contemporaneous emails, the judgment and counsel's evidence about what was and was not said when the judge spoke privately to Mr Varma, there was no material uncertainty about the relevant facts;
- it was perfectly proper for the judge to express preliminary views about the strength or weakness of each party's case during the proceedings and no criticism could reasonably have been made of him if his comments had been made in open court – the expression of such views could only be thought to indicate bias if they are stated in terms which suggest that the judge has already reached a final decision before hearing all the evidence and argument;
- it was of critical importance that the judge, in making the comments that he did (i) made it clear that his purpose was to assist both parties in preparing their closing submissions, and (ii) specifically asked counsel to pass on the comments to his opponent (which counsel did);
- in the conversation, counsel made no submissions to the trial judge about the case, nor did the judge invite him to do so;
- the fact that the trial judge himself sent an email to B&W's counsel the next day conveying to him directly the provisional view about the counterclaim which he had already communicated via Mr Lusha's counsel confirms that the judge was not intending to give – and indeed was seeking to ensure that he did not give – one party assistance which the other was denied.

***Mathias Kruck and others v. Kingdom of Spain,* ICSID Case No. ARB/15/23 (Decision on the Proposal to Disqualify Mr. Gary B. Born, 16 March 2018)**

On 4 June 2015, the Secretary-General of ICSID registered the Request for Arbitration filed by the Claimants (108 legal entities established in Germany (including sixty-five limited liability partnerships and forty-three private companies), and eight individuals of German nationality, including Mathias Kruck) against the Respondent.

On 19 January 2016, the Secretary-General notified the Parties that all three arbitrators - Vaughan Lowe, President, appointed by agreement of the Parties; Gary B. Born, appointed by Claimants; and Zachary Douglas, appointed by the Respondent - had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date

On 13 February 2018, Respondent proposed the disqualification of Gary B. Born on the basis of "lack of the qualities required by Article 14(1) of the ICSID Convention, evidenced by different circumstances described herein below and which manifestly preclude the challenged arbitrator from being relied upon to exercise independent judgment." In essence, the Tribunal's summarized the grounds for disqualification as being:

- Mr Born's dissenting opinion in *Case No. 2014-03 Mr Jürgen Wirtgen and others v Czech Republic* (11 October 2017) demonstrated that he has already reached an immutable and biased opinion on issues at the core of the present arbitration, notably on the question of the nature and effect of government commitments to maintain prices paid for electricity, and on the question of the applicability and effect of EU Law;
- Mr Born's questioning of counsel/witnesses in *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain (ICSID Case No. ARB/14/1)*, and *KS Invest GmbH and TLS Invest GmbH v Kingdom of Spain (ICSID Case No. ARB/15/25)* was intended to obtain admissions on questions that Mr Born had already prejudged, and demonstrated Mr Born's unwillingness or apparent inability to consider alternative viewpoints.

The remaining members of the Tribunal rejected the Respondent's proposal to disqualify Mr Born.

The test applied by the other members of the Tribunal was "whether it has been shown that there are any circumstances that would cause a reasonable third party to conclude that Mr Born cannot be relied upon to exercise independent judgment." Considering both the specific facts in each of the circumstances identified by the Respondent, namely Mr Born's dissenting opinion in Wirtgen and his questioning of counsel and witnesses in the Masdar and KS Invest cases, the other members of the Tribunal held that they were "clearly of the view that there is no basis for the suggestion that Mr Born cannot be relied upon to exercise independent judgment, or is not impartial, or does not have a mind open to the arguments to be presented in this case, or has any bias against Respondent in this case".

Halliburton Co v Chubb Bermuda Insurance Ltd **[2018] EWCA Civ 817**

The arbitration proceedings arose out of the Deepwater Horizon incident in 2010. Following settlement of various claims against it, Halliburton claimed on its insurance with Chubb. Chubb refused to pay, and Halliburton commenced arbitration proceedings. Both Halliburton and Chubb appointed arbitrators, but the identity of the third arbitrator could not be agreed. Following an application to the High Court, on 12 June 2015 Flaux J appointed "M" (who was Chubb's preferred candidate) and Halliburton did not appeal against this order.

Prior to expressing his willingness to be appointed, M disclosed that he had previously acted as arbitrator in a number of arbitrations in which Chubb was a party, including appointments on behalf of Chubb, and that he was currently appointed as arbitrator in two pending references in which Chubb was involved. Following his appointment in the proceedings between Halliburton and Chubb, M subsequently accepted further appointments in proceedings with overlapping subject matter which he did not disclose to Halliburton.

Following correspondence, on 21 December 2016 Halliburton issued a Claim Form seeking an order pursuant to section 24(1)(a) of the Arbitration Act 1996 ("the Act") that M be removed as an arbitrator. Halliburton's arbitration application was heard by the High Court on 12 January 2017, and on 3 February 2017 Mr Justice Popplewell delivered his judgment dismissing the application. In his judgment, he considered three elements of M's conduct which were relied upon as giving rise to an appearance of bias: (1) his acceptance of the

appointments in the subsequent arbitrations; (2) his failure to disclose those appointments to Halliburton; and (3) his response to the challenge to his impartiality.

Halliburton appealed against Popplewell J's decision. The issues for the Court were:

(1) Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias.

(2) Whether and to what extent he may do so without disclosure:

(a) When should an arbitrator make disclosure of circumstances which may give rise to justifiable doubts as to his impartiality?

(b) What are the consequences of failing to make disclosure of circumstances which should have been disclosed?

The Court of Appeal (Sir Geoffrey Vos, Chancellor of the High Court; Lord Justice Simon; and Lord Justice Hamblen) dismissed the appeal.

In relation to the first question, Lord Justice Hamblen (delivering the judgment of the Court) observed that:

- inside information and knowledge may be a legitimate concern for the parties to have in overlapping arbitrations involving a common arbitrator but only one common party, but he agreed with previous decisions that that did not, in itself, justify an inference of apparent bias.
- The starting point is that an arbitrator should be trusted to decide the case solely on the evidence or other material adduced in the proceedings in question.
- The mere fact of appointment and decision making in overlapping references does not give rise to justifiable doubts as to the arbitrator's impartiality, and objectively this is not affected by the fact that there is a common party.

In relation to the second question(s):

- While many institutional rules governing arbitration include provisions requiring disclosure to be made of facts or circumstances which may give rise to justifiable doubts as to an arbitrator's impartiality, the rule under the common law is that judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality – and the same rule applied to arbitral tribunals.
- The disclosure required depends on what the arbitrator knows. The fact that disclosure is required of circumstances that might lead to a conclusion of apparent bias, emphasises that the question of what is to be disclosed is to be considered prospectively. The question of whether or not disclosure should be made, or should have been made, depends on the prevailing circumstances at that time. A decision as to disclosure based on a conclusion which might be drawn can only be made on the basis of the circumstances as they were then known to be and, in principle, a determination of whether or not such disclosure should have been made should similarly be so judged.

- Accordingly, the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality. Under English law this means facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased.
- As to the consequences of failing to make disclosure of circumstances which should have been disclosed, Hamblen LJ observed that there were two distinct questions for the court considering an allegation of non-disclosure after the event - first, the court needs to consider whether disclosure ought to have been made in accordance with the principles we have just enunciated; and secondly, the court needs to consider the significance of that non-disclosure in the context of the application with which the court is dealing. In the case of an application for removal of the arbitrator in question, the court will consider on the basis of all the factual information available when that application is heard (including the fact that there has been non-disclosure), whether the fair-minded and informed observer would conclude that there was a real possibility that the arbitrator was biased.
- If a disclosure that ought to have been made has not been made, that will mean that the arbitrator will not have displayed the "badge of impartiality" which he should have done and non-disclosure is therefore a factor to be taken into account in considering the issue of apparent bias. An inappropriate response to the suggestion that there should be or should have been disclosure may further colour the thinking of the observer and may fortify or even lead to an overall conclusion of apparent bias.
- Non-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality, cannot, however, in and of itself justify an inference of apparent bias. Something more is required.

On the facts of the case, the Court concluded that M ought as a matter of good practice and, in the circumstances, as a matter of law to have made disclosure to Halliburton at the time of his appointments in the subsequent references. In considering whether, at the time of the hearing to remove, the non-disclosure taken together with any other relevant factors would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility that M was biased, the Court would take into account 1) the non-disclosed circumstance does not in itself justify an inference of apparent bias; (2) disclosure ought to have been made, but the omission was accidental rather than deliberate; (3) the very limited degree of overlap means that this is not a case where overlapping issues should give rise to any significant concerns; (4) the fair-minded and informed observer would not consider that mere oversight in such circumstances would give rise to justifiable doubts as to impartiality; and (5) there is no substance in Halliburton's criticisms of M's conduct after the non-disclosure was challenged or in the other heads of complaint raised by them.

Having reviewed the relevant facts, the Court agreed with the judge's overall conclusion that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that M was biased and therefore dismissed the appeal.

Concluding Observations.

These recent cases illustrate the increasing trend to challenge Judges and arbitrators on the grounds of conflict of interest. As has been stated in our previous mailings, full material disclosure and adherence to the standard of independence as well as impartiality is essential to maintain trust and confidence in any system of adjudication. As the old "gentlemanly" understandings of ethics and trust are being rapidly undermined or eroded and litigation/arbitration becomes increasingly aggressive, (for better or worse) such challenges are likely to be more common place.