
Removal of Arbitrator for Doubts as to Impartiality under the English Arbitration Act

By Raymond L. Sweigart

In Sierra Fishing Company and others v Hasan Said Farran and others [2015] EWHC 140 (Comm), the English Court removed an arbitrator under section 24 of the Arbitration Act 1996. Under that provision, a party to an arbitration may “apply to the court to remove an arbitrator on [the basis that] circumstances exist that give rise to justifiable doubts as to his impartiality.” The Court applied the test articulated by the House of Lords in Porter v Magill [2001] UKHL 67 and also relied upon the International Bar Association Guidelines on Conflicts of Interest in International Arbitration and held that “the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased“. The decision also confirms the English Court’s position that arbitrators have a duty to disclose any circumstances that may raise questions or doubts as to their impartiality, regardless of whether the parties may be able to determine these through due diligence or other available procedural steps. Also worth noting are the Court’s comments on actions that a party may take without losing the right to object to an irregularity affecting the tribunal or proceedings.

The claimants had entered into arrangements with the first two defendants for a loan to finance the purchase of two fishing vessels. That loan agreement contained a clause providing for arbitration of disputes in London. When claimants failed to make required payments, the first two defendants commenced an arbitration proceeding under the loan agreement, appointed the third defendant as their arbitrator, and requested that claimants appoint an arbitrator. The parties subsequently made a series of agreements for repayment of the loan and suspension of the arbitration, including an agreement for transfer of shares in the first claimant company to the first defendant in satisfaction of the debt. Those agreements were not fully performed, and the

first and second defendant parties recommenced the arbitration with the third defendant now designated as sole arbitrator, on the basis that claimants had earlier failed to appoint an arbitrator.

When the arbitrator rejected claimants' challenge to his impartiality, accepted jurisdiction, and proceeded with the arbitration, claimants then applied to the English Court to remove the arbitrator under section 24(1)(a) of the Act. They noted that there was a legal and business connection between the arbitrator and the defendants since the arbitrator had been retained as legal counsel to a bank where the first defendant was chairman; the arbitrator's father was partner with the arbitrator in a law firm which continued to serve as legal counsel to the first defendant's bank; the arbitrator's father also held an internal role at the bank and was a member of the bank's executive management along with the first defendant; the arbitrator had been involved in the negotiation and drafting of the agreements that the parties entered into after the loan agreement; and the arbitrator's decision in rejecting the challenge to his impartiality itself gave rise to justifiable doubts as to his impartiality. On the latter point, it was noted that the Arbitrator had refused to delay issuance of an award pending determination of the Court challenge, even though both parties had requested that. His award, however, was reported as unpublished at the time of the court hearing, apparently because his arbitrator's fee had not been paid.

The Court proceeded to consider two issues:

1. Whether there were circumstances which gave rise to justifiable doubts as to the arbitrator's impartiality under section 24 of the Arbitration Act; and
2. If so, whether the claimants had nevertheless taken part in the arbitration proceedings without timely raising the objection, when they knew or could with reasonable diligence have discovered the existence of those circumstances or grounds for objection, and thus had lost their right to object under section 73(1) of the Arbitration Act.

On the first issue, the Court found that there were circumstances which did give rise to justifiable doubts about the arbitrator's impartiality under section 24(1)(a) of the Arbitration Act. It held that a fair minded observer would conclude that the business relationship between the arbitrator, his law firm and the defendant parties gave rise to a real possibility that the arbitrator would be disposed to favor the defendants in the dispute in order to foster and maintain the financially beneficial business relationship with himself, his firm and his father. The Court also found that the arbitrator's actions reinforced a fair minded observer's doubts as to his impartiality. The arbitrator in denying the objections to his impartiality had erroneously asserted that it was for claimants' due diligence to identify any connections he might have had with the defendants and not for him to volunteer those circumstances.

The Court further found that it was possible that the defendants had been advised by the arbitrator, or his father and his law firm, about the terms and effect of the arbitration clause. If so, a situation was presented where the arbitrator had given legal advice on the dispute to a party or an affiliate of one of the parties and/or where the arbitrator had previous involvement in the case, both of which are included in the "Red List" of conflicts under the International Bar Association Guidelines.

The Court appears to have been persuaded that the arbitrator's own conduct during the arbitral proceedings by itself was sufficient to raise justifiable doubts about his impartiality. The Court found that only in exceptional circumstances should an arbitrator refuse to give effect to the parties' request that the tribunal postpone its award until after a court challenge to jurisdiction to make the award. The Court also commented on the tone and content of the arbitrator's communications with the parties and the Court once questions had been lodged as to his impartiality and jurisdiction. While an arbitrator is entitled to respond to

an application for his removal and to put forward his evidence, in doing so he must not appear to take sides and must show that he would still be able to judge the dispute before him impartially. The Court concluded that here the arbitrator advanced arguments on the merits in support of the defendants that they had not advanced for themselves, and he questioned the claimant's good faith in bringing the application. He clearly had become so personally embroiled in the objections to his impartiality and jurisdiction to raise doubt as to his continuing ability to be objective.

The Court further found that these circumstances were by themselves sufficient to give rise to justifiable doubts about the arbitrator's impartiality, and the claimant's right to object would only be lost if section 73 of the Act were satisfied as to each set of facts. In this regard, the Court found that claimants had not taken part in the arbitration proceedings without voicing relevant objections promptly after the occurrence of the particular circumstances surrounding the arbitrator's conduct of the proceedings, and thus claimant had not lost its right to object on those grounds. The Court also found that claimants had not lost the right to object in respect of the arbitrator's past commercial dealings with the defendants, as claimants had not taken part in the proceedings at any relevant time without raising a timely objection. The Court held that the agreement to "freeze" the arbitration proceedings and claimants' alleged inactivity in response to the other side's revival of the arbitration process could not amount to taking part. The Court also found that requests or agreements to adjourn a procedural hearing would not standing alone amount to taking part although they might amount to continuing to take part where the party had already agreed to or invoked the tribunal's jurisdiction. Likewise an indication that a party would be appointing its own arbitrator would not amount to taking part and could not amount to invoking the jurisdiction of a tribunal where the party had not yet recognized the tribunal as being properly constituted. The Court further found that it was not necessary to undertake an analysis of the state of claimants' actual or constructive knowledge of the connections between the arbitrator and the other defendants where, as here, the arbitrator had failed to meet a clear obligation to disclose those relationships.

While this decision did come out well for the claimants, the particular facts of this case may have led to that conclusion. Thus it remains advisable for a party to raise any objections promptly as soon as it discovers grounds for doing so, as in other circumstances not quite so egregious a party may lose its right to object under section 73 of the Arbitration Act if it takes part or continues to take part in proceedings when it could with reasonable diligence have earlier discovered the grounds for objection.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author below.

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