Kluwer Arbitration Blog

Applicable Tests For Arbitrator Bias: Recent Practice In Select Common Law Jurisdictions

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Over the last few years, arbitrator independence and impartiality have been under heightened scrutiny by courts and tribunals. This is not unexpected. The importance of the rule against bias is best explained by Lord Denning's dictum in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 where he held that "[j]*ustice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'*"

Arbitrator bias may be "actual" or "apparent". Whilst the position on actual bias is clear i.e., it is a factual question, the test for apparent bias may not be quite so straightforward in all cases. Most common law jurisdictions rely on one of the two tests for apparent bias in international arbitration:

1. the less stringent "reasonable apprehension of bias" test, which poses the question as to "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*" (originally laid down in *Porter v Magill* [2002] 1 All ER 465 at 507); or
2. the stricter "real danger of bias" test, where the question is whether "*having regard to those circumstances, [the court considers] there [to be] a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him*" (originally laid down in *R v Gough* [1993] AC 646 at 670).

There are two immediately visible differences between these two tests. The first lies in the perspective of the observer of bias. While for the reasonable apprehension test relies on the concept of the vantage point of "a fair-minded and informed observer", in case of the real danger test, the court is the observer. The second difference lies in the degree of proof required to establish bias: the reasonable apprehension test merely requires there to be a "real possibility" of bias i.e. a lower threshold, whereas the real danger test requires a "reasonable likelihood" of bias.

Unsurprisingly, the traditional competition between the two tests originated in the English common law as applied to the rule of bias to administrative and judicial decision makers. In the arbitration context, the UK Supreme Court confirmed that reasonable apprehension test applies to apparent bias in *Halliburton v Chubb* [2020] UKSC 48 (see previous posts on this case here and here).

This post traces recent applications of the apparent bias test across select common law jurisdictions of Australia, Canada and India. We analyse the formulation of the apparent bias tests and recent

legislative and judicial responses to the issue of arbitrator bias in these jurisdictions.

Australia

In the recent decision of *Hancock v Hancock Prospecting Pty Ltd* [2022] NSWSC 724, the New South Wales Supreme Court considered a challenge to an arbitrator appointment under the Commercial Arbitration Act 2012 (WA) (the "CAA").

The circumstances in the challenge centred around the arbitrator's relationship with his spouse. The arbitrator's spouse was employed in the past by the law firm representing the defendant. During the spouse's employment at the law firm, she attended certain meetings between the parties and the arbitrator had been briefed by his spouse in a related procedural matter in the arbitration. On this basis the plaintiff alleged that justifiable doubts exist as to the arbitrator's independence and impartiality.

In making its decision, the court relied on the text of section 12 of the CAA which provides that the "justifiable doubts" standard will only be reached if there is a *real danger of bias*. The court reiterated the policy reasons for the adoption of this stricter standard – and found support for its conclusions in a consultation report that preceded the enactment of the CAA – to discourage the procedural tactic of arbitrator challenges by parties and to promote Australia as a hub for international arbitration.

With clear legislative backing for the application of the stricter standard, the court dismissed the challenge on the basis that a case of "real danger of bias" was not made out by the plaintiff. According to the court, the test is whether there is an "*objective likelihood of there being a real risk that someone in the position of the arbitrator would not be able to bring an impartial mind to (all of) the questions to be determined*." The court deemed the passage of time of 20 years between the circumstances allegedly giving rise to the bias and the current case as a relevant factor in dismissing the challenge. It held that the "*test should not be understood as requiring an investigation into the particular attitudes or propensities of the arbitrator under challenge*".

Whilst the *Hancock* decision was under the Western Australia arbitration legislation, the same position applies to Australia-seated international arbitrations (*Sino Dragon*) and other domestic arbitrations (*Gascor v Ellicott* [1997] VR 332). In an application to set aside an arbitral award under the International Arbitration Act 1974, the Federal Court of Australia held in *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 that the higher "real danger of bias" test applies to an international commercial arbitration. It expressly rejected the contention that the common law test of "reasonable apprehension of bias" was part of Australia's public policy.

Canada

For domestic arbitration in Canada, the less stringent "reasonable apprehension" test generally applies at common law, which was recently confirmed by the Supreme Court of Canada's decision in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)* [2015] 2 SCR 282. One of the first elucidations of this principle came about in Justice de Grandpre's

dissenting opinion in *Committee for Justice & Liberty v Canada (National Energy Board)* [1978] 1 SCR 369. According to Justice de Grandpre, there was "no real difference" between the expressions "reasonable apprehension of bias", "reasonable suspicion of bias" and "real likelihood of bias".

When it comes to the applicable test for arbitrator bias, the situation differs across the Canadian provinces. The Ontario Arbitration Act expressly mentions the "reasonable apprehension" test for challenging an arbitrator (Section 13(1)1.). The test was most recently applied in *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485, where the applicant alleged bias on the basis that the arbitrator had pre-judged the issues, and their conduct in the proceeding was akin to being an advocate for the other side. The court acknowledged that while the arbitrator may have been interventionist, it could not conclude that such behaviour would give rise to a reasonable apprehension of bias. Instead, the arbitrator was found to be "*a deeply invested, engaged [a]rbitrator that worked tirelessly for the parties in furtherance of his mandate, which was to determine the truth of the issues before him*".

Notably, the British Columbia Arbitration Act has recently gone the opposite way. In 2018, it expressly established the "real danger" test (Section 17). Effects of the shift are yet to be confirmed in practice, but some practitioners contend that the amendment will make it harder for applicants to successfully challenge arbitrators in British Columbia-seated proceedings. Finally, the same "real danger" test applies in the case of international arbitration (Section 12 of the British Columbia International Commercial Arbitration Act).

India

In India, the relevant test for arbitrator impartiality is whether there is a reasonable apprehension of bias from the viewpoint of the concerned party rather than that of the arbitrator (*Murlidhar Roongta v S Jagannath Tibrewala* 2005 57 SCL 128 Bom and *Ranjit Thakur v Union of India* AIR 1987 SC 2386). This alters the common law test from the point of view of a fair-minded and informed observer to that of the party. However, the test is still an objective one.

India's response to the issue of arbitrator independence and impartiality has been unconventional. Inspired by the IBA Guidelines on Conflicts of Interest in International Arbitration, the 2015 amendments to the Arbitration and Conciliation Act 1996 (the "ACA") included an extensive list of circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality in the Fifth and Seventh Schedules.

The Seventh Schedule to the ACA introduces certain grounds mirroring the Red List of the IBA Guidelines which *de jure* renders an arbitrator ineligible for appointment. This blanket ineligibility approach has been criticized for not considering the particular circumstances of each case such as the proximity to the dispute, any economic interest and the arbitrator's relative position to the party. The Indian Supreme Court, in a recent decision of *HRD Corporation v GAIL (India) Limited*, (2018) 12 SCC 471, provided parties with an interlocutory remedy to approach courts directly to decide the ineligibility of an arbitrator appointment under the Seventh Schedule. It is not inconceivable that this mechanism might be used by parties as a procedural tactic to delay the arbitral process.

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As countries continue to upgrade their international arbitration legislations to bring them in line with international practice, recent jurisprudence on the rule against bias in the arbitration context may inform potential legislative reform efforts.

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