Should we be concerned if arbitrator & counsel are from the same chambers? **Khawar Qureshi QC** reports

IN BRIEF

- English case-law from 1999 indicates no cause for concern.
- A recent International Arbitral Tribunal decision points to the contrary.

For many years, London has been seen as the seat of choice for international arbitration. One of the central features of arbitration has been the involvement of English barristers as counsel and arbitrators, due in large part to the specialist skills and high reputation of the English Bar. In addition, the pool of potential arbitrators has been enhanced by retired English judges, as well as internationally qualified lawyers joining barristers' chambers as door tenants.

It has been commonplace for international arbitration proceedings in London (and indeed elsewhere) to feature at least one barrister and one arbitrator from the same set of chambers. Sometimes, the barrister and arbitrator have been appointed by the same party. In other cases, the barrister and arbitrator may be from the same chambers but appointed by different parties.

A question which is acquiring increasing focus is as follows—is it no longer tenable for counsel and arbitrator to be from the same chambers—whether or not appointed by the same party? To understand this question, we need to consider the position under English Law, and a recent decision of an International Centre for the Settlement of Investments Disputes (ICSID) Tribunal.

The short answer appears to be that (regrettably or otherwise), a consensus is rapidly emerging which is likely to make it impermissible (without the consent of all the parties involved) for a barrister and arbitrator to be from the same chambers.

English law

The *Laker Airways* case [2000] 1 WLR 113 (20/4/99) (Mr Justice Rix, now Lord Justice Rix).

The facts of the case were as follows: Laker Airways (now defunct but the first "no frills" airline) was in dispute towards the end of 1998 with FLS for aircraft maintenance services. FLS appointed Stanley Burnton QC (now Lord Justice Stanley Burnton) as its arbitrator (SB). Laker's counsel was a barrister (LC) who had then recently joined the same chambers as SB.

Laker's US attorney (The Attorney) apparently only discovered that LC was a member of the same chambers as SB in the context of discussions with FLS regarding the composition of the arbitral tribunal. The Attorney insisted that FLS replace SB on the basis that LC was from "Mr Burnton's law office". FLS pointed out that barristers are self-employed but share office space and clerks, as well as the unquestioned independence of SB.

Laker's English solicitors wrote to SB to resign—SB declined, on the basis that Laker's stance would provide it with an unjustified veto over the choice of arbitrator by the other party (FLS). Laker applied to the Commercial Court for removal of SB as arbitrator pursuant to s 24(1) of the Arbitration Act 1996 (AA 1996).

Laker's president's affidavit stated that "circumstances exist that give rise to justifiable doubts as to (SB's) impartiality"—the test for s 24 to apply. The asserted doubts were essentially based upon SB and LC being members of the same chambers. Importantly, no suggestion was made of actual bias or conflict of interest as such. Laker's standpoint essentially rested upon the perception in the US of a barrister's chambers being akin to a "firm".

> **This finding potentially opens the door to a challenge every time an arbitrator and counsel are from the same chambers**

Application dismissed

When the application came to be heard, Laker did not appear and so the application was formally dismissed. However, while acknowledging that full argument had not taken place, Rix J did consider the substantive issue, within the context of extensive oral and written submissions having been made by the Bar Council. The Bar Council sought to explain the nature of barristers' chambers and how Laker's assertion, if sustained, would considerably diminish the (already small and specialised) pool of persons available for arbitral matters.

Rix J observed that the test within s 24 was objective—the court must find that circumstances exist, and those circumstances must justify doubts as to impartiality. His Lordship also observed that the approach was the same as that applied for determining bias in the judicial context (*R v Gough* [1993] AC 646 (HL), [1993] 2 All ER 724 and *R v Bow Street Magistrate, exp. Pinochet (No.*

2) [1999] 2 WLR 272 (HL), [1999] 1 All ER 577. As Lord Browne-Wilkinson stated in *Pinochet (No. 2)*: "There is no room for fine distinctions… it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

His Lordship further observed that s 24 referred only to "impartiality", and that the DAC Committee (chaired by Lord Saville) whose report was the precursor for AA 1996 had considered against including "independence" within the statutory test. The DAC Report (paras 101–104) indicated that a requirement for "independence" in addition to "impartiality" would either be superfluous or likely to lead to confusion and/or challenges—in situations which might also include the counsel/arbitrator from the same chambers context.

His Lordship also referred to the pre-existing English case law, as well as a Paris Court of Appeal decision of 26 June 1991 (in the case of *KFTCIC v Icori Estero* Spa (Unreported), where the French court dismissed a challenge to an award rendered by a tribunal which had been chaired by a Barrister from the same chambers as counsel for one of the parties. The French court concluded that "the function of a barrister is essentially carried out independently". The French court decision was important in His Lordship's reasoning because it evidenced the approach of a well respected foreign judicial body towards what is a specific English institution—barristers' chambers.

His Lordship emphasised the features of practice at the Bar, such as individual practice, the prohibition against partnership, and the everyday occurrence for a barrister to appear in front of or against a member of his/her chambers.

His Lordship concluded that there was no basis to sustain an argument that the organisation of barristers' chambers per se gave rise to justifiable doubts about an arbitrators impartiality (whether because of risk of accidental or improper dissemination of confidential information or because of possible "partisan" communications).

While the decision of Rix J appears to reflect the consensus within the English legal profession, the attitude of many foreign lawyers and parties is very different—as evidenced by a recent and potentially highly significant ICSID Tribunal ruling.

The HE case

Hrvatska Elektroprivreda v Slovenia [ICSID Case No ARB/05/24] (6 May 2008) concerned a bilateral investment dispute relating to a power plant. The request for arbitration was filed on 4 November 2005, and a three-person tribunal consisting of eminent lawyers was constituted on 20 April 2006.

A week before a substantive hearing, Slovenia's lawyers (Allen & Overy (A&O)) wrote to the secretary of the tribunal to notify the list of persons attending, which included a QC (the QC) from the same chambers as the chairman of the tribunal (the chairman).

The claimants lawyers (Hunton & Williams) (H&W) raised concerns as to the "11th hour" disclosure of the QC's involvement, and sought details of his relationship with the chairman, as well as when the QC was first instructed and what his intended role would be. The chairman wrote to the parties confirming that he never had any personal relationship with the QC, the sole connecting factor being that they were members of the same chambers. A&O refused to disclose when the QC had been retained, or what role he was expected to play in the hearing.

H&W maintained their objection, pointing out that the claimant was unfamiliar with the English legal system and the nature of barristers' chambers—they pointed to the fact that participants in ICSID arbitrations were from all over the world. A&O rejected any suggestion that they should have disclosed the QC's involvement as soon as he was instructed, or that there were any justifiable doubts as to the impartiality/independence of the chairman.

It was only when the hearing began that A&O conceded that they should have disclosed that the QC had been approached in late February 2008.

The tribunal considered that it had an inherent jurisdiction to control its procedure, and that the ICSID Rules also imposed a requirement upon parties to promptly disclose the identity of their counsel (r 18(1)).

The tribunal noted that barristers are sole practitioners, and that chambers are not law firms. However, the tribunal also observed that chambers have evolved and often market themselves with a collective connotation. Within that context, the tribunal observed that para 4.5 of the Background Information on the IBA Guidelines on Conflict of Interest in International Arbitration referred to "an understandable perception that barristers' chambers should be treated in the same way as law firms".

Status & legitimacy

The tribunal was particularly concerned by the fact that the circumstances surrounding the appointment of the QC were imperiling the status and legitimacy of the tribunal (because of the asserted/perceived connection with the chairman).

Nevertheless, the core of the tribunal's decision (para 30 of the Ruling) rests upon a finding (implicit if not explicit) to the effect that the QC's continued participation in the proceedings could lead a reasonable observer to form justifiable doubts as to the impartiality or independence of the chairman. The tribunal thus ruled that the QC was excluded from the hearing.

This is a highly significant finding, as it potentially opens the door to a challenge (at the very least in ICSID proceedings) every time an arbitrator and counsel are from the same chambers. However, the tribunal attempted to play down the significance of its decision by stating that there was no "hard-and-fast rule" to this effect.

The tribunal referred to four factors as being determinative in the present case: (i) the claimant's unfamiliarity with barristers' chambers; (ii) the respondent/A&O's conscious decision not to disclose the involvement of the QC in February 2008; (iii) the late disclosure by the respondent/A&O of the QC's involvement one week before the hearing; and (iv) the insistent refusal to provide further information—all of these were described as errors of judgment which had created an atmosphere of distrust.

Formalism

At a time when increasing formalism is replacing trust and convention, it is perhaps unsurprising that parties (particularly foreign parties) will be less willing to accept that members of the same chambers can be counsel and arbitrator in the same matter. It requires a considerable insight and leap of confidence for an "outsider" in the present cynicism and suspicion laden environment to accept such a situation.

While this is a matter of deep regret (not least because formalism is actually more susceptible to manipulation than trust or convention), the advent of pseudo-corporate branding (not to mention the potential impact of "multi-disciplinary partnerships") is perhaps leading to an inevitable situation where an arbitrator and counsel cannot be from the same chambers, in the absence of the consent of the parties. NLJ

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