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'Perspective'

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Fire Risk in Tall Building Façade Systems: *The Independent Review of UK Building Regulations and Fire Safety – Is the new UAE fire code relevant to UK post-Grenfell Tower?*

By Christopher Miers

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"*… fire and life safety's success in the cities depends on a collective effort by all the stakeholders involved.*" (UAE Civil Defence Fire Code, 2017)

The UK's Independent Review of Building Regulations and Fire Safety is in process at the time of publication of this printed copy, and we expect the final conclusions within the next few months. This review, led by Dame Judith Hackitt, is running in parallel with the work of the statutory enquiry headed by Sir Martin Moore-Bick in respect of the Grenfell Tower disaster in London, UK.

As readers may be aware, the December 2017 interim report of the UK's Independent Review concluded that "***the current regulatory system [in England and Wales] for ensuring fire safety in high-rise and complex buildings is not fit for purpose.***" And that "*This applies throughout the life cycle of a building, both during construction and occupation, and is a problem connected both to the culture of the construction industry and the effectiveness of the regulators*". [1]

Dubai and the adjacent Emirates have suffered serious fires in tall buildings, of course, but none with fatalities. As we have written in previous published articles [2], the UAE Fire and Life Safety Code of Practice, also known as the 'Civil Defence Fire Code' ("Fire Code"), was modified in 2012 by a new appendix, Annexure A.1.21.Revision 2 which came into effect in September 2012 (for new approvals) and in April 2013 (installation of cladding) regarding the external building envelope. Unlike the UK Building Regulations Approved Documents which provide guidance, this Annexure specified mandatory requirements to reduce the risk of fire spread in external cladding systems for new construction.

In 2017 the UAE took a further step in enhancing its Fire Code which is seen as increasing the safety of people and property and reducing the risk of fire spread in tall buildings, amongst other things. The Civil Defence Fire Code, 2017 Edition, runs to almost 1500 pages, providing minimum requirements and also guidance. It addresses all aspects of passive and active fire protection and means of escape, including fire and life safety during construction and maintenance, as well as during subsequent building occupation and operation.

There are three particular features of the new UAE Fire Code which I want to highlight:

- training;
- the provisions for inspection of work during construction; and
- the cooperation of stakeholders.

These are issues of concern in the UK also, as raised by Dame Judith Hackitt and her panel ("the UK Panel"), in respect of "Competence"; "Process, compliance and enforcement" along with "Quality Assurance and products"; and "Roles and Responsibilities". [3] On these issues in England and Wales, the UK Panel states, amongst other matters:

- The competence of those involved in the design, construction, ongoing operational management and maintenance of complex and high-risk buildings has been called into question… In particular, for fire risk assessors undertaking risk assessments … there are no statutory registration or accreditation requirements…. This is one area where England and Wales appears to be lagging behind many other parts of the world that require key personnel throughout the system to be properly trained, assessed and in many cases licensed to carry out specific roles.
- There is widespread deviation from what is originally designed to what is actually built, without clear and consistent requirements to seek authorisation or review, or to document changes made. The current trend for 'design and build' contracts … has been identified as being particularly problematic in facilitating evolutionary design, which fails to be properly documented or reviewed… There is evidence of a number of key control stages of the process not being followed

as intended: for example, the handover of fire safety information and the issuing of Completion Certificates… The integrity and efficacy of product and system classifications are highly dependent on correct installation by competent and knowledgeable persons.

- The [UK] Building Regulations 2010 are clear but not about where responsibilities lie… Even where there are requirements for key activities to take place it is not always clear who has responsibility for making these happen… Primary responsibility for ensuring that buildings are built to the correct standards and are fit for purpose must rest with those who commission the work and those who design and build the project. Those commissioning must ensure that those they commission to do the work have the right levels of competence and are appropriately supervised. Responsibilities must not be dispersed through the chain as they are now. Even in an environment where there are multiple layers of sub-contracting there must be a clear, responsible dutyholder who is held to account for the performance or non-performance of all of those to whom sub-contracts are let at all stages in the life of a building.

Training:

All of those familiar with construction will understand the challenges of maintaining the quality of materials and workmanship on site. Processes of quality management need to be delivered right down through the supply chain from the management team to the workforce undertaking the installation. Site operatives need to understand the criticality of particular details as much as do the designers, if a 'defects free' construction is to be achieved. Training is an essential component of achieving such understanding.

In respect of façade design and construction, the new UAE Fire Code requires, amongst other matters, training and prior approval of those involved:

- Consultants shall have competent and qualified facade specialists in-house or shall hire Civil Defence approved specialists who have experience and expertise in facades (Chapter 1, Construction, 4.4.1.8).
- It is the consultant's responsibility to ensure that the installation is carried out by Civil Defence and Municipality approved installers and fabricators as per the design specifications, system manufacturers' installation instructions and complying with code and the local construction regulations (4.4.5.2).
- An installer specialising in facade and cladding systems shall be trained and certified by the system manufacturer, and qualified and licensed by Civil Defence (4.4.6.1-2).

Inspection during construction:

Inspection of work is clearly an important part of achieving a 'defects free' construction. A hierarchy of inspections is essential, from inspection by those carrying out the works, to independent inspections by suitable specialists at appropriate stages of the work.

The new Fire Code mandates specific inspections, requiring:

- The consultant is responsible for ensuring that the installers' work is inspected during construction and installation at each stage (4.4.7.2).
- Special inspections are required for all façade and cladding systems, which shall take place in successive stages as the installation proceeds. This shall be at every 20% interval of the total building height (4.4.7.1).
- The specialists undertaking these inspections shall certify and sign off the façade and cladding installations at each successive stage, and their reports form part of the documentation required by Civil Defence at final inspection and handover (4.4.7.4).

Stakeholders taking responsibility:

The new Fire Code provides a chapter specifically on the responsibilities of building owners, developers, consultants, contractors, materials manufacturers and others. It highlights that the Civil Defence "*intended fire and life safety's success in the cities depends on a collective effort by all the*

stakeholders involved." (Chapter 18, Responsibilities of Stakeholders, 2.1.1).

Stakeholders are identified: investor; owner; participating parties; service providers (architects, consulting engineers, installation contractors, inspection agencies, maintenance contractors etc); profit makers; interested parties; as well as third parties and caretakers involved in the project development, design,
construction, installation, inspection and maintenance (1.2.1).

The new Fire Code identifies:

- Owners are responsible for fire safety from the design stage. They should be actively involved in the planning stage to ensure that the end result of the project is in full compliance with regulations (2.2.2).
- Consultants provide a vital role in achieving a fire safe building, and their professional commitment in planning, designing and executing projects to provide fire safe environments is of utmost importance (2.2.3).
- Similar commitment and professionalism is expected from contractors (2.2.4).

Specific regulations for training and inspection, alongside express requirements for minimum performance of materials, can, of course, have cost implications on the design and construction processes. A Government must consider life safety as the overriding priority, whilst also recognising that regulatory reform may result in a cost increase to the procurement of housing and other building types.

I will provide a further update on these issues later in 2018 as further UK and UAE Governmental and construction industry developments follow.

[1] *Building a Safer Future, Independent Review of Building Regulations and Fire Safety: Interim Report, December 2017, page 9/118*

[2] *Probyn Miers Perspective - Fire Safety in Tall Buildings – Part 2 The Future (October 2016), Fire Risks From External Cladding Panels – A Perspective From The UK (February 2016), Fire Safety in Tall Buildings – Part 1 (October 2015)* http://www.probyn-miers.com/perspective/

[3] *Ibid, pages 9 & 10/118*

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- *Fire Safety in Tall Buildings – Part 2 The Future (October 2016)*
- *Fire Risks From External Cladding Panels – A Perspective From The UK (February 2016) Fire Safety in Tall Buildings – Part 1 (October 2015)*
- *Fire Safety in Timber Framed Buildings: Part 1 & Part 2 Fire spread in cavities – UK Building Regulations past, present and future (June 2011)*
- *Designing Buildings for Fire Safety: BS 9999:2008 (June 2010)*

Independence and Impartiality in Arbitration

By Magdalena Prus

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Quis custodiet ipsos custodes?

Who will guard the guards themselves? Or, who will guard the guards, themselves?

It has been over a year now since the decision in **Cofely v Bingham & Knowles** [1] opened a lively debate about the *impartiality* and *independence* of the decision-maker, not only in adjudication but also in domestic and international commercial arbitrations.

In principle, the requirement for an *impartial* and *independent* arbitrator is not controversial; indeed independence and impartiality are fundamental requirements for all third party neutral tribunals. The majority of arbitral institutions and national laws, as well as soft law instruments (guidelines and codes of practice which are not legally binding) have specific provisions which require that every arbitrator must be, and must remain *impartial* and *independent* throughout the arbitral process, from appointment to final award. The real question, which **Cofely** has raised for the arbitral community, is how to ensure that party perceptions of the proper standards of *impartiality* and *independence* are met.

The provisions of the Arbitration Act 1996, ("**the Act**") in England and Wales, and the rules of the various arbitral institutions with regard to safeguarding the integrity and legitimacy of the arbitral process, and protecting the parties against a biased decision-maker, focus primarily on two areas. First, they impose on the arbitrator a continuing duty to disclose any conflicts of interest at the appointment stage and if new circumstances arise at any time after the commencement of arbitration. [2] Secondly, they give the parties a right to challenge an arbitrator, or award, if circumstances exist that give rise to justifiable doubts as to his or her *impartiality* and *independence*. [3]

Although the safeguards provided by the Act and the Institutional Rules are clear, they do not always offer a perfect solution. For example, it became apparent in **Cofely** that disclosure by the arbitrator of what a party might consider to be a conflict of interest, can only be effective as a safeguarding tool when carried out not only with an independent and impartial mind-set by tribunal members but also with a degree of transparency in the process of disclosure. Furthermore, challenges to impartiality and independence are prone to use as tactical weapons, to be deployed in attempts to derail the arbitral process. Such challenges frequently carry significant consequences for the time and cost of the process.

The fact that the regulatory standards for disclosures and challenges are open to interpretation, (for example: what are the circumstances that should give rise to disclosure? what does 'justifiable doubts' mean?), misunderstanding and possibly abuse, does not assist the arbitral community to meet these standards, nor can it inspire the full confidence of users of the process. This is particularly relevant in the context of international arbitration where frequently parties are from different cultural and legal backgrounds. This diversification may lead to a range of interpretations, especially when combined with the lack of familiarity of legal practices, local rules and customs, the limited pool of arbitrators or simply the realities of modern life.

Several institutions, such as the IBA [4] and CIArb [5] have analysed these concerns and proposed solutions in the form of guidelines and codes of conduct. However, alongside the development of such soft law instruments, there has been a substantial discussion on the whole topic of transparency and its potential role in achieving higher standards in safeguarding the requirements of *impartiality* and *independence* in international arbitration.

In 2015 White & Case together with Queen Mary London University published "*2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*" [6] ("**the 2015 Survey**") which stated that the arbitral community would "*welcome increased transparency in institutional decision-making on the appointment of, and challenges to, arbitrators.*" [7] Some steps towards greater transparency have already been taken by arbitral institutions, including their commitment to the quality and integrity of arbitration through disclosure of potential conflicts of interest of tribunal members.

For instance, in 2016 the ICC started to publish a list of the members of arbitral tribunals appointed in ICC arbitrations including their names, nationality and role, as well as the appointment method, but not the names of the parties. Following the 2015 Survey, the ICC Court announced that, where the parties agree, it will provide reasons for its administrative decisions including those regarding challenge, removal, or replacement of an arbitrator.

The LCIA has taken an even more dramatic step. It has been a common practice of the LCIA to provide a *reasoned* decision to the parties as part of their challenge procedures, to increase transparency of the process. Since 2007, however, the LCIA has been publishing selected decisions, including a

description of the exact circumstances and the grounds for the challenge, and providing the reasons for accepting or rejecting such an objection.

This type of information is extremely beneficial to the arbitral community, both arbitrators and users of arbitration, for the purposes of safeguarding the requirements for *impartiality* and *independence*. Not only does it provide clear information to arbitrators about the types of circumstance that should give rise to disclosure, it also alerts parties to the types of challenge that are unlikely to succeed. In effect, at least with respect to challenges related to bias, it provides the type of precedent that can be so useful in litigation. At the appointment stage, it may clarify standards and the *real purpose* of disclosure in international arbitration. [8] In the context of objections, it may "*promote understanding of and consistency in standards for reviewing arbitrator challenges, leading to better decision-making.*" [9]

Moving towards transparency may be seen by some to threaten confidentiality and privacy of the arbitral or adjudication process. Given that the 2015 Survey showed that 33% of the respondents choose to resolve their disputes in arbitration because of confidentiality, [10] it is understandable why arbitral institutions are so reluctant to impose any radical changes which would affect the confidentiality and privacy of the process. However, the type of information provided by the LCIA since 2007 relates only to the appointment process rather than the substance of the proceedings. It carries, therefore, little or no risk of breaching the confidentiality of the proceedings themselves

In conclusion, it seems clear that moving towards transparency with respect to the appointment procedure would achieve higher standards for disclosure by arbitrators and a reduction in the number of spurious challenges, without compromising the confidentiality of the proceedings themselves. It seems also that, in their role as principal policy makers, arbitral institutions have it within their power to develop and promote this level of transparency in order to ensure the selection of decision makers who are seen by the parties to be *impartial* and *independent*.

With this in place the proper translation of the Latin tag in the title may well be "*who will guard the guards, themselves?* And the answer to that question might reasonably be yes.

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[1] [2016] EWHC 240 (Comm)

[2] E.g. Articles 11(2) and (3) of the ICC Arbitral Rules (2017 ed.), and Articles 5.4 and 5.5 of the LCIA Arbitral Rules (2014 ed.). The Act itself does not provide for a duty to disclose. However, Popplewell J in Sierra Fishing Co v Farran [2014] 2 Lloyd's Rep 514 (Comm) found that it was the arbitrator's duty to make voluntary disclosure of connections which were known to him and might cast a shadow over his impartiality.

[3] E.g. Article 14(1) of the ICC Arbitral Rules (2017 ed.) and Article 10.1 of the LCIA Arbitral Rules (2014 ed.), as well as s.24 and s.68 of the Act.

[4] "1987 Rules of Ethics for Arbitrators", "2014 Guidelines on Conflicts of Interest in International Arbitration", "2013 "Guidelines on Party Representation in International Arbitration".

[5] "CIArb International Arbitration Guidelines 2016 – Interview for Prospective Arbitrators"

[6] The 2015 Survey, (accessed 14 August 2017) http://www.arbitration.qmul.ac.uk/docs/164761.pdf

[7] The 2015 Survey (n. 5) [p.2]

[8] Often disclosure is considered to lead to disqualification or to facilitate a challenge, rather than to forestall objections as discussed in Brower Charles, 'Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator' (2010) 15 [p.20]

[9] Brower (n. 7) [p.20]

[10] Confidentiality in this context was considered to be one of the main valuable attributes of arbitration.

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