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"ARBITRATION AND AFRICA: PROSPECTS AND CHALLENGES"**

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**TRIBUNAL BIAS IN AFRICAN ARBITRATIONS  
HARRY MATOVU QC<sup>1</sup>**

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## INTRODUCTION

1. The expansion of African economies and the increase in investment and trade across the continent has awakened a major interest in the potential of the African legal market. In a report published at the end of February 2015, Redstone Consultants said:<sup>2</sup>

“Africa is rapidly becoming the most magnetic part of the world for companies, investors and their advisers. Eighteen months ago we interviewed Global law firms about their work in Africa and their plans for building on this in the future. In revisiting these firms, we have found a substantial sea change. Firms that have been investing in Africa for years are realising that competition is hotting up. Newcomers are getting Board level commitment to plans and investments.

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Over the past 3 years, more than half our Africa respondents have experienced growth rates in excess of 25%, with a significant number doubling or more in size over this period. Optimism is high. The majority expect this growth to continue or even accelerate. Only in South Africa is there a sense that growth may slow – or even reverse in the domestic market. This of course is providing a spur to South African firms to expand into other African jurisdictions.”

The excitement is not limited to law firms. The so-called ‘emergence of Africa’ has also been the focus of activity and competition amongst leading arbitral institutions, including the ICC International Court of Arbitration (“**the ICC**”), and a growing number of national and regional arbitration centres in Africa.

2. The title of this conference, “*Arbitration and Africa: Prospects and Challenges*”, recognises both the growth potential of arbitration in Africa in the light of expanding

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<sup>1</sup> Barrister and Queen’s Counsel, Brick Court Chambers, London

<sup>2</sup> *African and International Law Firms: Friends or Foes* – Redstone Consultants, February 2015. In a more recent blog in March 2016, Redstone suggested that the interest in Africa among global law firms is still very strong: “*Global firms’ interest in Africa is escalating fast. Many of them are looking to find ways of establishing a presence in Sub-Saharan Africa – or strengthening the presence they already have*”: <http://www.redstoneconsultants.com/#!/Hoggers-and-Huggers-why-independence-doesn't-mean-treating-all-firms-the-same/cv59/551975040cf2aa18116cae15>.

investment and trade across the continent, and the possibility that local conditions may call for different approaches to the conduct of arbitrations in relation to African disputes.

3. This paper considers the issue of the appointment of arbitral tribunals. It suggests that commonly accepted rules and guidelines regarding the selection of arbitral tribunals and tribunal bias need to have regard to the social and cultural norms, values and structures of African jurisdictions, as well as the conditions and realities of the legal market in Africa. Awareness of the social and cultural context in which dispute resolution takes place is important in any assessment of the fairness of the procedure in question and 'due process'. Courts and arbitral institutions which supervise or examine such issues should be aware of cultural norms and values and the structure of African societies if challenges to arbitral appointments and awards are to be determined properly and the arbitration market in Africa is to develop to its full potential. The risk of disqualification of arbitrators and non-enforcement of awards on grounds of tribunal bias also raises questions for the leaders of African law firms seeking to compete in the international arbitration market as to the best business models and competitive alliances to adopt for the growth of their businesses.

#### THE APPOINTMENT OF TRIBUNALS AND THE DEVELOPMENT OF ARBITRATION IN AFRICA

4. A hallmark of arbitration law and practice is the principle of party autonomy. Parties to a dispute agree to avoid the courts in favour of dispute resolution by one or more individuals chosen by them in accordance with a mutually agreed procedure. In the White and Case 2015 International Arbitration Survey conducted by Queen Mary University of London ("**the White and Case 2015 Survey**"), respondents indicated that autonomy in the selection of arbitrators was one of the most valued attributes of arbitration (after enforceability of awards, avoiding specific legal systems/national courts and flexibility).<sup>3</sup>
5. Another important aspect of party autonomy concerns the choice of arbitral seat. The White and Case 2015 Survey found that a local legal infrastructure demonstrating neutrality and impartiality, a national arbitration law and a track record of supporting arbitration agreements and awards are the principal factors governing the choice and reputation of arbitral seats, but that the availability of quality arbitrators who are familiar with the seat was "*arguably a strong secondary factor*".<sup>4</sup> On this basis, London and Paris continue to be the most favoured arbitral seats, and Hong Kong and Singapore have shown rapid gains in popularity. African jurisdictions do not feature in the results of this survey. But if international arbitral institutions are serious about promoting arbitration on the continent, they must show a commitment to the development of a strong body of quality arbitrators from Africa who are familiar, not only with African jurisdictions which may be chosen as arbitral seats, but also with the

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<sup>3</sup> White and Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, pp.5-6

<sup>4</sup> *Ibid.* at p.14

arbitration law and practice in established seats such as London and Paris where a large number of arbitrations are currently conducted.

6. Rules and guidelines regarding the appointment and disqualification of arbitrators need to reflect the principle of party autonomy in the choice of tribunal and the choice of seat. They should not stand unnecessarily in the way of the development of an arbitration market in which party autonomy and freedom of choice can be properly exercised. On the other hand, rules and guidelines cannot ignore the fundamental requirement of tribunal impartiality. This is an overriding requirement, to which the principle of party autonomy and any wider aims of capacity building must always yield. The balancing of these objectives is not always straightforward, and it requires particular care in developing arbitration markets. Potential difficulties in this area are illustrated by challenges to tribunal appointments and awards on grounds of apparent bias or conflicts of interests.

### TRIBUNAL BIAS: GENERAL PRINCIPLES

7. The fundamental requirement of tribunal independence and impartiality is typically enshrined in both national arbitration laws and the rules of arbitral institutions under whose aegis arbitrations are conducted. The application of this principle in any case is highly fact-specific, and the determination of any challenge on grounds of lack of independence or impartiality will be coloured by prevailing standards of practice in arbitration, and by guidance published by arbitral institutions or professional bodies, such as the IBA Guidelines on Conflicts of Interest and the ICC Guidance Note for the disclosure of conflicts by arbitrators. The determination of such challenges is also likely to be coloured by the professional and judicial experience of the judges hearing the challenge. Given all these factors, different courts may reach different conclusions as to the risk of impartiality or bias in a given arbitral appointment. The outcome is not always easy to predict.
8. Article 12(2) of the UNCITRAL Model Law on International Commercial Arbitration<sup>5</sup> (“**the Model Law**”) has been incorporated or echoed in several national arbitration codes.<sup>6</sup> It states as follows:

“An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties...”

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<sup>5</sup> As adopted by the UN Commission on International Trade Law on 21 June 1985, and amended by the UN Commission on International Trade Law on 7 July 2006

<sup>6</sup> See, for example, s.24(1)(a) of the UK Arbitration Act 1996 (“*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...*”); and s.13(3) of the Kenya Arbitration Act 1995 and s.12(2) of the Uganda Arbitration and Conciliation Act 2000 (“*An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence*”)

The provision classically reflects the tension in arbitration law between (1) the principle of party autonomy and the need for the courts to intervene as little as possible, and (2) the overriding requirement of tribunal impartiality and independence, and ‘due process’ in the conduct of arbitrations.

### The Appearance of Bias

9. It is generally recognised that there are two types of judicial or arbitral bias or partiality: actual bias and the appearance of bias (“apparent bias”). Actual bias needs no explanation. The principal concern in this area is the appearance of bias.
10. The test for the appearance of bias in Article 12(2) of the Model Law is whether “*circumstances exist that give rise to justifiable doubts as to [the] impartiality or independence*” of an arbitrator. This begs the question as to what doubts would justify a challenge to the appointment of an arbitrator. Several common-law jurisdictions have developed case-law in this area. I shall focus on the English authorities because (1) this is the body of case-law with which I am most familiar, and (2) even if they do not entirely reflect the way in which the law has developed in other jurisdictions, the discussion in these cases is illuminating.

### English Authorities

11. The classic exposition of the principle of apparent bias in English law appears in the House of Lords case of *Porter v Magill*.<sup>7</sup> The test for determining an issue of apparent bias is

“... whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.”<sup>8</sup>

It has been emphasised that the test is whether there is a **possibility** – not a **probability** – of bias.<sup>9</sup> It is an objective test based on **the fair-minded and informed observer**, not the subjective views of the parties or the tribunal under scrutiny.

12. The English Court of Appeal has more recently explained the essence of bias as follows:<sup>10</sup>

“The concept of bias includes any personal interest in the case or friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility, in other words, that he might in some way have ‘pre-judged’ the case.”

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<sup>7</sup> [2002] 2 AC 357

<sup>8</sup> Per Lord Hope of Craighead at [103]

<sup>9</sup> *R v Gough* [1993] AC 646, per Lord Goff of Chieveley at 670, approved and followed in *Porter v Magill* (see Lord Hope at [99]-[103]).

<sup>10</sup> *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315, per Longmore LJ

This is the essential mischief to which the rule against the appearance of bias is directed.

13. Furthermore, the issue of apparent bias is not confined to the question whether there is a real possibility or likelihood of **conscious** bias. The threshold of the test is “*a real possibility of unconscious bias*” in the mind of the tribunal.<sup>11</sup> Nor does the **appearance** of bias require proof of **actual** bias: see *R v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, per Devlin LJ at 187.<sup>12</sup>

“Real likelihood’ [of bias] depends on the impression which the court gets from the circumstances in which the justices [or arbitrators] were sitting. Do they give rise to a real likelihood that the justices [or arbitrators] might be biased? The court might come to the conclusion that there was such a likelihood, without impugning the affidavit of a justice [or arbitrator] that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so.”

14. This important point about the way in which bias may act unconsciously on the mind of a scrupulous tribunal has been emphasized by the English courts on more than one occasion. In *R v Gough*, it was observed that “*bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias.*”<sup>13</sup> So a statement or assurance by the tribunal under scrutiny that it has not been, or is unlikely to be, unduly influenced or biased in its determination of a dispute is of little value. As the Court of Appeal explained in *Locabail (UK) Ltd. v Bayfield Properties Ltd*:<sup>14</sup>

“There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision.”

15. The English authorities make it clear that, if there is any real doubt as to whether a tribunal might be biased (whether consciously or unconsciously), that doubt should be

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<sup>11</sup> Per the Privy Council in *Lawal v Northern Spirit Ltd.* [2004] 1 All ER 187 at [19]. As the Privy Council observed in that case (at [14]), “*public perception of the possibility of unconscious bias is the key*”.

<sup>12</sup> Cited with approval by Lord Goff in *R v Gough* [1993] AC 646

<sup>13</sup> *R v Gough* [1993] AC 646, per Lord Goff at p.659F-G

<sup>14</sup> [2000] QB 451 at [19]. See also *R v Bow Street Magistrates, ex parte Pinochet (No.2)* [2000] 1 AC 119, per Lord Hope of Craighead at 140H-141B: “*It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of partiality.*”

resolved in favour of recusal,<sup>15</sup> because “*in any case where the impartiality of a judge is in question, the appearance of the matter is just as important as the reality*”.<sup>16</sup>

16. Whilst acknowledging that the appearance of impartiality is as important as the reality, the English courts have also emphasised the need for robustness in assessing claims of apparent bias. Judges and arbitrators are appointed and expected to decide disputes, not to be over-eager to cave in to self-interested arguments by one of the parties that they should be removed from a case. The Court of Appeal so stated in *Bennett v London Borough of Southwark*,<sup>17</sup> a case in which an employment tribunal hearing a case of racial discrimination had felt that it had no alternative but to recuse itself when it was itself accused of racial discrimination by the claimant’s representative in the course of the hearing. As Sedley LJ observed:<sup>18</sup>

“Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation.”

Ward LJ added:<sup>19</sup>

“Judicial duty is to be performed both without fear as well as without favour. The tribunal did not act fearlessly when it capitulated to the inexcusable petulance and insolence displayed by Mr Harry. It was wrong not to listen to Mr Harry’s diatribe with phlegmatic fortitude, retiring, if necessary, to compose itself and to cool the advocate’s ardour, and then calmly continuing. Instead it allowed invective to infect it with prejudice. In getting on its high horse it fell off the judgment seat. I do not deny that it is thoroughly unpleasant and uncomfortable to be accused of bias. It is, sadly, not an uncommon charge. It is, on the contrary, a worryingly increasing challenge to the court’s authority at all levels. Judges, members of tribunals, magistrates, all have to rise above such a challenge because all must be confident in their ability to judge impartially.”

17. The English courts have held that the test of apparent bias under s.24(1)(a) of the Arbitration Act 1996 (justifiable doubts as to the impartiality of an arbitrator) is the same as the test of apparent bias at common law.<sup>20</sup> This is a sound approach: there is no reason in principle why the test should be any different. So in the context of arbitrations, the English authorities reveal a tension in English between (1) the

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<sup>15</sup> *Locabail (UK) Ltd. v Bayfield Properties Ltd.*, *loc.cit.* at [25]

<sup>16</sup> *R v Bow Street Magistrates, ex parte Pinochet (No.2)*, per Lord Nolan at p.139H

<sup>17</sup> [2002] EWCA Civ 223

<sup>18</sup> *Loc.cit.* at [19]

<sup>19</sup> *Ibid.* at [42]

<sup>20</sup> See e.g. *Laker Airways Inc v FLS Aerospace Ltd.* [1999] 2 Ll.Rep. 45, per Rix J at page 48; and *ASM Shipping v TTM Ltd.* at page 384 (col.2)

paramount requirement of ‘due process’ and an acknowledgment that the appearance of impartiality is just as important as the reality, and (2) the need to honour the principle of party autonomy in the choice of tribunal and the insistence on a robust approach to challenges which might deprive a party of its reasonable choice of arbitrator. This tension lies at the heart of many challenges to arbitral appointments and awards on grounds of apparent bias.

### IBA Guidelines on Conflicts of Interest

18. The IBA has recently grappled with the issue of apparent bias. In 2004, it published Guidelines on Conflicts of Interest in International Arbitrations (“**the IBA Guidelines**”). In the foreword to the 2014 revision of the IBA Guidelines, the IBA fairly claims that the Guidelines have gained wide acceptance within the international arbitration community, and that:

“Arbitrators commonly use the Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators, and arbitral institutions and courts also often consult the Guidelines in considering challenges to arbitrators.”

It is not the purpose of this paper to analyse the IBA Guidelines in any detail. It is sufficient simply to refer to a few guidelines as a basis for considering the issue of apparent bias in an African context.

19. The stated purpose of the IBA Guidelines is to promote greater consistency across the international arbitration community in the assessment and treatment of potential conflicts of interests and apparent bias, and to avoid unnecessary challenges and arbitrator withdrawals and removals. With this in mind, the IBA Guidelines set out General Standards and lists of specific situations that might arise, indicating whether they warrant disclosure or disqualification of an arbitrator on grounds of apparent bias. There are three so-called “Application Lists”, which are designated ‘Red’, ‘Orange’ and ‘Green’ Lists. The General Standards and the Application Lists are said to be based on statutes and case law in a cross-section of jurisdictions, and on the judgment and experience of practitioners involved in international arbitration.<sup>21</sup> It is expressly stated that “[t]he IBA Arbitration Committee trusts that the Guidelines will be applied with robust common sense and without unduly formalistic interpretation”.<sup>22</sup>
20. The General Standard in relation to conflicts of interests is stated in terms similar to Article 12(2) of the Model Law. It advises that an arbitrator should refuse to accept an appointment if he or she has any doubt as to his/her impartiality or independence, or

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<sup>21</sup> IBA Guidelines 2014, para. 4

<sup>22</sup> IBA Guidelines 2014, para. 6

“if facts or circumstances exist which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”

21. The concept of justifiable doubt is explained by the IBA Guidelines as follows:<sup>23</sup>
- “(c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.
  - (d) Justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence in any of the situations described in the Non-Waivable Red List.”
22. The Application Lists in the IBA Guidelines identify circumstances which may raise questions as to independence and impartiality. In a nutshell:
- 22.1. The Red List identifies situations which **necessarily** disqualify an arbitrator from accepting an appointment in all circumstances (the Non-Waivable Red List) or in the absence of full disclosure and express waiver by the parties (the Non-Waivable Red List). In very broad terms, the Red List includes (amongst other things) situations where a prospective arbitrator has a financial connection or a familial or other personal relationship with a party, such that his/her appointment might be considered to infringe the principle that no one may be a judge in his/her own cause.
  - 22.2. The Orange List identifies situations which may, in the eyes of the parties, give rise to doubts as to impartiality or independence, depending on the facts of each case.
  - 22.3. The Green List identifies situations where no appearance or apparent conflict of interests exists from an objective point of view, i.e. situations which are considered to be insufficient ever to compel disqualification of an arbitrator.

As the IBA Guidelines state, “*the borderline between the categories that comprise the Lists can be thin*”.<sup>24</sup>

23. The Red List contains a number of very different situations which might give rise to disqualification or challenge for an arbitrator. For example, in the absence of full

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<sup>23</sup> IBA Guidelines 2014, Explanation to General Standard 1

<sup>24</sup> IBA Guidelines 2014, para. 8. The Guidelines are also not accepted without question. For example, in a recent challenge to an award on grounds of bias, the English Commercial Court refused to accept the stricture of the Non-Waivable Red List that justifiable doubts as to impartiality were automatically raised where “*the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom*”: *W Ltd v M Sdn Bhd* [2016] EWHC 422 (Comm).

disclosure to and waiver by the parties, automatic disqualification is considered to be justified where:

- 23.1. a close family member of the arbitrator (defined as “*a spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists*”) has a significant financial interest in the outcome of the dispute; or
  - 23.2. a close family member of the arbitrator (as defined) has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties; or
  - 23.3. the arbitrator, or a close family member of the arbitrator (as defined), has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute; or
  - 23.4. The arbitrator’s law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.
24. Similarly, the Orange List (situations which may give rise to doubts as to impartiality or independence, depending on the facts) includes a variety of situations, including (amongst other things) circumstances where:
- 24.1. a law firm or other legal organisation that shares significant fees or other revenues with the arbitrator’s law firm renders services to one of the parties, or an affiliate of one of the parties; or
  - 24.2. a close family member of the arbitrator (as defined) is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute; or
  - 24.3. a close personal friendship or enmity exists between (1) an arbitrator and (2) a manager or director or a member of the supervisory board of a party or of an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert.
25. However, by contrast with the situation in the Orange List referred to in paragraph 24.1 above, the Green List (situations which would never give rise to a material conflict of interest) includes a case where an arbitrator’s law firm is in association or alliance with a firm which renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter, but does **not** share significant fees or other revenues with the arbitrator’s law firm.

## ICC Guidance for the Disclosure of Conflicts by Arbitrators

26. Following the publication of the IBA Guidelines, in February 2016 the ICC published its own guidance for the disclosure of conflicts by arbitrators. This invites arbitrators “to consider specifically certain situations that may call into question their independence or impartiality in the eyes of the parties”.<sup>25</sup> The guidance has been incorporated into the ICC’s Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (“**the ICC Note**”).
27. The ICC Note directs arbitrators to disclose in their Statement of Acceptance, Availability, Impartiality and Independence “any circumstance that might be of such a nature as to call into question his or her independence in the eyes of any of the parties or give rise to reasonable doubts as to his or her impartiality”, although it also explains that disclosure does not imply the existence of a conflict.<sup>26</sup> In this connection, arbitrators are advised to “pay attention” to a number of different circumstances, including situations where an arbitrator or prospective arbitrator has a professional or “close personal relationship” with counsel for one of the parties or its law firm.<sup>27</sup> No definition or explanation is offered of the precise nature of any “close personal relationship” which might trigger a disclosure obligation or give rise to reasonable doubts as to the impartiality of an arbitrator. The ICC Note simply explains that it is for the ICC Court to assess whether the matter disclosed is an impediment to service as an arbitrator.<sup>28</sup> This is no doubt a recognition of the fact that each case must turn on its own facts and context.
28. There is wisdom in the deliberately non-prescriptive approach of the ICC to its guidance on issues of conflicts of interests and the appointment of arbitrators.<sup>29</sup> This is an interesting contrast with the more comprehensive approach of the IBA Guidelines. However, it may simply be an implicit acceptance of the fact that the latter Guidelines will likely be taken into account in any event on any challenge to an arbitral appointment under ICC Rules. Whatever the rationale for the form of the ICC’s guidance, in determining challenges to arbitral appointments, the ICC Court – like any other arbitral institution or a supervisory or enforcing court – should adopt a nuanced understanding and appreciation of the context in which arbitral appointments may arise. This raises specific questions in the case of African arbitrations.

## APPEARANCE OF BIAS: THE AFRICAN CONTEXT

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<sup>25</sup> ICC Press Release, 23 February 2016

<sup>26</sup> ICC Note, para. 18

<sup>27</sup> ICC Note, para. 20

<sup>28</sup> ICC Note, para. 19

<sup>29</sup> As the English Court of Appeal noted in *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [2000] QB 451 at [25], “It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias” (although the Court in that case could not resist the temptation to venture at least some way down this line).

29. The commonly accepted principles and guidelines governing the appointment and disqualification of arbitrators and the identification of conflicts of interests have been developed principally through the case-law of European, North American and Antipodean jurisdictions, and through consultations with practitioners from those legal traditions and cultures. Thus the illustrations and guidance from case-law and the examples in the IBA Guidelines are readily applicable to international arbitrations conducted in those jurisdictions. However, it does not follow that the same must be true for African arbitrations or for arbitrations in any other jurisdictions which have different cultures and traditions. It is therefore important to consider whether there are any features in the structure of society in African jurisdictions or in business or professional practice, which require a different perspective to the assessment of potential conflicts of interest or the appearance of bias in an arbitrator.

### Social Norms, Values and Traditions

30. In *Locabail v Bayfield*, the English Court of Appeal considered a number of situations which might give rise to a challenge on grounds of apparent bias, and it identified those which, in its view, could and those which could not conceivably succeed:<sup>30</sup>

“Everything will depend on the facts, which may include the nature of the issue to be decided. **We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family;** or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see *K.F.T.C.I.C. v. Icori Estero S.p.A.* (Court of Appeal of Paris, 28 June 1991, *International Arbitration Report*, vol. 6, 8/91)). **By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case;** or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568 ); **or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.** The mere fact that a

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<sup>30</sup> [2000] QB 451 at [25]

judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case.” (Emphasis added)

31. In that case, the Court was considering situations in the context of English society and judicial experience with which it was familiar. The references to religious and ethnic differences and to close acquaintance with individuals involved in a case (see the first two sections emphasised in the quoted passage) should be understood on this basis. But the fact-specific nature of any enquiry into apparent bias requires a careful assessment of the cultural context in which any arbitral appointment or challenge may arise. Accordingly, if the context is different, it is questionable whether “*the answer, one way or the other, will be obvious*”.<sup>31</sup> In particular, the parochialism with which a national court considers issues of apparent bias and impartiality in a domestic case may not be appropriate for courts which supervise the conduct of or enforce awards from international arbitrations involving parties and relationships that originate from different cultures and social contexts; nor should it govern the guidelines of professional bodies or arbitral institutions which regulate the conduct of such international arbitrations.
32. The point may be illustrated by reference to the passages highlighted above from the Judgment of the Court in *Locabail v Bayfield*. In relation to the first highlighted passage, is it obviously right to assert, in the context of an African arbitration, that an objection to an arbitral appointment “*could not conceivably be soundly based*” on the religious, ethnic or national origin of the prospective arbitrator? In many African jurisdictions, religious and ethnic associations can be powerful forces of both cohesion and conflict in social and business life in a way that they are not in European and North American states. As explained by one international business consultant with management expertise in Nigeria:<sup>32</sup>

“The way religious tensions affect an operation is demonstrated by Afro Nigeria Business. Part of an international enterprise, this company has a staff of Western expatriates and Nigerians. Religious identities, intertwined with ethnicity, are very important for the Nigerian staff. More than sharing a national identity they consider themselves Hausa-Islamic, Igbo-Christian etc. During religious conflicts in society the cooperation between Muslim and Christian colleagues is severely affected. They distrust and ignore each other. As a result of the religious tensions the entire company faces during these periods an unproductive situation.”

33. May not the same religious differences and allegiances potentially affect the minds and objectivity of commercial arbitrators? If one party to an African arbitration

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<sup>31</sup> *Ibid.*

<sup>32</sup> Religion and Managers’ Mindset in Africa, Basileia Business, [https://www.nabc.nl/uploads/content/files/BBusiness.Dokman%20\(1\).pdf](https://www.nabc.nl/uploads/content/files/BBusiness.Dokman%20(1).pdf)

appoints a co-religionist as arbitrator in a jurisdiction where society is subject to powerful religious ties and differences, a challenge on the grounds of apparent bias cannot be lightly dismissed. Where the relevant test is whether there is “*a real possibility of unconscious bias*”, it may be unwise to assume that a challenge on grounds of religious affiliation “*could not conceivably be soundly based*”.

34. The same is true of ethnic or tribal affiliations in many (but not all) African jurisdictions. Ethnic allegiance is a much more distinct and powerful force in many African societies than it is in Europe and North America. Whilst globalisation and urbanisation may be eroding some of this force in many African countries, and African economies and societies may be becoming increasingly ‘Westernised’, it is a rash court that would dismiss out of hand the possibility that tribal allegiance might have an unconscious pull on the mind of a prospective arbitrator. The nature and power of tribal allegiances will differ from one African jurisdiction to another – for example, Rwanda, with its recent history of horrific genocidal civil war, is very different from (say) Tanzania in this respect – but it is a feature of African societies that may merit consideration when examining the issue of arbitral impartiality in a particular case.
35. What of the suggestion that close acquaintance with someone involved in the case would give rise to a real danger of bias (the second passage highlighted above from the Judgment in *Locabail v Bayfield*)? When referring to this possibility, the English Court of Appeal clearly had in mind direct personal friendships, business connections or a very close family relationship as understood in Western society. The same would apply in relation to African arbitrations. But might “*close acquaintance*” have a wider ambit in an African social or business context? The same point may be made in relation to the reference in the IBA Guidelines to “*a close family member*” and “*a close personal friendship*” (see paragraph 24 above) and the reference to “*a close personal relationship*” in the ICC Note (see paragraph 27 above).
36. In most African societies, family obligations extend rather wider than they do in European and North American societies: for present purposes,<sup>33</sup> they may be conveniently encapsulated by the term, kinship. Kinship covers a widely extended family, and it imposes obligations and expectations on individuals towards their wider kin which are often stronger than those which govern individuals in Western countries. For example, the notion of family and kinship embraces a strong tradition of respect for elders and support for kin in need. Notwithstanding the march of globalisation and urbanisation, kinship and allegiance and obligation to the extended family are still powerful forces in African societies.<sup>34</sup> Coupled with the wider concept

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<sup>33</sup> I do not pretend to be an anthropologist.

<sup>34</sup> See, for example, Fleischer, *Family, obligations, and migration: The role of kinship in Cameroon*, *Demographic Research*: Vol.16, Article 13, pp.413-440: “*Extended family systems and strong kin and lineage relations remain important in most regions of Cameroon since they provide a sense of belonging, solidarity, and protection. However, they also involve expectations, obligations and responsibilities (Tiemoko 2004: 157). They play a crucial role in social control. Economic, social and demographic behavior in African societies cannot be analyzed without reference to the extended family and its involvement in the decision-making processes.*”

of ‘ubuntu’,<sup>35</sup> this social obligation could exert as powerful an influence on the conscious or unconscious mind of an arbitrator as a close family association in the Western sense of the term, or a close business connection or acquaintance. Might this be a reasonable basis for a challenge on grounds of apparent bias?

37. I can only ask these questions; I do not suggest answers, because every case must turn on its own particular facts and circumstances. Of course, one must not lose sight of the point, which the English courts have emphasised (see paragraph 16 above), that a measure of robustness is required when considering allegations of apparent bias. However, the balance between the need for robustness and the need to guard against any possibility of bias<sup>36</sup> can only properly be weighed by reference to the facts of a particular case.

### The African Legal Market

38. Professional associations which directly or indirectly involve an arbitrator may also give rise to challenges on grounds of apparent bias. For example, the IBA Guidelines state (see paragraph 24 above) that, where a law firm that shares significant fees or other revenues with the arbitrator’s law firm renders legal services to one of the parties to an arbitration, this may give rise to doubts as to the independence or impartiality of the arbitrator. The Guidelines do not suggest that a doubt automatically arises in such a case; it depends on the facts of each case. However, the issue of professional associations and their conscious or subconscious influence on the mind of an arbitrator must be examined in the context of the business environment in which the arbitrator works. In the case of African arbitrations, this will include the legal market from which many African arbitrators will be drawn.
39. In their 2015 report on the African legal market (see paragraph 1 above) (“**the 2015 Redstone Report**”), Redstone Consultants reported that African firms were “*highly dependent on referrals from international law firms*”, and that typically an African firm will see between 10 and 20% of the fees on instructions from international clients where both global and African law firms are engaged.<sup>37</sup> The report also noted that African firms considered their relationships with law firms outside Africa to be “*vital*”, and that the proportion of fees arising from referrals from global firms “*typically lies somewhere between one quarter and three quarters of revenue*”. The responses from both global and African firms indicated that larger African firms tended to enter into relationships with several global firms (“*chasing any and every firm*”). However, African firms were not entirely dependent on global firms: it was reported that African firms were “*increasingly focused on building or joining networks of law firms*”. The

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<sup>35</sup> A philosophy common in African societies that “*emphasises the principle of helping others as a way of helping oneself, collective activity and well being rather than individualism, unification rather than division, respect for elders and sharing*”: Mufune, *African Culture and Managerial Behaviour: Clarifying the Connections*, South African Business Management, Vol. 34 No. 3, pp.17-28 (2013)

<sup>36</sup> See paragraph 13 and footnote 11 above

<sup>37</sup> *African and International Law Firms: Friends or Foes* – Redstone Consultants, February 2014

report noted in conclusion that there was a constant tension for African firms between whether the international players could be regarded as friends to partner with and invest in, or competitors who would take the best work and leave Africans with slim pickings.

40. As the 2015 Redstone Report explained, the African legal market in international commercial transactions and disputes has been developing rapidly, and it will be interesting to see whether the trends identified in that report have continued or changed. However, the picture of the market that emerges from this report is one of (1) significant dependence by African firms on one or more global firms for referrals of international business, and (2) a countervailing strategy of forming alliances with other African firms in order to grow business and market-share for international work. How is the issue of potential tribunal bias in African arbitrations to be considered against such a market background?<sup>38</sup>
41. The IBA Guidelines would suggest that an African arbitrator could be disqualified from acting if his/her firm shares significant revenues with any global firm which provides services to one of the parties (whether in connection with the dispute in question or not). Given the apparent extent of reliance on global firms for the introduction of international work, challenges to arbitrators from the leading African commercial firms may succeed on this ground. Similarly, the IBA Guidelines suggest that an alliance between African firms to compete for international work may also give rise to a challenge on grounds of apparent bias if the arbitrator is a partner or employee of a firm which shares “*significant revenues*” with one or more firms in the alliance (see paragraph 25 above). In a given case, it would be necessary to examine the terms of any alliance agreement, but, given the continuing growth of alliances of law firms across the continent, this is an issue of which the leaders of such firms will need to be aware.
42. It follows that, if the IBA Guidelines on conflicts of interests are observed, the strategies that African firms have adopted in order to compete for international work threaten to disqualify the partners and employees of such firms from appointment to some tribunals in major African arbitrations. This could seriously impede the growth of a body of suitably qualified and experienced African arbitrators and thus the development of the international arbitration market in Africa. However, it is not easy to devise a principled approach to the issue of tribunal bias which can be reconciled with current trends in the development of the African legal profession for international work.

## TRIBUNAL BIAS: THE CHALLENGE OF AFRICAN ARBITRATIONS

43. The law and guidelines on apparent bias, which have been established by reference to the structures and norms of Western society and business practice, raise challenges

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<sup>38</sup> For the purpose of this discussion, I shall focus solely on international arbitrations in Africa. Domestic arbitrations in Africa involve different market conditions.

for the development of arbitration in Africa, and in particular a market of qualified and experienced arbitrators on the continent. It is important that these principles and guidelines be carefully reviewed and applied on the basis of a properly informed understanding of the culture and structures of African societies and the African legal market. It is not enough to apply dicta or examples from European, North American or Antipodean case-law inflexibly in order to determine an issue of tribunal bias in an African arbitration: as explained above, the relevant societal or business context may be significantly different.

44. The issues posed by social, cultural and market conditions across Africa are important for the proper conduct of African arbitrations and issues of 'due process'. They need to be recognised and carefully considered by everyone involved in the arbitral process, including (1) the legal advisors to parties who may wish to mount or resist challenges on grounds of tribunal bias; (2) arbitrators facing such challenges, who must consider whether to rise robustly to the challenge in the confidence of their ability to judge impartially or whether to accept that the situation gives an appearance of possible bias which demands recusal (see paragraphs 11-17 above); (3) arbitral institutions such as the ICC, which publish rules under which arbitrations are conducted, oversee the appointment of arbitrators and administer arbitrations under their aegis;<sup>39</sup> (4) the supervisory courts of the seat of an arbitration, to whom any challenge may be referred; and (5) professional bodies such as the IBA which seek to develop and promulgate authoritative guidance for the benefit of the profession at large. The issues posed must also be recognised and carefully considered on any challenges to awards from African arbitrations on grounds of tribunal bias, whether those challenges are made to the supervisory courts of the arbitral seat or to a court in another jurisdiction which is asked to enforce an award. In addition, leaders of African law firms wishing to compete in the international arbitration market need to consider the dilemma posed for arbitrators in their firms by a business model which is based on alliances, referrals and fee-sharing with global firms and joining networks of African firms. Arbitral institutions such as the ICC should engage with African firms to consider guidelines on conflicts of interests and tribunal bias in this market context.
45. In all such cases, the deliberations must be conducted on a properly informed basis, with an informed understanding of the cultural and market backgrounds against which the issue of tribunal bias is to be considered. Accordingly, parties, their legal representatives and supervisory and enforcing courts must be properly advised on the issues, and arbitral institutions must include or have access to individuals with the relevant experience and expertise to advise on such matters.
46. These are challenges for the development of an international arbitration market in Africa. The less mature the arbitration market in which the issues of conflicts of interests and apparent bias arise, the more unpredictable will be the outcome of

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<sup>39</sup> It is to be noted that the White and Case 2015 Survey reported that "*a recurring theme throughout the interviews was users' discontent with ... the lack of transparency in institutional decision-making in relation to the appointment of, and challenges to, arbitrators*": [loc.cit.](#) at p.22.

challenges to arbitrators and the development of a body of experienced arbitrators in that market. Moreover, the body of experienced commercial arbitrators in Africa is relatively small compared with jurisdictions with a fully mature arbitration market, and the development of the arbitration market in Africa is likely to be influenced by the way in which issues of tribunal bias are addressed by the courts and arbitral institutions. There is a real need for an informed and nuanced awareness of the influences of African social structures on the unconscious minds of arbitrators and on the reasonable perceptions of parties. As has recently been said:<sup>40</sup>

“As companies move to do business in Africa, a greater sensitivity to African culture will be required and an understanding of African cultural realities should facilitate business transactions in this region. African culture differs from other cultures in the way Africans construct meanings, negotiate social contexts and make sense of their environment (Ahiauzu, 1986).

...

We acknowledge the fact that to propose a monolithic African culture ... may be inaccurate because of the strong national differences. Nonetheless, there are some cultural dimensions common to the sub-region (Grzeda and Assogbavi, 1999). These commonalities include: a hierarchical social structure, the importance of kinship, the primacy of the group, the driving norms of human interdependence, virtue of symbiosis and reciprocity (Mangaliso, 2001), ... and the value attached to the extended family (Mwamwenda, 1999). Thus, the argument for cultural relatedness across Africa has been strongly made by Mbiti (1990) and Gyeke (1995, 1997)...

... [I]n the light of significant market potential for multinational corporations in Africa, research is needed to continue the assessment of the applicability of Western business models in Africa (Appiah-Adu, 2001; Kuada and Buatsi, 2005).”

The same is true of arbitration in Africa. It is time to take this work forward.

**Brick Court Chambers**  
**7-8 Essex Street**  
**London WC2R 3LD**  
[www.brickcourt.co.uk](http://www.brickcourt.co.uk)

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<sup>40</sup> William K. Darley and Charles Blankson (2008), African Culture and Business Markets: Implications for Marketing Practices, Journal of Business & Industrial Marketing, Vol. 23 Iss: 6 pp.374 - 383