

Go Back to Gough: The Need for the ‘Real Danger’ Test for Arbitrator Bias in the Common Law Seats of the Asia Pacific

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Abstract

The practice of challenging arbitrators for bias is on the rise in international commercial arbitration. Bias challenges are now used tactically to delay arbitral proceedings and deprive the other side of the arbitrator of their choice. There are two main streams of common law authority on the test to be applied to an allegation of apparent bias: the *Sussex Justices* ‘reasonable apprehension’ test and the *Gough* ‘real danger’ test. At different times and places, both tests have been applied to arbitrators. This paper traces the English development of the competing tests and their uptake in the common law states in the Asia Pacific region that have adopted the UNCITRAL Model Law on International Commercial Arbitration (1985). It concludes with legal and policy-based arguments for the application of the *Gough* ‘real danger’ test to arbitrators in international disputes.

1. Introduction

This paper is concerned with procedural fairness in international commercial arbitration (ICA) in the Anglo-influenced Model Law states of the Asia Pacific region. It commences with a short discussion of the rules of procedural fairness in international commercial arbitration and their sources. It then assesses the rules of arbitrator bias observed in England. This preface on English law is necessary for two reasons. First, England is the parent jurisdiction of the common law states surveyed in this paper. Second, a fine point of English law is the focus of this paper: in these places, what is the test for determining whether

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