Arbitral Bias and MENA Disputes in London

By Michael Black*

Introduction:

London is often the venue of choice for the determination of the disputes emanating from the MENA Region. In the event of an allegation of bias against a tribunal or tribunal member, the parties will find themselves before the English courts. Parties may be surprised to find that English law can differ from international so-called "soft law" norms[1]. This article examines the recent development of English law and practice in relation to allegations of arbitral bias in the light of a trio of English cases - two of which arise from transactions linked to the Region[2].

The English Legal Background[3]:

Section 1(a) of the English Arbitration Act 1996 ("**the Act**") provides that the material provisions of the Act are founded on the following principle, *inter alia*, and must be interpreted accordingly, namely that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. Further, section 33(1)(a) of the Act imposes a duty on all tribunals to act fairly and impartially as between

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1. For example, the *IBA Guidelines on Conflicts of Interest in International Arbitration (2014)* ("**the IBA Guidelines**") or the ICC's *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* dated 22 September 2016 ("**the ICC Note**").
2. *Sierra Fishing Company & Others v Hasan Said Farran & Others* [2015] EWHC 140 (Comm) ("***Sierra Fishing***"); *Cofely Ltd v Bingham & Another* [2016] EWHC 240 (Comm) ("***Cofely v Bingham***"); *W Ltd v M Sdn Bhd* [2016] EWHC 422 (Comm.) ("***W v M***").
3. For a full treatment, see *Arbitration Law* Loose-leaf, Merkin, (25 July 2016), Chapter 10; *Russell on Arbitration*, Sutton, Gill & Gearing, (24th Edition, 2015), paragraphs 4-110 to 4-133 *International Commercial Arbitration*, Gary B Born, (2nd Edition, 2014), §12.05[A][1][d]; *Redfern & Hunter on International Arbitration*, *Blackaby & Partasides* (6th Edition, 2015), paragraphs 4.75 to 4.88.

the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.

By section 24(1)(a) of the Act 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 the ground that circumstances exist that give rise to justifiable doubts as to his impartiality.

Following the making of the award, under section 68(2)(a) of the Act, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging the award on the ground of serious irregularity affecting the tribunal, the proceedings or the award. "Serious irregularity" includes a failure by the tribunal to comply with section 33 which the court considers has caused or will cause substantial injustice to the applicant. However by section 73(1)(d) if a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making timeous objection that there has been irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

Professor Robert Merkin QC suggest that the case law establishes that the courts will take the view that there is sufficient ground to intervene for potential lack of impartiality in the following situations:

a) The arbitrator has some connection with one or other of the parties to the arbitration proceedings;
b) The arbitrator has some interest in the outcome of the proceedings;
c) The arbitrator's conduct prior to or during the proceedings demonstrates that his mind is made up.[4]

It will be noted that the Act refers neither to independence nor neutrality. As to the former the English court has observed that between "independence" and "impartiality" there is "*a difference without distinction*"[5]. Whereas, as to the latter, it has been observed that "neutrality" is not the same concept as "independence" but is much broader[6]. The draughtsmen of the English Act chose to retain the old rule that lack of independence is significant only where it leads to justifiable doubt about an arbitrator's independence: Lord Donaldson (formerly England's most senior civil judge) pointed out in Parliament during the

4. Arbitration Law, §10.27.
5. *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm) at [14], per Morison J.
6. *Russell on Arbitration*, paragraph 4-133.

legislative process that a requirement for independence would run contrary to the tradition in England where each party appoints his own arbitrator, the only issue being whether the arbitrators are impartial rather than independent.

"Impartiality" has been considered in detail by the English courts in relation to judges. The same principles apply in relation to arbitrators as made clear in a case concerning the provision of telecommunications in Saudi Arabia[7]. There are three situations - first, cases in which the judge or arbitrator is automatically disqualified; secondly, cases where the disqualification is not automatic but there may be grounds for removal; and, cases where there are no grounds for removal.

Automatic disqualification will arise where the arbitrator has a personal outcome in the case[8].

The second situation arises where a fair-minded and informed observer would be led to conclude that there was a real possibility, or a real danger, that the tribunal was biased[9]. This is the same test as justifiable doubts as to an arbitrator's impartiality under section 24 of the Act[10].

The "Soft Law":

The IBA Guidelines have adopted a fourfold non-exhaustive classification of situations:

a) The Non-Waivable Red List where there are circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence so that the parties, cannot waive the conflict of interest arising in such a situation;
b) The Waivable Red List covers situations that are serious but not as severe those in the Non-Waivable Red List. These situations can be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator;
c) The Orange List where the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, but the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made;

7. *AT & T Corp v Saudi Cable Co* [2000] 2 Lloyd's Rep 127.
8. *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (*No2*) [1999] 1 Al ER 577.
9. *Porter v Magill* [2002] 2 AC 357.
10. *Locabail* (*UK*) *Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65.

d) The Green List where no appearance and no actual conflict of interest exists from an objective point of view and, consequently, the arbitrator has no duty to disclose situations falling within the Green List.

At the core of the operation of the IBA Guidelines is the arbitrator's duty of disclosure. The obligation is summarised in General Standard 3(a):

If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.

The IBA Guidelines emphasize the continuing duty of disclosure and the principle, "*when in doubt, disclose*". Helpfully, the IBA Guidelines do provide some practical guidance as to the circumstances that will give rise to a duty of disclosure; for example, paragraph 3.1.1 of the Orange List describes a situation where:

*The arbitrator has, **within the past three years**, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.* [emphasis added].

Other specific provisions of the IBA Guidelines will be addressed below in the context the English decisions the subject of this article.

The ICC Note provides at paragraph 20:

*Each arbitrator or prospective arbitrator must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, an arbitrator or prospective arbitrator should in particular, **but not limited to**, pay attention to the following circumstances*:

- *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 to one of the parties or the counsel's 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 affiliates.*
- *The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case.*
- *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 to one of the parties or the counsel's law firm.* [original emphasis]

While the ICC Note does not attempt to match the level of detail of the IBA Guidelines, the absence of any reference to any periods of time, it is suggested, is unhelpful. Ready literally, an arbitrator or prospective arbitrator may be obliged to disclose that his or her law firm gave a single piece of advice to an affiliate of one of the parties thirty years' earlier. The ICC Note appears to add to little or nothing to the IBA Guidelines and it is likely that, in practice, recourse will be had to the latter.

Sierra Fishing:

The First Claimant ("**SFC**") was a company incorporated in Sierra Leone involved in the supply of seafood. Its managing director was Mr Bassem Jamil Said Mohamed ("Mr **Bassem Mohamed**"), the brother of the Second Claimant ("**Mr Said Mohamed**'). The Third Claimant was the estate of their late father, who owned a 64% shareholding in SFC ("**the Estate**"). Mr Ali Zbeeb (the Third Defendant) was a Lebanese lawyer and one of three founding partners in the law firm Zbeeb Law & Associates, together with his father, Mr Hussein Zbeeb, and Mr Hadi Zbeeb. Mr Ali Zbeeb was the managing partner of the firm. The First Defendant ("**Dr Farran**") was at all material times the chairman of Finance Bank SAL ("**Finance Bank**"), a Lebanese bank based in Beirut. The Second Defendant ("**Mr Assad**") was an individual of Iraqi nationality.

In 2011 Dr Farran and Mr Assad agreed to lend a sum of money to SFC in order to purchase two fishing vessels under a Loan Agreement with Mr Said Mohamed (on his own behalf and on behalf of the Estate) containing an arbitration clause that permitted arbitration in London at the election of the lenders.

No repayments were made under the Loan Agreement. On 9 August 2012, Dr Farran and Mr Assad served a request for arbitration on the claimants, notifying an intention to commence arbitration in London and the appointment of Mr Ali Zbeeb as their arbitrator. The request was addressed to SFC and Mr Said Mohamed, and related to the failure to fulfil the Loan Agreement. The request called upon the claimants to appoint their own arbitrator.

The request for arbitration was in fact defective under English law because the arbitration clause did not specify the constitution of the tribunal and by section 15(3) of the Act, if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator. By section 16 of the Act, if or to the extent that there is no agreed procedure for appointing the arbitrator or arbitrators, and if (as in the present case by reason of section 15(3)) the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.

There were negotiations between the parties during which the arbitral proceedings were suspended by agreement. The negotiations did not result in a settlement and in April 2013 Dr Farran and Mr Assad gave notice of the resumption of the proceedings with Mr Ali Zbeeb acting as sole arbitrator. The claimants objected to his appointment.

There was then a further round of abortive negotiation and the arbitration commenced one again on 9 October 2013. The first hearing took place on 26 June 2014. The claimants objected to Mr Ali Zbeeb acting as sole arbitrator on the grounds of his business and personal connections with Dr Farran and Mr Assad. As an alternative, while still maintaining the objection, the claimants sought permission from Mr Ali Zbeeb to be allowed to appoint their own arbitrator. Mr Ali Zbeeb refused the application.

There was a further meeting on 28 July 2014, at which the claimants generally reserved their position in relation to the validity of Mr Ali Zbeeb's appointment and jurisdiction, as well as in relation to their concerns over his independence and impartiality. At the meeting, Mr Ali Zbeeb circulated a written response in which he said that the issue as to his impartiality had been adequately addressed in his previous communications. The response included the words: "*I do not see why it is incumbent on me to perform the due diligence homework of* [the claimants]". He alleged that the claimants had lost any right to object by reason of section 73.

The claimants did not serve a defence but instead wrote to Mr Ali Zbeeb challenging his jurisdiction on the basis, *inter alia*, of justifiable doubts as to his impartiality. He nevertheless decided to proceed with the arbitration prompting an application by the claimants for his removal under section 24(1)(a) of the Act.

Mr Ali Zbeeb wrote to the court asserting that the right to object has been lost under section 73 of the Act. The parties asked him to suspend the arbitral proceedings but he again wrote the court denying bias and accusing the claimants of "*odd and absurd accusations and analysis*".

The case was heard by the Hon. Mr Justice Popplewell ("**Popplewell J**") who gave a reserved judgment on 30 January 2015. Popplewell J recalled the common law test for apparent bias described in the *Locobail* and *Porter* cases. He considered the evidence of the legal and business connection between Dr Farran and Mr Ali Zbeeb and came to the conclusion that:

> *I have little hesitation in concluding that these connections would give rise to justifiable doubts as to Mr Ali Zbeeb's ability to act impartially in a dispute to which Dr Farran was a party. The fair minded observer would take the view that this gave rise to a real possibility that Mr Ali Zbeeb would be predisposed to favour Dr Farran in the dispute in order to foster and maintain the business relationship with himself, his firm and his father, to the financial benefit of all three. Such possibility is not significantly diminished if, as Mr Ali Zbeeb's evidence suggests, the financial benefit would accrue to his father rather than to the firm.*[11]

Popplewell J referred to the IBA Guidelines:

… assistance is derived from … the IBA Guidelines, which provide illustrations of what the international arbitral community considers to be cases of conflicts of interest or apparent bias. Part I of the Guidelines contains General Standards with explanatory notes. General Standard 6 recognises that the fact that the arbitrator's law firm may have dealings with one of the parties does not automatically give rise to a conflict of interest requiring disclosure and that all depends on the circumstances of each individual case …

One of only four situations identified in the Non-Waivable Red List is where "the arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom" (paragraph 1.4). The Waivable Red list includes the situation where "the arbitrator currently represents

11. [57].

or advises one of the parties or an affiliate of one of the parties." (*paragraph 2.3.1*) *and where "the arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties."* (*paragraph 2.3.6*) *… In my view this reflects the wider category of circumstances recognised in Locobail v Bayfield and section 24 of the Act as giving rise to a justifiable doubt as to impartiality. The state of the evidence in this case would leave the fair-minded observer concluding that there was a real possibility that the relationship between Mr Ali Zbeeb and Dr Farran fell within these criteria, as well as the situation described in the Orange List where "the arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator."* (*paragraph 3.1.4*).[12]

The judge considered that the doubts were reinforced by Mr Ali Zbeeb's statement at the hearing on 26 June 2014 that it was not for him to do due diligence on behalf of the claimants in relation to any connections he had with Dr Farran. He held that, on the contrary, it was his duty to make voluntary disclosure to the parties of connections which were known to him which might justify doubts as to his impartiality, a duty recognised in General Principle 3 of the IBA Guidelines. Such disclosure is required of an arbitrator whatever "due diligence homework' steps may be available to the parties to discover their existence for themselves. Mr Ali Zbeeb's assertion that it was for the claimants to find out whether such circumstances existed, not for him to volunteer them if they did exist, amounted to an erroneous denial of his duty of disclosure to the claimants, which revealed an attitude which would reinforce a fair minded observer's doubts as to his impartiality.

Popplewell J went on to consider Mr Ali Zbeeb's involvement in the negotiation and drafting of various proposed settlement documents[13]. He held that it was to be inferred that Mr Ali Zbeeb and/or his father was giving advice to Dr Farran and Mr Assad. Such advice potentially included advice as to the terms and effect of the clause in a respect which would include a jurisdictional issue upon which Mr Ali Zbeeb was called to adjudicate as arbitrator. He was responsible for the drafting of the clause. There would be a real possibility, in the mind of a fair minded observer, that he would wish to decide the jurisdiction issue in favour of Dr Farran and Mr Assad whom he and/or his father was advising at the time. The situation potentially fell within paragraphs 2.1.1 and/or 2.1.2 of the Waivable Red List of the IBA Guidelines where "*the arbitrator has given legal advice ... on the dispute to a party or an affiliate of one of the parties*" and/or "*the arbitrator has previous involvement in the case.*"

12. [58]-[59].
13. [61].

Finally the judge examined Mr Ali Zbeeb's conduct of the proceedings. He found that two aspects did justify doubts as to his impartiality:

- First, he refused to postpone the publishing of his award pending the outcome of the application to the court when asked to do so by both sides. The justification put forward was Mr Ali Zbeeb's view that the application was unfounded. However the judge found that this afforded no reason for failing to give effect to the expressed desire of both parties that the question should be resolved by the court, which is the proper forum for its determination. Save in exceptional circumstances an arbitrator in the consensual arbitral process should give effect to the parties' desire that the tribunal should postpone its award until after determination of a court challenge which is capable of affecting the jurisdiction to make such an award, with the obvious advantages in cost and convenience which that entails;

- Second, the content and tone of the tribunal's communications with the parties, once the dispute as to impartiality and jurisdiction had arisen in the summer of 2014, and of the communications with the court thereafter, justified doubts as to his impartiality. The correspondence from Mr Ali Zbeeb was argumentative in style and advanced points against the claimants which had not been put forward by Dr Farran or Mr Assad, and to which the claimants had not been given an opportunity to respond. There was nothing wrong with him putting before the court his evidence on the course of the proceedings, and his evidence in relation to that which is said to raise justifiable doubts about his impartiality; and he was entitled to put before the court his view as to why he should not be removed. But in doing so, he had to be careful not to appear to take sides, so as to be unable subsequently to judge impartially the rival arguments in the case. In the view of the judge the content and tone of Mr Ali Zbeeb's communications was clearly on the wrong side of the line. They involved detailed and vehement argument, not merely as to whether there are grounds for apparent bias, but also, and indeed predominantly, why the claimants had lost the right to object. They advanced arguments on behalf of Dr Farran and Mr Assad which the latter had not advanced for themselves, supported by detailed exposition and citation of authority. They also advanced the case of Dr Farran and Mr Assad as to the tribunal's jurisdiction over a claim for transfer of the shares in SFC in terms that had not been articulated or advanced by Dr Farran and Mr Assad themselves. Mr Ali Zbeeb disparaged the claimants' section 24 application in intemperate language. He questioned the good faith of the claimants in advancing it. He gives the appearance of having descended into the arena and taken up the battle on behalf of Dr Farran and Mr Assad. He had become too personally involved in the issue of impartiality, and the issue of his jurisdiction, to guarantee the necessary objectivity which is required to determine the merits of the dispute.

Popplewell J then turned to the question of whether by reason of their conduct in and about the arbitral proceedings the claimants had lost the right to object under section 73 of the Act. He held that they had not and therefore came to the conclusion that the application for the removal of Mr Ali Zbeeb succeeded.

Cofely v Bingham:

Cofely v Bingham is not a case arising from the MENA Region but is a further illustration of the problems arising from the connections between an arbitrator and a party or its counsel. Cofely was a construction company and entered into an agreement with Knowles, a construction claims consultancy (**"the Success Fee Agreement"**) whereby Knowles was to provide advice relating to claims under a major infrastructure project in the UK for an extension of time and associated additional costs. Knowles' remuneration was based on the financial outcome. The Success Fee Agreement contained an arbitration clause.

Cofely became dissatisfied with Knowles' services and settled the claims under the infrastructure project. On 21 January 2013, Knowles instituted arbitration proceedings against Cofely and applied to the nominated appointing institution to appoint an arbitrator. The institution appointed Mr Bingham, a well-known construction arbitrator.

Mr Bingham made a partial award in favour of Knowles to which no challenge was made and it was duly honoured. The arbitration proceeded haltingly in respect of the remaining claims until February 2015.

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*[14] in which judgment had been delivered on 7 November 2014. The *Eurocom* case concerned a summary judgment application made by Eurocom against Siemens in respect of an adjudication decision made by Mr Bingham. The judge in that case had found that there was a very strong *prima facie* case that Knowles had made fraudulent misrepresentations to the appointing authority to ensure that Mr Bingham was appointed adjudicator.

On 11 March 2015 Cofely wrote the Mr Bingham asking six questions, including how many times in the last 3 years had he acted as adjudicator or arbitrator in disputes where Knowles represented, or was itself, the claimant/referring party; how many times he had made an award or decision in favour of the claimant/referring party and how much of his

14. [2014] EWHC 3710 (TCC).

income was attributable to those appointments and decisions. There followed substantial correspondence but Mr Bingham did not answer the questions save to disclose that in the preceding 3 years he had received 137 appointments as arbitrator or adjudicator, 25 of which involved Knowles. There as a hearing on 17 April 2015. On 30 April 2015 Mr Bingham issued an "Arbitrator's Ruling" as to whether the tribunal was "properly constituted" - concluding that it was and that he had no conflict of interest.

On 5 June 2015 Mr Bingham disclosed that over the preceding three years he had earned approximately 20% of his income from appointments involving Knowles. On 3 July 2015, Knowles wrote to Cofely's lawyers disclosing that out of the 25 times Mr Bingham had been appointed it had excluded other candidates in requests for appointments on 16 occasions. On 8 July 2015, Cofely's lawyers wrote to Mr Bingham asking him to recuse himself - to which there was no response from Mr Bingham. On 22 July 2015, Cofely issued an application seeking an order that Mr Bingham be removed as arbitrator pursuant to section 24(1)(a) of the Act, on the grounds that circumstances exist that give rise to justifiable doubts as to his impartiality.

The judge, the Hon. Mr Justice Hamblen ("**Hamblen J**") found that there was evidence of apparent bias. He found that it was of most significance that over the last three years 18% of Mr Bingham's appointments and 25% of his income as arbitrator/adjudicator derived from cases involving Knowles. He noted Mr Bingham's attitude to this, as made clear at the hearing and as maintained in his statement, was that this was irrelevant as all these appointments were made by an appointing body rather than Knowles directly. On this logic even if all his income derived from cases involving Knowles there would still be no cause for concern.

The judge noted, that the appointing institution acceptance of nomination form called for disclosure of "*any involvement, however remote,*" with either party over the last five years. Acting as arbitrator/adjudicator in cases in which Knowles is a party or a representative of a party was in his view, a form of involvement.

He found that the *Eurocom* case provided a striking example of Knowles steering the appointment process towards its desired appointees, and doing so as a matter of general practice. These practices would be apparent from the appointment forms which, as was common ground, would have been forwarded to Mr Bingham. The existence of Knowles' appointment "blacklist" was itself a matter of significance. It meant that the arbitrator/adjudicator's conduct of the reference may lead to him/her falling out of favour and being placed on that list and thereby effectively excluded from further appointments involving Knowles. That was going to be important for anyone whose appointments and income were dependent on Knowles-related cases to a material extent, as was the case for Mr Bingham.

The judge found that only 3 of the 25 cases (including the present case) involved Knowles as a party, but that would be sufficient to trigger disclosure under both the acceptance of nomination form and under the IBA Guidelines' Orange List.

Hamblen J considered that the concerns raised by the relationship were heightened by Mr Bingham's response to Cofely's inquiries and application: it was reasonable for Cofely to inquire into the nature of the relationship between Mr Bingham and Knowles, but Mr Bingham's essential response involved avoiding addressing the requests and instead giving the appearance of seeking to foreclose further inquiry by demonstrating their irrelevance and, moreover, doing so in an aggressive manner. At the hearing on 17 April 2015, Mr Bingham was effectively cross examining Cofely's counsel and doing so aggressively and in a hostile manner. Although counsel had explained that all that was being sought at this stage was information and that Cofely was not yet in a position to state what its ultimate stance was to be, Mr Bingham continually pressed him to state its position and sought to demonstrate at the hearing and through his "ruling" that there were no grounds for concern. The judge agreed with Cofely that Mr Bingham was thereby descending into the arena in an inappropriate manner.

The judge found that Mr Bingham's evidence before him that he did not regard his conduct of the April 2015 hearing as in any way inappropriate showed a lack of awareness demonstrating a lack of objectivity and an increased risk of unconscious bias. Mr Bingham appeared to have considered Cofely's reasonable inquiries to amount to an unwarranted attack on him and in turn to have seen attack as the best form of defence - this involved descending into the arena.

In the circumstances, Hamblen J considered that the evidence considered cumulatively raised the real possibility of apparent bias. He followed earlier authority to the effect that where there is actual or apparent bias there is also substantial injustice and there is no need for this to be additionally proved[15]. He was satisfied that that there was no loss of the right to object under section 73 of the Act and held that Cofely had established the requisite grounds for removal of Mr Bingham as arbitrator under section 24(1)(a) of the Act. If Mr Bingham did not resign an order for removal would accordingly be made.

W v M:

W v M is the third and most recent case in the trio. It has also attracted the most comment, especially within the international arbitration community.

15. *Lesotho Highlands v Impreglio* [2006] 1 AC 221 at [35].

The claimant was a corporation incorporated in the British Virgin Islands. The defendant was a corporation incorporated in Malaysia. The parties contracted in relation to a project in Iraq. A dispute arose, and an arbitration under the auspices of the London Court of International Arbitration ("**LCIA**") was commenced by the defendant in April 2012. Mr David Haigh QC, a Canadian lawyer, was appointed sole arbitrator.

Mr Haigh QC made two awards in the arbitration; one dated 16 October 2014 and one dated 26 March 2015. The claimant challenged the awards under section 68 of the Act on the grounds of serious irregularity on the basis of apparent bias arising out of alleged conflict of interest. The claimant submitted 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, namely:

> *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 Hon. Mr Justice Knowles ("**Knowles J**" and no connection Knowles in the *Cofely* case) found that there was no doubt that the instant case fell within the description given in paragraph 1.4 of the 2014 IBA Guidelines. The arbitrator's firm (but not the arbitrator) did regularly advise an affiliate of the defendant (but not the defendant) and the arbitrator's firm (but not the arbitrator) derived substantial financial income from advising the affiliate.

Mr Haigh practiced almost exclusively as an international arbitrator as essentially a sole practitioner carrying on his international practice with support systems in the way of secretarial and administrative assistance provided by his firm. At the time of his appointment a company Q was a client of his firm. The defendant was a subsidiary of P. As the result of the acquisition of Q by P in December 2012, Q became an affiliate of the defendant. Mr Haigh's firm continued to render substantial services to Q.

Mr Haigh had made a statement of independence dated 18 May 2012 on consenting to his appointment as arbitrator. As it happened this was a month or so before the announcement of the acquisition of Q by P. The firm's conflict check systems did not draw Q or its new relationship with P to Mr Haigh's attention. He regretted that this is what happened, as he would have wished to make a disclosure had he known.

Knowles J referred to the test in *Porter v Magill*: whether "*a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*". He also referred to another appellate decision in which it was held that:

> *The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the [here, arbitrator] as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the [arbitrator] on it, and no attention will be paid to any statement by the [arbitrator] as to the impact of any knowledge on his or her mind … The fair-minded and informed observer is "neither complacent nor unduly sensitive or suspicious" …*[16]

The judge held "*without hesitation*" 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 as, while the arbitrator was a partner in a law firm that earned substantial remuneration from providing legal services to a client company that had the same corporate parent as a company that was a party in the arbitration, the firm did not advise the parent, or the party. There was no suggestion the arbitrator did any of the work for the client company. Further, 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 if he had been alerted to the situation. The judge found that the fact that the arbitrator would have made a disclosure if he had been alerted to the situation showed a commitment to transparency that would be relevant in the mind of the fair minded and informed observer. It also showed that the arbitrator could not have been biased by reason of the firm's work for the client. That work was not in his mind at all; had it been he would have disclosed it.

Knowles J found that uncertainty arose from the application of the IBA Guidelines. He referred to *Sierra Fishing* and *Cofely v Bingham* noting that the IBA Guidelines do not bind the court, but they can be of assistance and it is valuable and appropriate to examine them at least as a check.

He acknowledged that the IBA Guidelines make a distinguished contribution in the field of international arbitration but the instant case suggested there were weaknesses in the IBA Guidelines in two inter-connected respects.

- 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).

16. *Helow v Secretary of State for the Home Department and another* [2008] UKHL 62.

Paragraph 1.4 of the Non-Waivable Red List includes in the Non-Waivable Red List the situation where the advice is to an affiliate and the arbitrator is not involved in the advice, and without reference to the arbitrator's awareness or lack of awareness of that advice. The judge found it is hard to understand why this situation should warrant inclusion in the *Non-Waivable* Red List. He felt that the situation was classically appropriate for a case-specific judgment. Had the arbitrator been aware and made disclosure, why should the parties not, at least on occasion, be able to accept the situation by waiver?

Knowles J noted that the fundamental principle was that no arbitrator should have personal interest in the outcome in the case either as a judge in his own cause or the beneficiary of an award, but he considered that the situation under consideration, while undeniably within the Non-Waivable Red List, was not near to the situation where a person is his or her own judge, or where there is identity between an arbitrator and a party. Further, situations allocated to the "Waivable Red List" rather than the "Non-Waivable Red List" include where the arbitrator himself or herself has given legal advice on the dispute to a party[17], where "[a] *close family member of the arbitrator has a significant financial interest in the outcome of the dispute*"[18] and where "[t]*he arbitrator has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute*"[19]. These situations seemed to the judge potentially more serious than the circumstances of the instant case; again suggesting that the circumstances of the instant case did not sit well within a "Non-Waivable Red List".

Discussion:

The trio of cases considered in this article demonstrate that while the English courts will pay deference to the IBA Guidelines, they will not regard them as binding but rather the Guidelines are a helpful tool against which to check their judgments. The common law historically has prided itself on its flexibility as opposed to being constrained by written codes - Mr Justice Mccardie said in 1924:

The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of fact abnormal as well as usual. It must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law. A dozen decisions could be cited to illustrate the remarks I have just made. I mention only the words of Bankes L.J. in Rex v. Electricity Commissioners when he said: "It has, however, always

17. Paragraph 2.1.1 of the Waivable Red List.
18. Paragraph 2.2.2 of the Waivable Red List.
19. Paragraph 2.2.3 of the Waivable Red List.

been the boast of our common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances."

It is suggested that the trio cases amply demonstrates the wisdom of this approach. S*ierra Fishing* and *Cofely v Bingham* were straightforward cases. In *Sierra Fishing* Mr Ali Zbeeb's connections with Dr Farran and his involvement in the dispute were obviously such as would give rise to justifiable doubts as to his impartiality in the mind of a fair-minded and informed observer. In *Cofely v Bingham* Mr Bingham's connections with Knowles and his likely knowledge of their disreputable practices in the appointment of adjudicators and arbitrators clearly compromised his impartiality. Both he and Mr Ali Zbeeb served only to increase those doubts by their unacceptable conduct when the issue was raised with them. It is natural for an arbitrator to be wary of attempts to undermine the arbitral process, but he or she must maintain a dignified objectivity rather than descend into the arena.

It follows that in neither case was it necessary for the English court to consider whether there was any tension between the IBA Guidelines and English law. In contrast, in *W v M* Mr Haigh QC's conduct was beyond reproach. While the situation fell squarely within paragraph 1.4 of the Non-Waivable Red List, he was not only unaware of it, but he had made full disclosure of any possible conflicts of which he was aware. When the material facts came to light he expressed regret that his law firm's conflict check systems had not disclosed the problem as he would have wished to make a disclosure had he known. The judge accepted that Mr Haigh would indeed have made the disclosure The fact that he did not showed that he was unaware of the situation and therefore his failure to make a disclosure could not, logically, have given rise to justifiable doubts as to his impartiality in the mind of a fair-minded and informed observer as he could not disclose what he did not know.

Strict adherence to the IBA Guidelines would have led to the manifestly unjust result of the removal of Mr Haigh, even against the will of the parties. While of more limited practical assistance, it may be that the less directive and detailed approach of the ICC Note makes greater allowance for the possibility of changing and unforeseen circumstances as well as the possibility of differing approaches adopted by national courts.

One thing is clear: the English courts will not regard themselves as bound by any "soft law" guidelines but may well have regard to them when considering how the fair-minded and informed observer might react to a particular situation.