High Court removes arbitrator over doubts as to impartiality

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Introduction

Once appointed, an arbitral tribunal will generally retain its authority to determine a dispute until it has issued a final award and has no further duties. The tribunal's authority may come to an end before then if the parties agree to revoke it or if the arbitrators resign of their own volition. In the absence of the other parties' or the tribunal's agreement, a party can seek the court's help to oust an arbitrator. Section 24 of the Arbitration Act 1996, which applies to arbitrations seated in England and Wales, empowers the court to remove an arbitrator if the applicant can show that substantial injustice is or will be caused to it and if it can make out one of several grounds for the arbitrator's removal. The most significant ground is that there are circumstances giving rise to justifiable doubts as to the arbitrator's impartiality.

The right to challenge an arbitrator can be lost. Pursuant to Section 73 of the act, the applicant must raise an objection forthwith or within such time as is allowed by the arbitration agreement. An objection can no longer be raised if the applicant continues to take part in the arbitral proceedings, unless it can show that it did not know and could not with reasonable diligence have discovered the grounds for the objection at the time that it took part in the proceedings.

The High Court decision in *Sierra Fishing Company v Farran* ([2015] EWHC 140 (Comm)) provides guidance on the English courts' approach to determining an application to remove an arbitrator under Section 24 of the act and considers the circumstances in which the right to challenge might be lost under Section 73.

Facts

The three applicants were Sierra Fishing Company (SFC), a Sierra Leonean company involved in the supply of seafood, and two of SFC's affiliates. The three respondents were two lenders – Dr Farran, chairman of a Lebanese bank, and another individual involved in providing financing to SFC – and Ali Zbeeb, a Lebanese lawyer and partner in a law firm which he had founded together with his father.

The dispute arose out of a loan which the two lenders had advanced to one of the applicants in 2011 for the purchase of fishing vessels to be operated by SFC. The loan agreement provided for disputes to be referred to arbitration. When no repayments were made under the loan agreement, the lenders served a request for arbitration in London and appointed Zbeeb as their arbitrator in mid-2012. They invited the applicants to appoint their own arbitrator. When the applicants did not do so, the lenders submitted that Zbeeb should act as sole arbitrator.

During the remainder of 2012 and in 2013, the parties conducted settlement negotiations and suspended the arbitration on a number of occasions. Zbeeb was involved in the drafting of a first settlement agreement, which provided that some of the shares in SFC should be transferred to the lenders in satisfaction of the debt. However, neither this nor subsequent settlement agreements were performed.

The arbitration was revived and the lenders filed their statement of claim in mid-2014. Rather than seeking monetary relief pursuant to the initial loan agreement, the lenders based their claim on the settlement agreements and sought to have the shares in SFC transferred to them.

The applicants registered an objection against Zbeeb and requested that he step down as arbitrator, arguing that he had never been properly appointed as a sole arbitrator and that he had no jurisdiction over agreements which post-dated his appointment. They also expressed doubts as to his impartiality because of an alleged relationship between Farran and Zbeeb's father, whom Farran had retained as legal counsel.

Zbeeb refused to resign. He claimed that:

- he had been validly appointed as sole arbitrator;
- it was incumbent on the parties to ascertain whether circumstances existed that gave rise to doubts as to his impartiality; and
- any right to object to his appointment had in any event been lost by reason of Section 73 of the act.

The applicants applied to the High Court pursuant to Section 24 of the act to have Zbeeb removed.

Decision

Finding in favour of the applicants, the court ordered Zbeeb's removal.

The court identified two issues for determination:

- Were there circumstances giving rise to justifiable doubts as to Zbeeb's impartiality pursuant to Section 24 of the act?
- If so, did the applicants take part or continue to take part in the arbitration proceedings without raising their objection to Zbeeb forthwith, at a time when they knew or could with reasonable diligence have discovered the existence of such circumstances for the purposes of Section 73?

***Were there circumstances giving rise to justifiable doubts as to Zbeeb's impartiality*?**
The court confirmed that Section 24 of the act reflects the common law test for apparent bias, which was whether the fair-minded and informed observer – having considered the facts – would conclude that there was a real possibility that the tribunal was biased. The court found that three sets of circumstances relied on by the applicants gave rise to such apparent bias.

First, there was the legal and business connection between Farran and Zbeeb. Zbeeb was engaged by Farran's bank as legal counsel at a time when Farran was, as now, chairman of the bank. Zbeeb's father and a co-partner in his law firm had acted and continued to act as retained legal counsel to Farran and the bank. The court had little hesitation in concluding that these connections would give rise to justifiable doubts as to Zbeeb's ability to act impartially in a dispute to which Farran was a party. In reaching its conclusion, the court derived assistance from the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, which provide illustrations of what the international arbitral community considers to be cases of conflicts of interest or apparent bias. The IBA guidelines recognise the arbitrator's duty to disclose connections to the parties which might justify doubts as to his or her impartiality. Zbeeb's assertion that it was not incumbent on him "to perform the due diligence homework" of the parties amounted to an erroneous denial of his duty of disclosure – an attitude which would reinforce a fair-minded observer's doubts as to Zbeeb's impartiality.

The second set of circumstances relied on was Zbeeb's involvement in assisting the lenders in the settlement negotiations and his drafting of the first settlement agreement. On the assumption that the applicants and the lenders had jointly instructed Zbeeb to draft the settlement documentation, there would be no apparent bias if the dispute were confined to the parties' rights and obligations under the original loan agreement. However, the situation changed when the lenders presented their statement of claim and relied on the settlement documentation drafted by Zbeeb to support a claim for a transfer of the shares in SFC. The lenders also relied on the arbitration clause contained in the settlement documentation as conferring jurisdiction on Zbeeb. The court concluded that there would be a real possibility, in the mind of the fair-minded observer, that Zbeeb would wish to decide the jurisdiction issue in favour of the lenders whom he and/or his father had been advising at the time. Moreover, the situation potentially fell within one of the conflicts of interest described in the IBA guidelines.

Finally, the judge found that aspects of Zbeeb's conduct of the arbitration justified doubts as to his impartiality. Zbeeb refused to postpone publication of his award pending the outcome of the Section 24 application for his removal. Zbeeb's correspondence was argumentative in style and advanced points against the applicants which had not been put forward by the lenders and to which the applicants had not been given an opportunity to respond. While Zbeeb was entitled to put before the court his view as to why he should not be removed when responding to the Section 24 application, the arbitrator had to be careful not to appear to take sides. Zbeeb had failed to do this and instead gave the appearance of having taken up the battle on behalf of the lenders.

Had the applicants lost their right of challenge?
The court held that each of the three sets of circumstances identified was sufficient on its own to give rise to justifiable doubts as to Zbeeb's impartiality. It was therefore necessary to consider separately whether the right to rely on each set had been lost.

As to the connections between Zbeeb and Farran, the judge found that the first time that the applicants had raised any relevant objection to Zbeeb's impartiality was in mid-2014. The next question was whether the applicants had taken part in the proceedings before raising their objection. The court confirmed that a party does not take part in an arbitration for the purposes of Section 73 unless and until it invokes the tribunal's jurisdiction to determine its own jurisdiction over the merits of the dispute. Since Zbeeb's appointment in mid-2012, the applicants had agreed to put the arbitral process on hold on a number of occasions. They had remained silent in the face of a revival of the process by the lenders and had initially indicated that they would appoint their own arbitrator before refusing to do so. The court found that none of this activity or inactivity amounted to taking part in the

proceedings pursuant to Section 73. It was therefore unnecessary to determine whether the applicants had actual or constructive knowledge of the connections between Zbeeb and Farran at the time.

As for Zbeeb's role in advising the lenders on the settlement agreement, the court found that the applicants had raised their objection as soon as such conduct could justify doubts as to his impartiality. This did not occur until the lenders filed their statement of claim in mid-2014 and made clear that they relied on the settlement documentation rather than the original loan agreement for the substantive relief claimed and for Zbeeb's jurisdiction to grant such relief.

Finally, with respect to Zbeeb's communications with the parties and the court, the court found that there could be no question of the applicants' having lost their right to object. These were continuing circumstances giving rise to justifiable doubts as to Zbeeb's impartiality, which in large part had occurred after the applicants had advanced their request that Zbeeb stand down.

Comment

The decision makes clear that it is for the arbitrator to disclose circumstances giving rise to doubts as to his or her impartiality. The IBA guidelines provide useful guidance in this regard. However, the parties should also remain vigilant as to potential conflicts of interest and consider how best to deal with them as part of their overall case strategy. For example, if the parties knew or could with reasonable diligence have discovered the conflict, they may wish to raise it immediately so as not to lose the right to object. Depending on the particular circumstances of the case, an early disclosure or objection might also prevent the award from being set aside on the grounds of partiality after the conclusion of the arbitration.

When drafting arbitration clauses, parties should consider whether to include institutional arbitration rules – such as those of the International Chamber of Commerce or the LCIA – which render an arbitrator's appointment subject to the approval of the arbitral institution. The applicants and the lenders did not agree for any of these sets of rules to apply to their arbitration. Had they done so, this may have helped to safeguard the tribunal's independence and impartiality – provided that relevant disclosures of the pre-existing connections between the arbitrator and the party concerned had been made before his appointment.

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