

Arbitrating Insurance and Reinsurance Disputes:

“Transparent and Impartial?”

A summary of the talk given by Jeffrey Gruder QC to BILA at Lloyd's on 21 July 2017

There is no substantial basis for the suggestion that arbitration of commercial disputes, and, in particular, insurance and reinsurance claims, is anything other than fair and impartial, but there are some areas of concern and unease, which do not relate to impartiality as such.

The formal position is that the Court can remove arbitrators if circumstances exist which give rise as to justifiable doubts as to impartiality (section 24(1)(a) of the Arbitration Act 1996). Institutional rules are fuller since they also include the requirement of independence as well as impartiality (see e.g. LCIA Arbitration Rules (2014) Articles 5.3-5.5).

In the case of many insurance disputes, there is no conceivable problem e.g. many professional indemnity policies provide for a sole arbitrator to be appointed by the President of the Law Society, however, I do have a sense of unease about certain aspects of Bermuda Form arbitrations. The sense of unease does not relate to justifiable doubts as to the arbitrators' impartiality but the possession of, what I would term, “inside information” by one of the parties.

The Bermuda Form is a standard form policy, which has been in use for the last 30 years or so. The governing law is the law of New York (with some tweaks intended to remove doctrines which are deemed to be biased against insurers) with arbitration in London (or sometimes Bermuda). There are limited number of points of construction, or mixed fact and law, which crop up repeatedly in disputes. There are a relatively small number of insurers, which are frequently involved in disputes under the Bermuda Form. These insurers often instruct the same solicitors and counsel, who choose their arbitrators from a limited pool of retired High Court Judges or QCs, well known to the insurers and their lawyers. Because the same insurers and their lawyers are involved in recurrent disputes, which raise identical or very similar points, they may, over time, become familiar with the stance or attitude of individual arbitrators on contentious issues. Since arbitration hearings and decisions are confidential, in this respect, lawyers acting on behalf of insurers may be possessed of information not available to assureds and their lawyers, for whom, the dispute may be one-off, albeit important. To this extent, insurers and their lawyers may be in possession of “inside information” in deciding whom to appoint as their arbitrator, and to suggest as Chairman.

I have recently heard that dissatisfaction with the above situation has led to moves in some quarters to replace London as the seat of arbitration in some Bermuda Form policies, and there are policies, which now provide for arbitration in Vancouver or Toronto. This is not good for London in the long run

Similar problems arising from repeat appointments have manifested themselves

in other areas of the law. In Aldcroft v International Cotton Assoc [2017] EWHC 62 (Comm), the Commercial Court had to rule on legitimacy of a rule introduced by the International Cotton Association that no arbitrator could have more than 3 appointments at any one time from one company and 8 in total (“the 3 and 8 rule”). The Commercial Court upheld the legitimacy of the rule and dismissed the argument that the Association was unreasonably restraining trade. The judge (David Foxton QC) made some significant remarks:

“It is clear that the risk of a perception of lack of impartiality resulting from repeat appointments is a legitimate concern in the international arbitration community”...

...The 3 and 8 rule was introduced by the ICA as a measure intended to address perceptions that the arbitration process had a pro-merchant bias, in particular where this resulted from repeat appointments by a merchant of the same arbitrator...

... It is clear that the issues of repeat appointments by one party of the same arbitrator, and of the risk of delay caused by the number of references in which an arbitrator is involved at any one time, are topics of legitimate concern and interest in international arbitration, but that different views are held as to how these concerns should be addressed. Clearly this is an issue often addressed, in the first stage at least, through disclosure to the parties, leaving them to make their own challenge, as information to be provided to an appointing institution which it can take into account when considering whether to make or confirm an appointment, or as matters which the arbitrator is advised to consider before accepting an appointment...”

The reference to “*perceptions that the arbitration process had a pro-merchant bias, in particular where this resulted from repeat appointments by a merchant of the same arbitrator*” can be equally applied to Bermuda Form arbitrations with the word “*merchant*” replaced by “*insurer*”. However, there are no institutional rules such as the ‘3 and 8 rule’ of the International Cotton Association which govern Bermuda Form arbitrations, and disclosure by arbitrators of the number of appointments by the same solicitor or insurance company is not always made.

In extreme cases, repeated appointments by the same party can lead to removal by the Court. An obvious example is Cofely v Bingham [2016] EWHC 240 (Comm). Bingham was a barrister and quantity surveyor who acted as adjudicator and arbitrator. A reported case suggested that contractor called Knowles manipulated appointments in order to ensure that Bingham was appointed adjudicator by inventing conflicts in relation to other candidates and specifying that the adjudicator should be both a barrister and a quantity surveyor, which made Bingham a prime candidate and severely limited the field. Cofely who were in a dispute with Knowles, sought information from Bingham as to number of appointments Bingham had from Knowles and the proportion of his income he derived from them. Bingham arranged a hearing and then aggressively ruled that there were no grounds for him to cease to act and that he

did not have a conflict of interest, even though there was, at that point, no application to him to recuse himself. Cofely applied to court to remove Bingham as arbitrator on grounds that circumstances existed that give rise to justifiable doubts as to impartiality.

It was revealed that Knowles had appointed Bingham 25 times in previous 3 years and that his income from those appointments was about £285,000 out of £1.15 million (about 25%).

The Judge said that the fact that an arbitrator is regularly appointed or nominated by the same party/legal representative may be relevant to the issue of apparent bias, particularly if it raises questions of material financial dependence. The Judge's decision was based on an accumulation of factors:

- 1) The number of appointments by Knowles of Bingham in the previous 3 years
- 2) The high proportion of income derived by Bingham from adjudications in which Knowles was a party.
- 3) The manipulation of appointments by Knowles in favour of Bingham.
- 4) Bingham's aggressive response to Cofely's enquiries about his connections with Knowles.

In these circumstances, Hamblen J was of the view that a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased. Bingham was removed.

A troubling case is *H v L* [2017] EWHC 137 (soon to be heard in the Court of Appeal), a decision of Popplewell J. The underlying arbitration was a claim by H against L under a Bermuda Form insurance policy in respect of a liability which H and two other companies, Q and R, had been found to have in the United States of America. H sought to remove M ("*a well-known and highly respected international arbitrator*" who enjoyed "*a reputation as an international arbitrator of the highest quality and integrity*") under s.24 (1) of the Arbitration Act 1996 on the grounds that "*circumstances exist that give rise to justifiable doubts as to his impartiality*".

M had been appointed not by either party, but by Flaux J. under s.18 of the Arbitration Act 1996 to act as third arbitrator and chairman when the two parties were unable to agree on whom to appoint. At the time of his appointment, M disclosed to the parties that he had previously been appointed by the insurers, L, as an arbitrator, and that he was currently acting as arbitrator in two arbitrations to which L was a party. H did not oppose M's appointment by the Court on these grounds, but for other reasons (i.e. preference for a US chairman), which were rejected by Flaux J.

M relied on what happened subsequently. After his appointment as chairman in the H v L arbitration, M accepted appointment on behalf of liability insurers in two other arbitrations in which R sought to recover from liability insurers in respect of the same underlying liability in respect of which H was seeking an indemnity from L. In one of those arbitrations, the liability insurer for whom M was appointed was also L. M did not disclose either of those subsequent appointments to H, who only found out about them much later from third parties.

In the hearing it was disclosed that M had sat as member of an arbitration tribunal in over thirty references concerning the Bermuda Form over many years. I would imagine that most of those appointments would have been on behalf of insurers. H did not, however, rely upon multiple appointments over the years for insurers. It argued that the appointment of M in the other undisclosed arbitrations involved an undeclared secret profit from L, which affected M's impartiality. H also relied upon the fact that, in the subsequent arbitrations, M would be presented with other evidence, which was potentially relevant to the first arbitration involving H, which was not available to H in the first arbitration.

Popplewell J said that H's arguments proceeded on the basis of a fundamental misunderstanding of arbitration in London under the Arbitration Act. It was his view that arbitrators are impartial and are unaffected by the identity of party appointing him or her. Appointment does not confer a direct benefit from the appointor, since it is the tribunal, which decides its fees and the paying party.

With respect, this analysis is divorced from reality. Even though arbitrator's fees are not paid directly by the appointor, but by the institution, or indirectly by the losing party, it is very fact of appointment, which gives the arbitrator an opportunity to earn remuneration. In the case of party appointed arbitrators, the parties and their lawyers make appointments. Even in the case of third arbitrators, the parties often have some input. Many full time arbitrators are in business and actively court appointments by law firms and clients. Appointments are an important source of income for them. They do not attend numerous conferences and drinks parties purely for fun and entertainment.

In addition, Popplewell J rejected the suggestion that the overlap in issues and evidence between the various arbitrations provided a sufficient basis for the exercise of the s.24 (1) power. He said that an overlap in claims was very common in insurance arbitrations, and that it was desirable for those with expertise to sit in different arbitrations arising from the same factual circumstances or subject matter. The fact that an arbitrator was appointed on multiple tribunals, in respect of different claims, arising out of the same subject matter, did not affect the obligation to decide each case on the basis of the material available to each tribunal. Arbitrators were well able to put out of their minds material in one arbitration, which was not presented in another arbitration.

H also relied on M's failure to disclose the two subsequent appointments after he was appointed Chairman but Popplewell J said since there was no objection to M

accepting those appointments, there was nothing for M to disclose. Accordingly, there was no real possibility of apparent bias. The fact that the IBA guidelines (of which more below) might have mandated disclosure was regarded as irrelevant since the guidelines were merely advisory and not binding as far as English law was concerned.

With respect, the Judge did not really grapple with the real problem of repeated appointments in this specialist area, and the problems arising from what I call “inside knowledge”. In addition, the judge’s relaxed attitude concerning multiple appointments in different arbitrations arising from the same factual circumstances or subject matter was not shared by Leggatt J in Guidant LLC v Swiss Re International SE [2016] EWHC 1201 (Comm).

In Guidant, the Claimant manufactured cardiac rhythm management devices and had incurred liabilities in claims for personal injuries arising from alleged defects in the devices. It claimed indemnities under three insurance policies, one with a Bermudian insurer (Markel) and two with the Swiss Re. All three policies were in identical terms, save for the limits of cover. Each contained an arbitration clause providing for arbitration in London by a tribunal of three arbitrators. Each party had the right to appoint an arbitrator, with the third being appointed by the two party-appointed arbitrators. The Claimant referred its claims to arbitration and appointed the same arbitrator in each arbitration. Markel and Swiss Re appointed different arbitrators in each. In the Markel arbitration, the two party-appointed arbitrators agreed on the appointment of Michael Collins QC as the third arbitrator and chairman. However, in the Swiss Re arbitrations there was disagreement as to the third arbitrator: the arbitrators appointed by the claimant wanted Michael Collins QC, while those appointed by Swiss Re did not. The claimant argued that Michael Collins QC should be appointed third arbitrator in 2 Swiss Re arbitrations in order to reduce the risk of inconsistent decisions, costs and delay, and in order to hold out the possibility of co-ordinating the procedure. Swiss Re submitted that, not only should the court decline to appoint Michael Collins QC, but also it should appoint a different third arbitrator in each of their arbitrations.

If Leggatt J had followed the approach of Popplewell J in H v L, he would have said that there was no problem which could arise from Michael Collins being appointed third arbitrator in all three arbitrations since he would be well able to decide one arbitration on the basis of material put before him in that arbitration and to put out of his mind anything he had learned from another arbitration. Leggatt J disagreed:

*“.....If this were litigation, the court would almost certainly order the three claims to be managed and tried together in the interests of efficiency and to avoid the risk of inconsistent results. **This is not litigation, however, and in arbitration proceedings considerations of party choice, privacy and confidentiality are relevant and important.** As Mr. Lockey QC for the defendant, Swiss Re, has emphasised, under the 1996 Act the court has no power to order consolidation or co-ordination of arbitration proceedings nor does an arbitral tribunal have such power except with the consent of the parties (see s.35 of the Act). Swiss Re and*

Markel have each made it clear that they do not consent to consolidation of the three arbitrations nor to concurrent hearings, and that is their right.

In circumstances where the arbitrations will therefore be taking place separately, it seems to me that Swiss Re has a legitimate basis for objecting to the appointment as the third member of the tribunals in its arbitrations of the same person who is the third arbitrator and chair of the tribunal in the Markel arbitration. If the same person were to be appointed, there would be a legitimate concern that that person would be influenced in deciding the Swiss Re arbitrations by arguments and evidence in the Markel arbitration. Indeed, the likelihood that that would occur is implicit in the very argument which Guidant makes that appointment of the same person would minimise the risk of inconsistent decisions. Swiss re is not a party to the Markel arbitration and will have no opportunity to be heard in that arbitration or to influence its outcome. Indeed, without a waiver of confidentiality, they will not be privy to the evidence adduced or the submissions made in the Markel arbitration. If the Markel arbitration were to be heard first, the members of the tribunal in that arbitration would form views, without any input or opportunity for input from Swiss re, from which they may afterwards be slow to resile..."

The approach of Leggatt J is entirely different from that adopted by Popplewell J in H v L.

A Tribunal is not complete without a Chairman, and there is often jockeying between the parties in an endeavour to procure a Chairman who is perceived to be congenial to the interests of one or other of the parties. There is often an attempt by Claimant or Respondent to procure the appointment of someone who, because of background, nationality or track record, might be perceived to be favourable to one side or the other. A typical scenario is that a Bermuda Form claimant appoints a US lawyer or arbitrator, while the insurer selects one of a small band of QCs or retired judges. The issue then who is appointed Chairman. If there is no agreement between arbitrators, then the court decides. Since the parties often agree that nominated arbitrators can speak to the parties about the choice of the third arbitrator and Chairman there is, often, stalemate since the policyholder wants an US third arbitrator, while the insurer prefers an English QC or retired judge.

To date, when the matter has gone to Court, it is little surprise that the tendency of the Court is to select an English third arbitrator and Chairman. A frequent argument is that as the seat is London, a chairman with knowledge of English procedure is necessary. In reality, this is a point of no substance, since the Tribunal has complete discretion as to the procedure to be adopted under section 34 of the Arbitration Act 1996. Examples of cases where the English Court has appointed an English third arbitrator is the OIL case in 1992 and Toyota v XL in the late 1990's. In addition, the judgment in H v L refers to Flaux J appointing M, an English QC who was the insurance company's preferred candidate. Flaux J rejected the argument of the Claimant that it was uncomfortable with an English retired judge or QC as chairman because of its concern that he would interpret policy through English eyes and be incapable of applying modified New York law. In my view, Courts have to become aware of

the games being played, and jockeying for position carried on, by parties in connection with the appointment of the third arbitrator and chairman and be more receptive to appointing a chairman other than an English retired judge or QC.

Of relevance are the IBA Guidelines as to Conflicts of Interest in International Arbitration. They are not binding but are generally adhered to in International Arbitration, but not necessarily in Bermuda Form arbitrations. The Orange List includes, amongst matters which should be disclosed to the parties (but which do not necessarily disqualify the arbitrator), (1) that the arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties; or (2) the arbitrator has within past three years been appointed on more than three occasions by the same counsel or law firm.

The IBA guidelines are criticised from time to time by English Courts, but if followed and arbitrators make requisite disclosure, while at the same time, English Courts become more aware of the inequality of knowledge between insurers and insured in specific areas such as Bermuda Form arbitrations, it might be that the present imbalance can be corrected, but Courts and legislators would have to realise that the enquiry does not end on the question of impartiality. The question of “inside information” also needs to be addressed.