UK: HIGH COURT DISMISSES APPLICATION TO REMOVE ARBITRATORS

Gordon Bell

The English Commercial Court has published two recentjudgments of Mr Justice Popplewell in a single anonymised case (P v Q and others) concerning the removal of two arbitrators under section 24(1)(d)(i) of the Arbitration Act 1996 (the "Arbitration Act"). The decisions reinforce the English Courts' non-interventionist approach when it comes to arbitrations with their seat in England.

BACKGROUND TO THE APPLICATIONS

The claimant, P, and the first defendant, Q, were parties to commercial agreements which were governed by English law and provided for disputes to be submitted to arbitration under the LCIA Rules, before three arbitrators. The parties fell into dispute and P brought arbitral proceedings against Q. With the agreement of the parties, the chairman appointed a secretary of the tribunal. The secretary was a qualified lawyer at a US law firm before becoming a legal advisor to the chairman.

During the procedural stages of the arbitration, the chairman mistakenly sent an email, intended for the secretary, to P's lawyers. In the email, the chairman asked the secretary: "Your reaction to this latest [letter] from [P]?"

The misdirected email triggered an application by P to the LCIA Court seeking to remove all three members of the tribunal on five grounds:

1. The improper delegation of the tribunal's decision making functions to the secretary;

2. A breach of the duty by the chairman in seeking the secretary's views on substantive procedural matters;

3. The failure of the co-arbitrators to participate in the proceedings;

4. Doubts as to chairman's independence or impartiality (based on the comments made by the Chairman at an international conference); and

5. Breach of duty by the chairman in failing to keep documents confidential.

The LCIA Court dismissed grounds 1, 2, 3 and 5, but upheld 4 and revoked the chairman's appointment. (The decision of the LCIA Court in relation to ground 4 has not been made public.)

Having failed to remove the entire panel, P issued an application in the Commercial Court to remove the remaining two arbitrators (defendants 2 and 3, or "R" and "S") under section 24 of the Arbitration Act, based (at least, in part) on grounds 1 and 3 above. P also applied to the court seeking disclosure from the arbitrators of documents to support the removal application (having already failed in

that application before the LCIA Court). In separate judgments, Popplewell J dismissed both applications.

THE DISCLOSURE APPLICATION

Applicable principles

In the disclosure application, P sought disclosure of documents passing between the arbitrators and the secretary, or relating to the role and tasks to be delegated to the secretary.

Popplewell J reviewed the principles applicable to disclosure in support of interlocutory (i.e. interim) applications generally and concluded that it would be a rare case in which disclosure would satisfy the overriding objective (i.e. enabling the court to deal with cases justly and at proportionate cost).

He also considered the particular context of arbitration, which requires disputes to be resolved without unnecessary delay or expense and with a minimum of intervention from the court - as laid out in sections 1 (a) and (c), 33 (1)(b) and 40(1) of the Arbitration Act. Applications such as P's section 24 removal application are an intrusion by the courts into the arbitral process and must be conducted with the minimum of delay and expense.

Popplewell J expressed the following principles applicable to disclosure in an arbitration claim (which includes the removal of an arbitrator):

- The arbitration claim must have a real prospect of success;
- The documents sought must be strictly necessary for fair disposal of the arbitration claim; and
- In exercising its discretion to order disclosure, the court will have regard to overriding objective but, in the particular context of arbitration:
    - o The court will not normally order disclosure as it will be inimical to principles of court intervention which underpin the Arbitration Act.
    - o Where the relevant arbitral institution has the power to order such disclosure but has declined to do so (as in this case), the court will not normally order disclosure;
    - o The court will not ordinarily order disclosure of documents which the parties and tribunal have agreed are confidential; and
    - o Only in the very rarest of cases, if ever, will arbitrators be required to give disclosure. Compelling reasons and exceptional circumstances will be needed.

DECISION

Applying the principles, Popplewell J determined the documents sought were not strictly necessary for the fair determination of the application for removal and that this was not a case with exceptional circumstances which would warrant the court exercising its discretion. More importantly, in the context of arbitral proceedings, the documents sought were part of the arbitrators' deliberations and were protected both by the LCIA Rules (and the LCIA Court's own decision not to order disclosure) and by the principles of confidentiality in so far as they relate to arbitrators. The application was dismissed.

THE REMOVAL APPLICATION

The removal application was founded on conduct in respect of a number of procedural decisions concerning documents and an application for a stay of the arbitration. Although based, at least in part, on the previous application for removal made to the LCIA Court, P's application shifted during the course of the application. This in itself drew criticism from Popplewell J, who said the changing pattern of allegations was entirely inappropriate on an application for removal of an arbitrator, and the arbitrator and opposing party were entitled to certainty and clarity in knowing what criticisms were being made.

In substance, the complaints amounted to personal failings on the part of the co-arbitrators properly to exercise their decision-making functions and responsibilities, an improper delegation of those responsibilities to the secretary and a failure to supervise the chairman in relation to the internal management of the tribunal. In addition, it was alleged the co-arbitrators negligently and/or innocently misrepresented to P the existence, nature, extent and effect of that delegation.

As the evidence emerged (both before the LCIA Court and the Commercial Court), it became clear that the secretary had spent significantly more time on the arbitration than the co-arbitrators and, in some respects, more than the chairman himself. The chairman had also spent considerably more time on the procedural issues than his co-arbitrators. However, the co-arbitrators were clear they had reviewed all procedural applications, participated in the decision making process and had made their views known to the chairman in relation to the procedural matters. The co-arbitrators had made plain that all decisions were made by the tribunal, at all times.

In his judgment, Popplewell J found that it was entirely proper for co-arbitrators to consider submissions but then leave it to the chairman to prepare a draft decision before they considered and approved it. Such an approach would ensure decisions reflected the views of the tribunal as a whole whilst avoiding delay or expense on procedural matters as to the tribunal is bound to do. Of course, the LCIA Rules also allow the co-arbitrators to delegate authority to the chairman to make procedural decisions in any event.

Popplewell J also found that the tribunal had not improperly delegated its decision-making function to the secretary. Just as a judge may be assisted by the views of a judicial assistant or law clerk, he said, "an arbitrator who receives the views of a secretary does not lose the ability to exercise full and independent judgment". He was also guided by the LCIA Court's own decision, which found there was no improper delegation, and said again that the court should be slow to differ from that.

In summary, Popplewell J concluded there was no merit in any of P's arguments that the co-arbitrators failed in their duties. He also concluded that, in any event, P had failed to demonstrate the further requirement in Section 24 of the Arbitration Act, that substantial injustice had been or would be caused to P. The fact that the newly constituted tribunal (which included the fourth defendant, U) had, after careful consideration, confirmed the three procedural decisions of the previous tribunal which led to this application was fatal to P meeting that threshold.

Accordingly the application to remove the two remaining arbitrators was dismissed.

COMMENT

These carefully considered judgments will be of great help to arbitrators and parties alike in understanding how the court will approach its supportive powers under Arbitration Act and, in particular, how it will continue to approach challenges to arbitrators. It is also enlightening as to the role arbitrators, the LCIA and the English Courts, believe a secretary might (or should) play in an arbitration.

There is no doubt that challenges to arbitrators are becoming an increasing trend. This may simply be a reaction to the fact that courts are making it more difficult for parties to challenge arbitral awards. In other words, a party who fears a losing case may consider an application to remove an arbitrator provides hope that the battle can be fought another day, and even on a different field, whereas a challenge to an award represents a battle already lost.

As Popplewell J put it: "it is a familiar, and perhaps increasing, phenomenon for one party to challenge an arbitrator it does not wish to have as part of the tribunal, and to use the challenge, and in particular the arbitrator's response to the challenge, as a ground to support an argument that the relationship

between the party and the arbitrator has become adversarial and that removal is justified on that separate ground for apparent bias."

> **"...tribunals should circumscribe the secretary's role so that they are not involved "in anything which could be characterised as expressing a view on the substance of that which the tribunal is called upon to decide..."**

In light of the increasing trend, the English courts are making it clearer that care should be taken not to indulge protracted and expensive satellite proceedings which are inimical to arbitration, and should minimise its intervention in a process to which the parties have submitted.

Helpfully, Popplewell J also took care to consider best practice on the appointment and use of secretaries. He acknowledged the "understandable anxiety in the international arbitration community that the use of secretaries risks them becoming, in effect, 'fourth arbitrators'", when the decision making process should be the preserve of the tribunal members alone. He suggested that to insulate themselves from the risk of secretaries exerting inappropriate influence on the decision-making process (and of a related challenge to the tribunal), tribunals should circumscribe the secretary's role so that they are not involved "in anything which could be characterised as expressing a view on the substance of that which the tribunal is called upon to decide". The judge did add that an arbitrator's failure to adhere to such best practice would not necessarily equate to a failure properly to conduct proceedings within the meaning of section 24(1)(d) of the Arbitration Act, but the sentiment remains clear enough.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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