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ARBITRATORS' NEUTRALITY IN THE UNITED KINGDOM AND THE UNITED STATES

By
Susanna Chehata*

I. INTRODUCTION

In January 2015, both the English High Court of Justice and the United States Ninth Circuit Court of Appeals were presented with interlocutory appeals in which the plaintiffs alleged that the other party's arbitrator was not impartial.¹ The English High Court of Justice permitted the appeal and found impartiality to exist.² Conversely, the Ninth Circuit Court of Appeals denied the interlocutory appeal; however, the court also examined the impartiality question and, using a lower partiality standard than the English Court, did not find impartiality.³

The difference in the two courts' procedures displays a difference in ideology concerning arbitration. The English generally value the importance of neutrality in arbitration.⁴ Furthermore, because England is a major location for international arbitration, the English courts are influenced by the rules of international arbitration, such as the International Bar Association's Rules of Ethic, which emphasize neutrality.⁵ On the other hand, while the American courts recognize the importance of neutrality, there is a strong federal policy favoring arbitration.⁶ Thus, neutrality is emphasized less, and enforcement of arbitration agreements is emphasized more.⁷

This paper first provides summaries of the Ninth Circuit and English cases. It then carries out a comparison of the different approaches concerning neutrality of the two courts. Finally, it examines the importance of neutrality in arbitration.

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¹ *Sussex v. United States Dist. Court for the Dist. of Nev.*, 776 F.3d 1092, 1095 (9th Cir. 2015); *Sierra Fishing Co. v. Farran* [2015] EWHC (Comm) 140 [1], [2015] 1 All ER (Comm.) 560 (Eng.).

² *Sierra Fishing Co.*, [2015] EWHC (Comm) 140 [60-63].

³ *Sussex*, 776 F.3d at 1101.

⁴ ANDREA DAHLBERG & ANGELINE WELSH, INT'L BAR ASS'N, ARBITRATION GUIDE: ENGLAND AND WALES 1 (2012), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=D49BD82B-83AA-47C3-A238-F7E165D03891>.

⁵ *Id.*

⁶ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011).

⁷ *Id.*

II. *SIERRA FISHING COMPANY V. FARRAN*, DECIDED BY THE ENGLISH HIGH COURT OF JUSTICE

A. Background

In *Sierra Fishing Company v. Farran*, the plaintiffs alleged that the arbitrator was partial and called for his removal pursuant to section 24(1)(a) of the English Arbitration Act of 1996.⁸ The defendants disputed the partiality claims and contended that the plaintiffs had waived the right to raise this objection, pursuant to section 73 of the act.⁹

In 2011, Plaintiff Said Mohamed entered into a finance arrangement with Defendants Mr. Farran and Mr. Assad.¹⁰ Mohamed advanced a deposit of \$3.8 million for the purchase of two fishing vessels to be operated by plaintiff Sierra-Fishing Company (SFC).¹¹ In 2012, Farran and Assad entered into a written agreement with SFC and Mohamed providing the terms by which the deposit would be paid.¹² The agreement contained an arbitration clause mandating that “in case any dispute arises in the execution of this agreement the parties to the agreement will refer to arbitration in Sierra Leone or London, UK as decided by Dr. Farran and Mr. Assad.”¹³

When no repayment was made on the loan, Farran and Assad served a request for arbitration, stating that it be conducted in London with Mr. Ali Zbeeb as an arbitrator.¹⁴ Before arbitration commenced, the defendants requested the names of the plaintiffs’ appointed arbitrator. The parties then entered into a Conversion Agreement in which the plaintiffs were to transfer shares to the defendants as a form of repayment by October 1st and decided that arbitration was unnecessary, so long as the plaintiffs adhered to the agreement, so the plaintiffs never appointed an arbitrator.¹⁵ However, the agreement was

⁸ *Sierra Fishing Co. v. Farran* [2015] EWHC (Comm) 140 [1], [2015] 1 All ER (Comm.) 560 (Eng.) (citing Arbitration Act 1996, c. 23, § 24(1)(a)). The English Arbitration Act of 1996 applies in England, Wales, and Northern Island. Arbitration Act 1996 § 2. It addresses the procedure to be followed in arbitration. See generally Guy Pendell & David Bridge, *Arbitration in England and Wales*, in 1 CMS GUIDE TO ARBITRATION 297, 327 (Torsten Loercher, Guy Pendell, & Jeremy Wilson eds., 2012), http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_ENGLAND%20WALES.pdf. Section 24 of the English Arbitration Act states that a court may remove an arbitrator if circumstances exist that give justifiable doubts to the arbitrator’s impartiality. See Arbitration Act, 1996 § 24.

⁹ The English Arbitration Act states that a party loses its right to appeal if it does not make a timely objection concerning the issue. Arbitration Act 1996 § 73.

¹⁰ *Sierra Fishing Co.* [2015] EWHC (Comm) 140 [5]. Mr. Farran was the chairman of Finance Bank SAL in Beirut, Lebanon. *Id.* ¶ 4. Mr. Assad is an individual of Iraqi origin. *Id.*

¹¹ *Sierra Fishing Company* is a company incorporated in Sierra Leone. *Id.* ¶ 2. Its managing director was the brother of Plaintiff Mohamed. *Id.*

¹² *Id.* ¶ 6.

¹³ *Id.*

¹⁴ *Id.* ¶ 7.

¹⁵ *Sierra Fishing Company* [2015] EWHC (Comm.) 140 [13].

not performed by the specified date, leading the parties to return to arbitration.¹⁶ The arbitration clause did not specify the number of arbitrators, and because the plaintiffs had not appointed an arbitrator, arbitration proceeded with Zbeeb as the sole arbitrator.¹⁷

B. Question Concerning Partiality

The plaintiffs objected to Zbeeb acting as an arbitrator because of his lack of independence and impartiality.¹⁸ Before a reward had been rendered, the plaintiffs applied to the English High Court of Justice to remove Zbeeb as an arbitrator, pursuant to section 24(1)(a) of the English Arbitration Act of 1996.¹⁹ Section 24 states:

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerning 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 impartiality²⁰

In determining whether or not partiality exists, the English High Court relied upon the common law rule articulated by the England and Wales Court of Appeal in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.*:

Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well-informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done.²¹

The plaintiffs pointed to four circumstances which gave rise to doubts of Zbeeb's impartiality.²² Ultimately, the court agreed that three of the circumstances did indeed give rise to doubts of his impartiality.²³

¹⁶ *Id.* ¶ 14.

¹⁷ *Id.* ¶ 15.

¹⁸ *Id.* ¶ 41.

¹⁹ Arbitration Act 1996, c. 23, § 24 (Eng., Wales, N. Ir.).

²⁰ *Id.*

²¹ *Locabail (UK) Ltd. v. Bayfield Props. Ltd* [1999] EWCA (Civ) 3004 [17], [2000] QB 451 (Eng.). The England and Wales Court of Appeal (Civil Division) determined this standard for finding bias. The issue in the case was whether the judge was biased. *Id.* ¶¶ 41-49.

²² *Sierra Fishing Company* [2015] EWHC (Comm.) 140 [52].

²³ *Id.*

First, the plaintiffs pointed to Zbeeb’s legal and business connection to Farran. Zbeeb served as legal counsel of Finance Bank when Farran was its chairman, and Zbeeb’s father and co-partner at Zbeeb Law and Associations acted as legal counsel to both the bank and Farran.²⁴ The law firm derived a “significant financial income” from its representation of Finance Bank.²⁵ The court found that that these relations would lead a fair-minded observer to conclude that Zbeeb was “predisposed to favor” Farran in order to maintain Farran’s business relation with himself, his father, and his law firm.²⁶

Second, the plaintiffs noted that Zbeeb assisted and advised the defendants in their previous settlement negotiations with the plaintiffs.²⁷ The court agreed that a fair-minded observer would find this to be partial behavior because of Zbeeb’s prior involvement in the dispute, on behalf of the defendants.²⁸

Third, the plaintiffs alleged that a close relationship existed between Zbeeb’s law firm and Mr. Daou, counsel for Farran and Assad in the arbitration.²⁹ The court did not find evidence of partiality on this ground.³⁰ The court reasoned that the only evidence relied upon was the bank’s website which stated that both Zbeeb Law & Associates and Daou were advisers to the bank.³¹ This evidence alone was insufficient to establish a relationship and presumption that Zbeeb would favor Farran.³²

Last, the plaintiffs brought Zbeeb’s conduct during arbitration to light.³³ When asked by both parties to postpone publication of the award, until the court announced the outcome of the case, he refused.³⁴ Additionally, he was argumentative in five of his communications to the court, and advanced arguments in favor of the defendants, even though the defendants had not raised them.³⁵ He vehemently argued to the court that the plaintiffs had lost the right to object, supported by citation of authority, so the court concluded that his conduct justified doubts about his impartiality.³⁶

²⁴ *Id.* ¶ 54.

²⁵ *Id.*

²⁶ *Id.* ¶ 57.

²⁷ *Sierra Fishing Company* [2015] EWHC (Comm.) 140 [61].

²⁸ *Id.*

²⁹ *Id.* ¶ 62.

³⁰ *Id.*

³¹ *Id.*

³² *Sierra Fishing Company* [2015] EWHC (Comm.) 140 [62].

³³ *Id.* ¶ 63.

³⁴ *Sierra Fishing Company* [2015] EWHC (Comm.) 140 [64].

³⁵ *Id.* ¶ 65.

³⁶ The Court stated that he “gives the appearance of having descended into the arena and taken up the battle on behalf of Dr. Farran and Mr. Assad.” *Id.*

C. Question Concerning the Interim Objection

Section 73 of the English Arbitration Act of 1996 states that the right to object for specific circumstances will be lost if a party does not raise a timely objection, unless the party shows that he did not know and could not have reasonably known of the objection.³⁷ The circumstances giving rise to the objection are as follows:

- (a) that the tribunal lacks substantive jurisdiction,
- (b) that the proceedings have been improperly conducted,
- (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
- (d) that there has been any other irregularity affecting the tribunal or the proceedings.³⁸

The defendants alleged that the plaintiffs failed to raise a timely objection, and thus, were prevented from doing so.³⁹ In deciding this claim, the court examined the three circumstances which gave rise to an impartiality objection, and whether the plaintiffs objected in a timely fashion.⁴⁰ In all three circumstances, the court found that the plaintiffs raised timely objections, upon observing signs that indicated the existence of partiality.⁴¹

III. *SUSSEX V. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA*, DECIDED BY THE NINTH CIRCUIT COURT OF APPEALS

A. Background

In *Sussex v. United States District Court for the District of Nevada*, the petitioners sought a writ of mandamus to remove an arbitrator and direct the district court to vacate the motion issued while arbitration was pending.⁴² In the underlying litigation, hundreds of luxury condominium purchasers brought civil actions against Turnberry/MGM Grand Towers, LLC, the developer and seller of the project, alleging fraud and seeking

³⁷ Arbitration Act 1996, c. 23, § 73 (Eng., Wales, & N. Ir.).

³⁸ *Id.* § 73(1).

³⁹ *Sierra Fishing Company* [2015] EWHC (Comm.) 140 [1].

⁴⁰ The three circumstances are as follows: first, Zbeeb's communications with the court in which he advanced arguments on behalf of the defendants; second, he advised the defendants in settlement agreements with the plaintiff; third, he had prior connections to the defendants. *Id.* ¶¶ 67-71. The defendants timely objected to all three circumstances. *Id.*

⁴¹ *Id.* ¶ 80.

⁴² *Sussex v. United States Dist. Court for the Dist. of Nev.*, 776 F.3d 1092, 1095 (9th Cir. 2015).

rescission of the purchase agreements or money damages.⁴³ The purchase agreements, required resolution of disputes in arbitration under the rules of the American Arbitration Association (AAA).⁴⁴ The AAA appointed a private attorney, Brendan Hare, to serve as an arbitrator.⁴⁵ In 2011, during the commencement of the arbitration process, Hare became involved in a business venture aimed at financing litigation for investment purposes.⁴⁶ In 2013, Hare updated his LinkedIn profile page stating that he had refocused his practice on the Litigation Finance and Funding field.⁴⁷ He had not disclosed these activities in his February 2012 disclosure.⁴⁸

Upon learning of Hare’s new efforts in this field, Turnberry filed a motion in the district court to disqualify Hare from his role as an arbitrator.⁴⁹ The district court granted the motion, citing *Aerojet-General Corp. v. American Arbitration Association*, in which the Ninth Circuit court said the court may intervene in “extreme cases.”⁵⁰ Furthermore, the district court found that Turnberry would likely succeed on a motion to vacate an award issued by Hare pursuant to section 10(a)(2) of the Federal Arbitration Act.⁵¹ That section states:

The United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . where there was evident partiality or corruption in the arbitrators, or either of them.⁵²

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1096.

⁴⁷ *Sussex*, 776 F.3d at 1096.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *Aerojet-General Corp. v. American Arbitration Assn.*, 478 F.2d 248, 251 (9th Cir. 1973)). In *Aerojet-General*, the appellee sought to conduct arbitration in California, but the appellant chose New York as the venue. 478 F.3d at 250. The appellee filed a lawsuit seeking an injunction against arbitration, claiming that the selection of New York was arbitrary and unreasonable. *Id.* The court held that choice of venue was not an “extreme case” that warranted judicial intervention. *Id.* at 251.

⁵¹ *Sussex*, 776 F.3d at 1096.

⁵² 9 U.S.C. § 10 (2016).

B. Question Concerning Partiality

Unlike the court in *Sierra Fishing Company*, the Ninth Circuit Court of Appeals examined the question of partiality as a secondary matter. The court first examined the United States Supreme Court's holding in *Commonwealth Coatings Corporation v. Continental Casualty Company*.⁵³ In *Commonwealth Coatings Corporation*, the court held that the arbitrator's failure to disclose business dealings with one of the parties created an "impression of bias" and vacated the award pursuant to the Federal Arbitration Act (FAA) § 10(a)(2).⁵⁴ In the concurrence, Justice White recognized that an arbitrator may have very diverse business relations, and cannot be expected to disclose every relation.⁵⁵

The Ninth Circuit has found "evident partiality" to exist in cases that involved "direct financial connections between a party and an arbitrator or its law firm."⁵⁶ In *Schmitz v. Zilveti*, the Ninth Circuit agreed with Justice White's reasoning in *Commonwealth Coatings*.⁵⁷ Conversely, the court has found that undisclosed facts concerning "long past, attenuated, or insubstantial connections between a party and an arbitrator" failed to create a reasonable impression of partiality.⁵⁸

Using these standards, the court held that Hare's "modest effort" to start a company to attract investors did not give rise to a reasonable impression that he would be partial toward either party.⁵⁹ The plaintiff conceded that no relationship existed between Hare and either party.⁶⁰ Furthermore, the court further reasoned that any potential for Hare to benefit from an award to Sussex was insubstantial.⁶¹ The court contrasted this situation from the situations in *Schmitz* and *New Regency* by stating that the "dormant nature of Hare's business efforts" creates a far less substantive relation than the

⁵³ *Sussex*, 776 F.3d at 1092 (citing *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 153 (1968)).

⁵⁴ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968).

⁵⁵ *Id.* at 151.

⁵⁶ See *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007); *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994). In *Schmitz*, the court held that there was a reasonable impression of partiality because the arbitrator failed to disclose that his firm had represented a party's parent company in at least 19 cases over 35 years. 20 F.3d 1043. The fact that the arbitrator did not know of this relation was irrelevant because he had a duty to inform himself and others of potential conflicts. *Id.* at 1049. In *New Regency Productions*, the court held that there was a reasonable impression of arbitration when the arbitrator failed to disclose that he was an executive of company that was negotiating with a party's executive in order to produce a film project. 501 F.3d 1101.

⁵⁷ *Sussex*, 776 F.3d at 1100 (citing *Schmitz*, 20 F.3d at 1046).

⁵⁸ *New Regency Prods.*, 501 F.3d at 1110.

⁵⁹ *Sussex*, 776 F.3d at 1101.

⁶⁰ *Id.*

⁶¹ *Id.*

undisclosed relations in those cases, because the relation here was “contingent, attenuated, and merely potential.”⁶²

C. Question Concerning the Interim Appeal

As previously mentioned, the issue of impartiality was the secondary question. The Ninth Circuit began its analysis by examining relevant case law concerning interim appeals.⁶³ The court first examined the Supreme Court’s view of arbitration, and examined Congress’s purpose for enacting the Federal Arbitration Act.⁶⁴ Congress enacted the FAA in order to curb the then-existing “judicial hostility towards arbitration.”⁶⁵ Since its enactment, the Supreme Court has determined that the FAA reflects a strong policy favoring arbitration, and thus requires courts to enforce agreements to arbitrate.⁶⁶

With that federal policy in mind, the Ninth Circuit court proceeded to examine its own holdings in situations where it was asked to intervene in an ongoing arbitration.⁶⁷ In *Aerojet-General v. American Arbitration Association*, the court was asked to intervene in an ongoing arbitration because of a dispute concerning venue.⁶⁸ Although the court found that the situation did not warrant judicial intervention during arbitration, it declined to issue a blanket rule against interim judicial intervention.⁶⁹ Rather, the court held that “extreme cases” would warrant judicial review during the arbitration process.⁷⁰ In *Sussex*, the court determined that the risk of continuing this arbitration process if partiality existed would be the delays and expenses associated with vacating the arbitration award.⁷¹ However, the court held that financial harm does not constitute an “extreme case;” thus, the court declined to grant an interlocutory appeal.⁷²

⁶² *Id.*

⁶³ *Id.* at 1098.

⁶⁴ *Sussex*, 776 F.3d, at 1098.

⁶⁵ *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 338 (2011)).

⁶⁶ *Id.* at 1099 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)).

⁶⁷ *Id.*

⁶⁸ *Aerojet-Gen. Corp. v. America Arbitration Ass’n*, 478 F.2d 248, 249 (9th Cir. 1973).

⁶⁹ *Aerojet-Gen. Corp.*, 478 F.2d at 251.

⁷⁰ *Id.* at 251.

⁷¹ *Sussex v. United States Dist. Court for the Dist. of Nev.*, 776 F.3d 1092, 1100 (9th Cir. 2015).

⁷² *Id.* at 1101.

D. Other Circuits' Views Concerning Interlocutory Appeals and Partiality

Despite the Ninth Circuit's reputation for viewing arbitration differently from the other circuits, its view on interlocutory appeals is aligned with the majority of the other circuits, who preclude mid-arbitration intervention.⁷³ In *Savers Property and Casualty Insurance Company v. National Insurance Fire Union Company*, the Sixth Circuit recognized that "laws are largely silent" in terms of judicial review.⁷⁴ The court proceeded to examine the Second, Third, Fourth, Fifth, Seventh, and D.C. Circuits' approaches to interlocutory appeals.⁷⁵ The Sixth Circuit then determined that the silence, along with the general structure of the FAA, have led many courts to determine that interlocutory appeals should be precluded.⁷⁶ In particular, the court cited a Second Circuit Court case which stated that a party may attack an arbitrator's determination, only after a final award has been rendered.⁷⁷ Furthermore, the Second Circuit specifically mentioned the issue of partiality as an interlocutory appeal and stated, "it is well established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award."⁷⁸

IV. A COMPARISON OF THE STANDARDS USED TO DETERMINE WHETHER PARTIALITY EXISTS

A. Would the English High Court Have Found Partiality to Exist in Sussex v. the United States District Court for the District of Nevada?

As previously mentioned, the English High Court in *Sierra Fishing Company* relied upon the "reasonable man" common law partiality standard articulated by the England and Wales Court of Appeals in order to determine whether partiality existed, pursuant to section 24(1)(a) of the English Arbitration Act.⁷⁹ The Ninth Circuit Court of Appeals rejected the claim that the arbitrator's new business venture made him partial toward the plaintiffs in *Sussex*.⁸⁰ Applying the English standard to the facts of *Sussex*, it is likely that the English High Court would have also found no partiality to exist. The court would have likely reasoned that because the facts of *Sussex* do not indicate that

⁷³ *Id.* at 1099.

⁷⁴ *Savers Prop. & Cas. Ins. Co. v. National Union Fire Ins. Co.*, 748 F.3d 708, 717 (6th Cir. 2014).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* (citing *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980)).

⁷⁸ *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980)

⁷⁹ *Locabail (UK) Ltd. v. Bayfield Props. Ltd* [1999] EWCA (Civ) 3004 [17], [2000] QB 451 (Eng.).

⁸⁰ *Sussex v. United States Dist. Court for the Dist. of Nev.*, 776 F.3d 1092, 1101 (9th Cir. 2015).

there was any direct relationship between the arbitrator and the plaintiffs, a reasonable person would not find that the arbitrator was partial. In *Sierra Fishing Company*, the court was not convinced by the plaintiffs third demonstration of partiality: that the defendants' bank's website listed both the arbitrator's law firm and defendants' counsel as the bank advisors.⁸¹ This alleged relationship is stronger than the alleged relationship in *Sussex* in which there was no evidence whatsoever that a relationship existed between the arbitrator and the defendant.⁸² Therefore, the English High Court would have likely held that a reasonable person would not find that partiality exists in *Sussex*.

B. Would the Ninth Circuit Court of Appeals Have Found Partiality to Exist in Sierra Fishing Company v. Farran?

In determining whether partiality exists, the Supreme Court of the United States has held that failure to disclose constitutes a finding of "evident partiality" pursuant to section 10(a)(2) of the Federal Arbitration Act.⁸³ The Ninth Circuit Court of Appeals found "evident partiality" to exist in cases where they found "direct financial connections between a party and an arbitrator or its law firm."⁸⁴

The English High Court was persuaded by three of the four partiality indicators presented by the plaintiffs, as mentioned above.⁸⁵ It is likely that the Ninth Circuit Court would have been persuaded only by the first of those indicators, that the arbitrator's law firm had represented one of the parties and gathered a significant financial income from that representation.⁸⁶ This fact would fit squarely within the Ninth Circuit's findings of evident partiality in cases where a direct financial interest existed between the arbitrator and one of the parties.⁸⁷

The other three partiality indicators, however, do not show any direct financial interest between the arbitrator and either of the parties. Thus, while the English High Court found that the second and fourth indicators created a reasonable doubt as to the arbitrator's neutrality, it is likely that the Ninth Circuit Court of Appeals would not have found partiality to exist.⁸⁸

⁸¹ *Sierra Fishing Co. v. Farran* [2015] EWHC (Comm) 140 [62], [2015] 1 All ER (Comm.) 560 (Eng.).

⁸² *Sussex*, 776 F.3d, at 1101.

⁸³ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 153 (1968)).

⁸⁴ *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007).

⁸⁵ *See supra* notes 22 to 36 and accompanying text.

⁸⁶ *Sierra Fishing Co.* [2015] EWHC (Comm) 140 [56].

⁸⁷ *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994).

⁸⁸ *Sierra Fishing Co.*, [2015] EWHC (Comm) 140 [54-65]. The second indicator of partiality was that the arbitrator assisted and advised the defendants in their previous settlement negotiations with the plaintiffs. *Id.* ¶ 61. The third indicator was that defendant bank's website stated that both the arbitrator's law firm and one of the party's counsel in arbitration were advisers to the bank. *Id.* ¶ 62. The fourth indicator was his conduct in arbitration; he refused to postpone publishing the award- until the court announced the outcome of the case—when asked by both parties—and he was argumentative in five of his communications,

C. Comparison of the Partiality Standards

Despite the similarities of the texts of section 24(1)(a) of the English Arbitration Act and Section 10(a)(2) of the Federal Arbitration Act, the importance of partiality and the standards used to apply them are different.⁸⁹ As previously noted, the English High Court addressed the issue of the arbitrator's partiality prior to addressing the issue of an interim appeal.⁹⁰ In contrast, the Ninth Circuit Court of Appeals addressed the issue of partiality after the issue of an interlocutory appeal.⁹¹ This may suggest that the English High Court placed more emphasis on ensuring a fair arbitration process, while the Ninth Circuit placed more emphasis on encouraging arbitration and limiting the court's interference in order to promote the strong federal policy favoring arbitration.

Additionally, the reasonableness standard employed by the English Court is arguably a more strict standard for partiality than the Ninth Circuit's trend of finding partiality to exist only in situations where a direct financial relationship exists between the arbitrator and one of the parties.⁹² It is not likely that a reasonable person would inquire specifically as to whether an arbitrator has a direct financial connection with one of the parties. A reasonable person would find other situations in which he or she would presume that the arbitrator is biased. This is evidenced in the analysis above, and the conclusion that the Ninth Circuit most likely would not have found partiality to exist in two situations in which the English High Court found partiality to exist.

In conclusion, the different standards each have their advantages and disadvantages. While the English standard leans more toward ensuring fairness of the process, it has the potential to take away the core benefits of arbitration.⁹³ The ability to question the arbitrator's impartiality during arbitration defeats the finality of the award and makes the process lengthier, less efficient, and more costly.⁹⁴ The Ninth Circuit approach, however, is the converse. By restricting the definition of impartiality and disallowing interlocutory appeals, arbitration in the Ninth Circuit will be low cost, efficient, final, and binding, and will promote the parties' freedom of contract and

advancing arguments in favor of the defendants even though the defendants had not raised them. *Id.* ¶¶ 63-65.

⁸⁹ See 9 U.S.C. § 10 (2016); Arbitration Act 1996, c. 23, § 24 (Eng., Wales, N. Ir.); *Schmitz*, 20 F.3d at 1046; *Locabail (UK) Ltd. v. Bayfield Props. Ltd* [1999] EWCA (Civ) 3004 [17], [2000] QB 451 (Eng.).

⁹⁰ *Sierra Fishing Co.* [2015] EWHC 140, [50].

⁹¹ *Sussex v. United States Dist. Court for the Dist. of Nev.*, 776 F.3d 1092, 1098 (9th Cir. 2015).

⁹² *Compare Locabail (UK)* [1999] EWCA (Civ) 3004 [17] with *Schmitz*, 20 F.3d at 1046.

⁹³ Fabricio Fortese & Lotta Hemmi, *Procedural Fairness and Efficiency in International Arbitration*, 3 GRONINGEN J. INT'L L. 110, 116 (2015) (stating that, ideally, arbitration would be both efficient and fair; the arbitration laws should make arbitration both efficient and fair).

⁹⁴ See THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* 14 (7th ed. 2015) (stating that arbitration tends to be more efficient and less costly than court proceedings).

freedom to choose its arbitrators; however, the Ninth Circuit accepts the risk that the arbitration process may not be entirely impartial and just.⁹⁵

V. THE IMPORTANCE OF NEUTRALITY IN ARBITRATION

Black's Law Dictionary defines "arbitration" as:

A dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute. The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party.⁹⁶

Therefore, in general, arbitration is an alternative dispute resolution process in which parties agree not to submit their disputes to the court, but rather, to *neutral* arbitrators.⁹⁷ The arbitrators are entrusted with the task of reaching a final and binding judgment.⁹⁸ Some of the advantages are to avoid the high costs and long waiting times associated with litigation. The goal, however, is to reach a fair result. Therefore, there is an expectation that the third-party arbitrators will be neutral, as mentioned in the above definition.⁹⁹

In an arbitration procedure, there are sometimes three arbitrators; each of the two parties chooses an arbitrator, and the two arbitrators choose a third arbitrator.¹⁰⁰ The practice of allowing each party to choose an arbitrator arose in order to ensure that each party has an arbitrator who can effectively present that party's position to the other arbitrators, particularly the third arbitrator.¹⁰¹ This practice, however, raises the question concerning the neutrality of the party-chosen arbitrators.¹⁰² They are placed in a strange position because they are "not quite 'advocates,' perhaps, but not exactly 'judges' either."¹⁰³ Hence, given their appointment by the parties, there may be a presumption that

⁹⁵ See generally Hiro Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 Y.B. ON ARB. & MEDIATION 2 (2016) (stating that arbitration is both a process and a form of dispute resolution, and must have procedures that may conflict with contractual norms).

⁹⁶ *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁹⁷ *What is Arbitration?*, MEDIATE.COM, <http://www.mediate.com/articles/grant.cfm#> (last visited May 10, 2015).

⁹⁸ *Id.*

⁹⁹ *What is Arbitration?*, *supra* note 97; see *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁰⁰ CARBONNEAU, *supra* note 94, at 15.

¹⁰¹ Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 498 (1997).

¹⁰² Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel*, 30 FORDHAM URBAN L. J. 1813, 1815 (2002).

¹⁰³ Rau, *supra* note 101, at 498.

they are likely to favor their party, or to be predisposed to that party.¹⁰⁴ Despite the presumption that two of the three arbitrators may be predisposed to favoring one of the parties, the third neutral arbitrator has the responsibility of ensuring that the decision is free from bias.¹⁰⁵

A. The English View of Neutrality in Arbitration

When discussing English arbitration law, it is important to realize that international arbitration plays a large role in England.¹⁰⁶ Similar to the Federal Arbitration Act, the English Arbitration Act is divided into sections for domestic arbitration as opposed to international arbitration.¹⁰⁷ However, the English Arbitration Act's first section, which contains the impartiality clause, applies to both domestic and international arbitration proceedings.¹⁰⁸ Many commercial parties choose London as the location to resolve international disputes, making it one of the world's leading cities in arbitration. Therefore, English courts are frequently exposed to both domestic and international disputes.¹⁰⁹

Because of the strong presence of international arbitration in England, the International Bar Association (IBA) Guidelines on Conflicts of Interest are one of the non-binding source of ethics rules which are followed by many English courts.¹¹⁰ The IBA is seated in London and first issued the Guidelines in 2004.¹¹¹ In its introduction, the IBA recognized that with the growth of international arbitration, more questions arise concerning the arbitrators' duty to disclose, and their neutrality.¹¹² The Guidelines applied to sole arbitrators, tribunal chairs, and party-arbitrators.¹¹³ However, the IBA stated that the duty to disclose did not apply to non-neutrals: party-appointed arbitrators who, under their domestic laws, do not have a duty to be impartial and independent.¹¹⁴

¹⁰⁴ Byrne, *supra* note 102, at 1815.

¹⁰⁵ *Id.*

¹⁰⁶ DAHLBERG & WELSH, *supra* note 4, at 1.

¹⁰⁷ *Compare* Arbitration Act 1996, c. 23, § 24 (Eng. Wales, N. Ir.), with 9 U.S.C. § 10 (2016).

¹⁰⁸ Arbitration Act 1996 § 1(a) (Eng., Wales, N. Ir.).

¹⁰⁹ DAHLBERG & WELSH, *supra* note 4 at 1-2.

¹¹⁰ *Id.* at 7.

¹¹¹ IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION (INT'L BAR ASS'N 2004), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=21D27F55-134B-4791-A01C-F8B6658BAB24> [hereinafter IBA GUIDELINES].

¹¹² *Id.* intro. ¶ 1.

¹¹³ *Id.* standard 5.

¹¹⁴ *Id.*

This shows that the IBA greatly values neutrality and the duty to disclose relationships with a party, but also allows for other domestic laws to allow a non-neutral arbitrator.

In 2014, the IBA released revised Guidelines on Conflicts of Interest in International Arbitration.¹¹⁵ In the introduction, the IBA states that the revised guidelines reflect stricter rules concerning disclosure because of the rise in international arbitration.¹¹⁶ The IBA altered the “Scope” provision of the “Duty to Disclose” section in order to include all arbitrators.¹¹⁷ The provision states that each member of an arbitral tribunal has a duty to be impartial, regardless of the manner through which he or she was appointed.¹¹⁸ Thus, the new Guidelines abolish any reference to domestic laws which may state otherwise.

The English Court’s ruling in *Sierra Fishing Company* is consistent with the English view of the importance of neutrality.¹¹⁹ The standard under which the court found impartiality to exist was strict, and had the potential to classify many acts as impartial.¹²⁰ By keeping a close eye on the neutrality of the arbitrators, even during an arbitration, the court supported the English policy which demonstrates the importance of impartiality.

B. The American View of Neutrality in Arbitration

The ability to choose arbitrators is among the many features that draw commercial parties to arbitration.¹²¹ Commercial parties trust the expertise and professional capabilities of the chosen experienced arbitrators.¹²² However, party-chosen arbitrators may not be neutral, and the neutrality of the arbitrators is central to the American practice of arbitration.¹²³

Because the Federal Arbitration Act does not explicitly mention the neutrality of the arbitrator, this concept of neutrality in the commercial setting can be examined in the evolving Code of Ethics established by the American Arbitration Association (AAA).¹²⁴ The AAA is a non-profit organization that provides alternative dispute services to both

¹¹⁵ *See id.*

¹¹⁶ IBA GUIDELINES preface.

¹¹⁷ *Id.* standards 3, 5.

¹¹⁸ IBA GUIDELINES, *supra* note 111, standard 1.

¹¹⁹ *See Sierra Fishing Co. v. Farran* [2015] EWHC (Comm) 140 [81], [2015] 1 All ER (Comm.) 560 (Eng.).

¹²⁰ *See Locabail (UK) Ltd. v. Bayfield Props. Ltd* [1999] EWCA (Civ) 3004 [17], [2000] QB 451 (Eng.).

¹²¹ Byrne, *supra* note 102, at 1817.

¹²² CARBONNEAU, *supra* note 94, at 14.

¹²³ *See* Byrne, *supra* note 102, at 1815.

¹²⁴ *Id.* at 1826; *see* THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (AM. ARBITRATION ASS’N & AM. BAR ASS’N 2004), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867 [hereinafter AAA CODE OF ETHICS (2004)].

individuals and organizations.¹²⁵ In 1977, the AAA and the American Bar Association (ABA) formed a joint committee in order to establish the “Code of Ethics for Arbitrators in Commercial Disputes.”¹²⁶ Canon VII of the Code discussed the ethical obligations of the arbitrators appointed by one party.¹²⁷ The Code stated that, “an arbitrator appointed by one party who is not expected to observe all of the same standards as the third arbitrator is called a ‘non-neutral arbitrator.’”¹²⁸ Thus, from the outset, there was a presumption that the party-appointed arbitrator would not be neutral.¹²⁹ Additionally, the 1977 Code’s disclosure requirements differentiated between neutrals and non-neutrals, stating that although non-neutrals must disclose generally any relationship with the parties, it “need not include as detailed information as is expected from persons appointed as neutral arbitrators.”¹³⁰

In 2003, the AAA and ABA updated the Code of Ethics for Arbitrators in Commercial Disputes.¹³¹ The AAA included a “Note on Neutrality” and recognized the common practice for each party to choose an arbitrator.¹³² The Code states: “The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards.”¹³³ By holding both “neutrals” and “non-neutrals” to the same ethical standards, the revised Code effectively eliminates the concept of a “non-neutral.”¹³⁴ This is clearly in stark contrast with the 1977 Code, mentioned above.¹³⁵ Furthermore, the revised Code includes more disclosure requirements for all arbitrators.¹³⁶

The AAA Code of Ethics, although binding only on AAA arbitrators, displays the general trend and attitude of American commercial arbitration through its changes.¹³⁷ As previously mentioned, judicial review during arbitration is disfavored in the United

¹²⁵ *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, AM. ARB. ASS’N, <http://www.adr.org> (last visited May 16, 2016).

¹²⁶ THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (AM. ARBITRATION ASS’N & AM. BAR ASS’N 1977) [hereinafter AAA CODE OF ETHICS (1977)].

¹²⁷ *Id.*

¹²⁸ AAA CODE OF ETHICS (1977), *supra* note 126.

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ AAA CODE OF ETHICS (2004), *supra* note 124.

¹³² *Id.* at Note on Neutrality.

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ *Compare id. with* AAA CODE OF ETHICS (1977), *supra* note 126.

¹³⁶ *See* AAA CODE OF ETHICS (2004), *supra* note 124, canon III.

¹³⁷ *See id.*

States, hence, it is likely that the AAA adopted these policies in order to ensure fairness.¹³⁸ Furthermore, the revised Code was made to eliminate the difference between American domestic arbitration, which contained a neutral and non-neutral distinction, and international arbitration, which did not include that distinction.¹³⁹

Viewed with this context, the Ninth Circuit's holding in *Sussex* is consistent with the general American view toward neutrality.¹⁴⁰ While the court has a standard through which it examines the issue of partiality, it is a strict standard—which is difficult to meet.¹⁴¹ This reflects the general American policy which desires to promote arbitration, at the expense of a less “fair” trial. While neutrality is important, the American courts’ desire is to enforce the arbitral awards. As the Supreme Court stated, “[t]he overarching purpose of the FAA was to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”¹⁴²

C. Comparison of English and American Views of Neutrality

In comparing the English and American views on arbitration, it is clear that both acknowledge the important role that neutrality plays in arbitration proceedings. Furthermore, it is notable that both the AAA and IBA have revised their ethical guidelines in order to hold all arbitrators to the same standards and abolish the idea of a party-appointed non-neutral arbitrator.¹⁴³ The differences, however, are also noteworthy. While both the AAA and IBA abolished the non-neutral arbitrator, the underlying reasons were different.¹⁴⁴ The IBA had originally included it only to accommodate for different domestic laws, but realized that with the growth of international arbitrators, this type of arbitrator could no longer exist.¹⁴⁵ In contrast, the AAA’s original guidelines created a domestic presumption on non-neutrality, and then abolished it to become more uniform with international arbitration.¹⁴⁶ These changes also reveal the impact of international arbitration, as manifested by the motivation of both the AAA and IBA to change the

¹³⁸ See AAA CODE OF ETHICS (2004), *supra* note 124, pmb1. (stating that arbitration has become a fundamental system of justice, on which society greatly lies).

¹³⁹ John D. Feerick, *The 1977 Code of Ethics for Arbitrators: An Outside Perspective*, 18 GA. ST. U.L. REV. 907, 909 (2002).

¹⁴⁰ See *Sussex v. United States Dist. Court for the Dist. of Nev.*, 776 F.3d 1092, 1101 (9th Cir. 2015).

¹⁴¹ *Id.* at 1100 (citing *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994)).

¹⁴² *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011).

¹⁴³ AAA CODE OF ETHICS (2004), *supra* note 124; IBA GUIDELINES, *supra* note 111.

¹⁴⁴ AAA CODE OF ETHICS (2004), *supra* note 124; IBA GUIDELINES, *supra* note 111.

¹⁴⁵ See AAA CODE OF ETHICS (2004), *supra* note 124; IBA GUIDELINES, *supra* note 111.

¹⁴⁶ AAA CODE OF ETHICS (1977), *supra* note 126; AAA CODE OF ETHICS (2004), *supra* note 124.

guidelines.¹⁴⁷ Perhaps this is an indicator that the countries are moving in the same general direction, emphasizing the importance of neutrality.

D. Analysis

The concept of neutrality is ever-evolving and questions remain as to whether arbitration should be neutral and whether it can be truly neutral. To answer the former, one must look at the underlying question: What is the purpose of arbitration? Arbitration is form of *alternative* dispute resolution, meaning it is an alternative to the judicial system.¹⁴⁸ One of the important attributes of the judicial system is neutrality.¹⁴⁹ However, in forgoing the court system, those who agree to arbitration agree to forgo some of the attributes associated with the court system.¹⁵⁰ Thus, it is against the quick and efficient nature of arbitration to expect it to have the same attributes as the court system, so arbitration should not be expected to be as neutral as the court system.

The answer to the latter question, whether arbitration can truly be neutral, depends upon the number of arbitrators and whether any of them are party-appointed. If the arbitral tribunal is composed of a sole arbitrator who was not assigned by only one party, then that arbitrator could feasibly be neutral. However, it is not realistic to believe that a party-appointed arbitrator will be capable of being truly neutral. When examining partiality, the Supreme Court of the United States has questioned whether the arbitrator disclosed business dealings with one of the parties that “might create an impression of possible bias.”¹⁵¹ In effect, a party-appointed arbitrator has a business dealing with the party that not only creates an impression of bias (fulfilling the impartiality standard), but likely also causes the arbitrator to be biased (making the arbitrator non-neutral); the arbitrator will be paid by that party, and perhaps hope to be re-appointed by that party in future disputes.

VI. CONCLUSION

The recent decisions of the English High Court and the United States Ninth Circuit Court of Appeals had conflicting results. While the former permitted an interim appeal from an arbitration procedure and used a strict standard to find that partiality existed, the latter held that interlocutory appeals for issues of impartiality were not permitted, and used a more lenient standard to find that partiality did not exist. These recent decisions represent the underlying core arbitration ideologies. The English courts

¹⁴⁷ See AAA CODE OF ETHICS (2004), *supra* note 124; IBA GUIDELINES, *supra* note 111 115.

¹⁴⁸ CARBONNEAU, *supra* note 94, at 1.

¹⁴⁹ See *ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE standard 6-1.6 (AM. BAR ASS'N 2002)*, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_trialjudge.html#6-1.6.

¹⁵⁰ CARBONNEAU, *supra* note 94, at 1.

¹⁵¹ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968).

are highly influenced by international arbitration, which strongly values neutrality. The American courts follow the strong American federal policy favoring arbitration.