

“Justice must not only be done, it must be seen to be done”.

An examination of the application of this principle as applied to arbitral process, in the light of **Bremer GmbH v ets Soules et Cie and Anthony G Scott** [1985] 1 Lloyd’s Rep 160 and **Tracom SA v Gibbs Nathaniel (Canada) Ltd & George Jacob Bridge** [1985] 1 Lloyd’s Rep 586, as the basis for guidelines to the courts in the exercise of its new powers under s24(1)(a) Arbitration Act 1996 to remove an arbitrator on the grounds of impartiality.

The power of the court to remove an arbitrator is set out in s24 Arbitration Act 1996 Whilst a s1(c) of the Act enshrines the general principle that the courts should not interfere unnecessarily in the arbitral process, the requirement under s1(a) as to fair resolution and impartiality means that in certain circumstances the courts will have to exercise their supervisory powers over the tribunal.

s24 (1) provides that 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 any of the following grounds,

- (a) that circumstances exist that give rise to justifiable doubts as to his impartiality,
- (b) that he does not possess the qualifications required by the arbitration agreement
- (c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so
- (d) that he has refused or failed
 - (i) properly to conduct the proceedings or
 - (ii) to use all reasonable dispatch in conducting the proceedings or making an award.

And that substantial injustice has been or will be caused to the applicant.

s24(2) If another body is given the power to remove the courts must not act until the other body has done its work.

s24(3) The tribunal can continue its work despite such an application.

s24(4) Discusses the fees of removed arbitrators.

s24(5) The arbitrator has locus standii in the application for removal.

s24(6) Any appeal from the court needs the court’s consent.

The provisions in respect of (b) lack of qualifications in breach of appointing contract and (c) physical and mental incapacity are uncontroversial and need little comment. The most controversial are in respect of (a) impartiality and (d) (i) proper conduct and (ii) reasonable dispatch.

Bremer and Tracom both discuss the power of removal for bias / impartiality and show that the basic provision of s24(1)(a) is simply a restatement of the previous law. There has always been a supervisory role for the courts in relation to natural justice – the classic latinate description of the principle being “Nemo Iudex in Causa Sua” namely that no man must be a judge in his own cause – that is to say a judge with a partisan interest in the outcome of a dispute should at the very least declare that interest to both parties or even remove himself from the panel. The principle applies as a general principle not only to arbitration but to all tribunals and to the courts themselves. It is a fundamental principle of the law and applies even to the highest court in the land.

Thus recently, the C.A. acting in its capacity as a public court struck down a decision of the House of Lords for impartiality when Hoffman J, one of the members of the court in the review of the Home Secretary’s decision to allow the proceedings for the deportation of General Pinochet to continue was shown to have been a leading member of Amnesty International, a body which had campaigned against the General for many years.

Leading cases in respect of impartiality and bias date back as far as Lord Hewart’s judgement in *Dimes v Grand Junction Canal* where a decision of the Master of the Roles was struck down, not because there was any genuine belief that he had acted impartially, but on the basis that “justice must be seen to be done” rather than that justice was or was not actually done. In that case an applicant for judicial review adduced evidence that the judge held a portfolio of shares which happened to include shares in one of the parties to the case. Clearly a favourable outcome for the company helped preserve the judge’s investment, and even though he did not know the company shares were part of his portfolio the case had to be retried. Likewise, in *R v Sussex Justices* the decision of a magistrate in a criminal case was struck down because the magistrate worked as a solicitor in a firm which was representing the defendant in a civil case based on the same facts. A non-conviction boosted the defendant’s chances of resisting the claim and therefore the magistrate’s colleagues chances of success. The magistrate was unaware of the connection but it was sufficient to damage the integrity of the proceedings.

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However, outside the judicial process some problems of impartiality arise merely by the nature of the person given the power to make decisions. Tribunals are frequently staffed by members of government departments with a direct interest in the generality of a claim as opposed to the specific outcome of a particular claim.

Appeal from tribunals is by statute frequently made to a government minister – who represents the government. From one perspective doubt about the integrity of the process could be cast on the basis that a government minister would not make decisions which go against the interests of the government. Such fears are generally unfounded. The Government is not opposed to paying people out of public funds – indeed for instance social security exists to pay money to the needy and it is the job of employees to rule on a routine basis on the criteria of need and whether or not applicants fulfil that need. . A Social Security Tribunal manned by Social Security Officers should impartially decide on whether or not the criteria are fulfilled. A minister on an appeal from the Tribunal will do the same. Such a close interest would not be permitted for a court but is allowed for public law tribunals. A similar link exists in respect of arbitrations in that frequently the members of a panel are drawn from industry bodies which may be deemed to have an institutional link with the outcome – but in reality are expected to be impartial enough to allow claims. After all the insurance industry would cease to exist if it never paid out to policy holders under claims. The Insurance industry watchdogs over loss adjuster claims frequently allow claims that adjusters have initially rejected.

Similar comments can be made about panels in the construction industry such as ICE, RICKS, and in shipping such as GAFTA and FOSFA.

Impartiality therefore is more likely to be detected in partisanship for one of the parties or in shares or other interests that the arbitrator might have had in the affairs of one of the parties. However, before going further, it should be noted that there is a rider to s24(1). In considering applications to dismiss the court find that substantial injustice has been or will be caused to the applicant. This being so, it is no longer trite law that “justice must not only be done, it must be seen to be done”. The requirement is that no substantial injustice result. Justice must be done. The court will make a ruling that therefore it is of the opinion that justice by being done is publicly declared and thus seen to be done. However, the mere fact that observers might see an unfavourable link will not of itself alone be sufficient grounds for the court to remove the arbitrator. The Bremer and Tracom decisions were made under the old regime before the rider was introduced as a positive requirement and so their authority might not be that strong today.

In *Bremer v Soules & Scott* the applicant for the dismissal of a member of a GAFTA arbitral appeals panel objected that Scott was a director of European Grain SS a wholly owned subsidiary of Andre Cie. Andre Cie was apparently involved in other disputes in respect of the same transactions and a favourable award to Soules would also help Andre Cie when the claims against it came for consideration. The implication was therefore that Scott would act in a manner beneficial to the parent company of EGS. Mustil J dismissed the application on the basis that Bremer had failed to show any misconduct. The application was governed by the old s23 Arbitration Act 1950 which required that an applicant establish

- a) actual bias – that the arbitrator is predisposed to favour one party or has acted unfavourably to the applicant – proof of actual bias requires that it be shown that the arbitrator is incapable of approaching the issue with the impartiality his office demands.
- b) Showing that the relationship between the arbitrator and the parties creates an evident risk that the arbitrator has not or will not act impartially. The risk must be manifest.
- c) Showing that the actual conduct of the arbitrator proves he is lacking in talent or experience (s24(b) 1996 Act) or lacks diligence.

Bremner falls into the category discussed above regarding tribunals and industry appeals boards and reflects the fact that such links alone were insufficient to found a dismissal and in the light of the rider to s24 Arbitration Act 1996 the outcome today would most likely be exactly the same in the absence of proof of actual misconduct under part (c) of Mustill’s judgement.

Staughton J presided over the *Tracom v Gibbs and Bridge* application for removal of Bridge as arbitrator from a FOSFA arbitration panel concerning non-shipment of goods. Tracom objected to Bridge because in a previous arbitration Bridge had openly consorted with the other party leaving Tracom completely dissatisfied with Bridge’s conduct and thus unwilling to submit to a further arbitration with Bridge on the panel. In the event the court agreed that Bridge should be removed since evidence of his open bias against

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Tracomini had been established before the arbitration even commenced. Clearly today there would likewise have been justifiable doubt as to his impartiality under s24(1)(a) Arbitration Act so the outcome would be the same.

What is interesting about the judgement is that Staunton J was unhappy with Mustill’s judgement in Bremer. Staunton J sought to impose an objective test – unrelated to subsequent proven facts in respect of imputations of bias whereas Mustill was prepared to look at actual conduct. For Staunton it would be sufficient to show that a reasonable man would be of opinion that there was a likelihood of bias for the dismissal to be granted. Mustill was prepared to examine subsequent evidence to show whether or not despite the outward appearance, any actual bias existed. If not Mustill would not remove the arbitrator. Staunton would remove.

Now, in the light of s24 the views of Mustill would prevail since the rider requires that a substantial injustice has been or will be caused. Any subsequent evidence showing no injustice has or will result will result in the application for removal being rejected.

Staunton J canvassed previous cases to determine the standard required of arbitrators and found a range of similar terminology. In Metropolitan Case Denning referred to “a real likelihood of bias” whilst Edmund Davies spoke of “a real danger”. Sachs in Hannam also referred to “a real danger”. The CA in Ardahanian spoke of “real likelihood”. Cross in Hannam and Ackner in Liverpool City Justices claimed there is no difference between the tests. For Staunton J the real danger test sets too lenient a standard. Now we have a new phrase which avoids the likelihood and real danger test, namely “justifiable doubt as to impartiality – with the rider that substantial injustice has been or will be caused.”

In what circumstances, if any at all, might an arbitrator reasonably continue the proceedings in the absence of one party and the ways in which the arbitrator might ensure that by so doing he does not fail in his duty under s33 Arbitration Act 1996?

s33 General duty of the tribunal require that.

33(1) The tribunal shall-

- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

33(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

Clearly there is a danger that in continuing an arbitration in the absence of a party the arbitrator risks breaching the duty under s33(1)(a) of affording each party an opportunity of putting his case etc. However, note that the duty is to provide a reasonable opportunity – there is no absolute duty to ensure that both parties actually present their case.

An arbitrator should not normally continue a hearing in the absence of a party if the absence is due to circumstances beyond the control of the party which make attendance impossible or even very arduous for a reasonably diligent party. Miscommunications, travel problems, urgent business or family commitments may result in an irritating absence of a party from a hearing and may be very stressful and inconvenient to the party in attendance but nonetheless it would be unwise to continue – and an arbitrator needs to have the courage to override the urgings of a forceful party in attendance and refuse to yield to a demand to continue in the absence of the other party.

Under s33 it is incumbent on the arbitrator to give the absent party the opportunity to attend. An electronic communication by phone / fax or email backed up by a registered mail communication requiring the absent party to provide an explanation as to why they have not attended followed by arrangements for a subsequent hearing at the nearest possible date is the best way to proceed where the tribunal does not know the reason for the non-attendance. If the reason is known and the explanation is accepted by the tribunal as being beyond that party’s control then arrangements should again be made for a new hearing at the soonest practicable date. The arbitrator can set fixed deadlines for such a hearing under s41(5) and issue a peremptory order. Such orders are enforceable by the courts under s42. Further more, under s34(3) The

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tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).

If having followed such procedures, or in situations where it is clear that the other party has no intention of appearing then the tribunal is entitled to continue in the absence of the other party. This ensures that a party cannot deprive another of justice simply by refusing to attend. These powers are explicit in s41(4).

Powers of tribunal in case of party's default.

- 41(1) The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.
- 41(2) Unless otherwise agreed by the parties, the following provisions apply.
- 41(3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay-
 - (a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or
 - (b) has caused, or is likely to cause, serious prejudice to the respondent,the tribunal may make an award dismissing the claim.
- 41(4) If without showing sufficient cause a party-
 - (a) fails to attend or be represented at an oral hearing of which due notice was given, or
 - (b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions,the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.
- 41(5) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.
- 41(6) If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.
- 41(7) If a party fails to comply with any other kind of peremptory order, then, without prejudice to section 42 (enforcement by court of tribunal's peremptory orders), the tribunal may do any of the following-
 - (a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;
 - (b) draw such adverse inferences from the act of non-compliance as the circumstances justify;
 - (c) proceed to an award on the basis of such materials as have been properly provided to it;
 - (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

Note that even where the tribunal makes arrangements for a subsequent hearing the tribunal has the power in relation to orders as to costs s63 and interest s49 to protect as much as possible the interests of the attending party. Thus the thrown away costs of the lost hearing and any additional cost incurred in rescheduling the hearing can be awarded against the absent party.

The absent party may seek to challenge the jurisdiction of the tribunal in court whilst refusing to attend s32. It is clear that the tribunal is entitled under the act to continue with the hearing and may even make an award whilst the challenge in the court is going ahead s32(4). However, the other party can actively promote the role of the tribunal by asking for a stay of court action in a separate application to the court. S9. Since under s30 the Tribunal has the power to rule on its jurisdiction this is a better course than proceeding in the absence of a party challenging jurisdiction. An application for a stay of court action is quite speedy. Then if the party still refuses to attend it is clear the tribunal is justified in exercising its s41 powers in default of a party.

Again the absent party might seek to have the award overturned by certiorari in an action for judicial review – but again provided the party had a reasonable opportunity to attend the application should fail.

Finally, if the party tries to resist the award at the enforcement stage again it is likely to fail provided a reasonable opportunity has been afforded for the party to attend but has obdurately refused to avail himself of that opportunity.