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Context is King: Court holds that industry context is key when determining arbitrator bias (Africa Sourcing v Rockwinds)

Industry context is important when considering arbitrator bias. In this case,¹ the court dismissed a challenge to a trade association arbitration award brought on the grounds that the chair of the arbitral appeal board had failed to make disclosures relating to contact with the defendant and other members of the trade association in a professional category giving rise to apparent bias. It held that in the context of a relatively small commodities market where traders and the trade association arbitrators were likely to know others in the market, a fair-minded and informed observer would not conclude there was a real possibility of bias.

The judge also considered guidance on when apparent bias will amount to substantial injustice so as to constitute serious irregularity under section 68(2)(a) Arbitration Act 1996 (AA 1996) and the loss of the right to object under s 73 AA 1996.

What are the practical implications of this case?

This judgment presents several important takeaways for practitioners and arbitrators:

- **apparent bias and context:** The context will always inform the circumstances that an objective observer might regard as giving rise to an appearance of bias. It should be given attention by arbitrators considering disclosure and practitioners considering making allegations of bias.
- **apparent bias and disclosure:** The judge offered a pragmatic warning that while it is essential to evaluate whether the disclosure is necessary to assure parties that there are no legitimate

concerns about impartiality, an arbitrator must avoid causing additional delay and expense by disclosing information that could not possibly result in a fair-minded and informed observer having any such concerns.

- **substantial injustice:** When dealing with allegations of apparent bias, unless the alleged non-disclosure is so egregious that substantial injustice is inherently likely, the party challenging an award will have to establish substantial injustice. In some cases, this puts a greater evidential burden on the claimant.
- **loss of the right to object:** The judgment offered a salient reminder of the importance of making enquiries and raising any issues as early in the arbitration process as possible so as not to lose the right to object.



What was the background?

The parties were:

- Two claimants, Africa Sourcing Cameroun Ltd and Africa Sourcing Côte d'Ivoire (together,

¹ *Africa Sourcing Cameroun Ltd and another v Société par Actions Simplifiée (Rockwinds) and another* [2023] EWHC 150 (Comm) (27 January 2023)

'AS'), who were cocoa product traders but not members of the Federation of Cocoa Commerce (the "FCC").

- LMBS Société Par Actions Simplifiée (trading as "Rockwinds") as the first defendant. Rockwinds was a cocoa trader and a member of the FCC. Its CEO, Mr Matthew Stolz ('Mr S'), was a member of the FCC council and had been active on FCC committees and sitting as an FCC arbitrator.
- Mr Eric Bourgeois ('Mr B') as the second defendant. He chaired the Board of Appeal (the 'Board') which made the FCC Award being challenged. Mr B was an experienced cocoa trader with over 30 years of experience in the market and over four years as a member of the FCC council.

The dispute between AS and Rockwinds arose from three contracts for the forward sale of cocoa, which each contained an arbitration agreement that provided for FCC arbitration. Nevertheless, AS started proceedings in the Bordeaux (France) court. They argued that it would not be fair to have the hearing before any FCC tribunal as Rockwinds and Mr S were leading members of the FCC. However, the Bordeaux courts of first instance and appeal found they did not have jurisdiction because of the FCC arbitration clause.

AS then brought FCC arbitration proceedings, seeking a declaration that the FCC had no jurisdiction to decide the dispute with Rockwinds. The FCC Tribunal held that it did have jurisdiction in the arbitration proceedings and that the claims were not time barred. Its award on the merits was in AS's favour, holding Rockwinds liable for over €5m.

Rockwinds appealed on various grounds, one of them being that the proceedings were not time barred. The Board concluded in its award that the dispute was time barred (the 'Award'), because AS missed a contractual deadline by over two years and chose not to exercise its discretion to extend time.

The claimants made an application to the English court under AA 1996, s 68 to set aside the Award on the grounds of apparent bias of Mr B.

What did the court decide?

Apparent bias

AS argued that there were four circumstances which should have been disclosed by Mr B at the time of his appointment to the Board, which, if they had been, would have led a fair-minded and informed observer to conclude there was a real possibility of Mr B being biased. The court adopted the approach in *Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48* that the fair-minded and informed observer informs

themselves of the relevant facts and appreciates the importance of context.

Against the backdrop of a relatively small and specialized trading community and trade association arbitration where arbitrators will be drawn from among the members and therefore likely to be known to or known about to those in trade with disputes, and may include those with whom they have dealt previously, none of the four matters raised by AS were disclosable or gave rise to justifiable doubts about Mr B's impartiality and a real possibility of bias.

Substantial injustice

The judge held that even if there had been a failure to disclose relevant circumstances, the challenge would fail because a case within AA 1996, s 68(2)(a) will not constitute a serious irregularity unless the court considers that it has caused substantial injustice.

In *RAV Bahamas Ltd and another v Therapy Beach Club Incorporated (Bahamas) [2021] UKPC 8*, the Privy Council guidance was that there will be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity. That was the case here where there were two other experienced arbitrators on the Board.

Loss of the right to object

The judge also held that AS failed to act with reasonable diligence, and so was precluded from raising these objections now, because they should have made their enquiries about Mr B at the outset of the appeal proceedings rather than almost six months later.

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