Independence and Impartiality in the Appointment of Arbitrators

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An independent and impartial judiciary is vital to the rule of law. Few would doubt that this should apply equally to arbitration, although it lacks a permanent "judiciary" rooted in a single legal culture. This creates potential conflicts of interest that may leave awards open to challenge, and challenges to arbitrators' impartiality are becoming more common.

To assist, the International Bar Association formulated the IBA Guidelines on Conflicts of Interest in International Arbitration, (amended in 2014). Although, not binding on national courts, the English Court draws on them for assistance. In W Ltd v M SDN [2016] EWHC 422 (Comm), where the complaint was that the arbitrator's law firm advised an affiliate of one of the parties, the Court observed in relation to the IBA Guidelines (at para. 44):

It would be possible simply to say that the 2014 IBA Guidelines are not a statement of English law and then not enter into any examination of them. However the present arbitration is international, and parties often choose English Law in an international context. Thus the role of this Court has an international dimension(…).

Institutions are responding to this issue by clarifying their appointment requirements. On 22 February 2016 the ICC published a "Note to Parties and Arbitral Tribunals" including guidance for completing the Statement of Acceptance, Availability, Impartiality and Independence. It calls specific attention situations such as where the arbitrator has acted as an arbitrator in previous arbitrations involving one of the parties.

The successful challenge to the award in Cofely Ltd v Bingham [2016] EWHC 240 (Comm) highlights the importance of this issue. During an arbitration brought by a construction claim consultant, the Defendant learned that the Claimant was accused in another case of improprieties to secure the appointment of the same sole arbitrator. The evidence disclosed that 25 of the arbitrator's appointments in the previous 3 years had come from the Claimant (or its clients), which accounted for 25% of his income. This was not disclosed when accepting the appointment. Also, when applying for the appointment of arbitrators the Claimant habitually specified selection criteria (a quantity surveyor and barrister) which narrowed the eligible candidates, restricted further by advancing a "black list" of candidates on the grounds of potential conflicts.

This decision will bring into focus issues about the appointing practices of regular arbitration users, the adequacy of disclosures made by prospective arbitrators, and how conflicts are managed. Institutions must also remain vigilant to guard against manipulations of the process. Ultimately, the risk is that the resulting award is set aside.

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