

ENGLISH HIGH COURT REMOVES ARBITRATOR ON THE GROUNDS OF JUSTIFIABLE DOUBTS AS TO HIS IMPARTIALITY

Sierra Fishing Company & Ors v Hasan Said Farran & Ors [2015] EWHC 140 (Comm)

Introduction

In a decision handed down on 30 January 2015 in *Sierra Fishing Company & Ors v Hasan Said Farran & Ors* [2015] EWHC 140 (Comm), the English High Court of Justice granted an application for the removal of an arbitrator on the grounds that circumstances existed which gave rise to justifiable doubts as to his impartiality.

Legal Principles

Under Section 24(1)(a) of the Arbitration Act 1996, a party to arbitral proceedings in England & Wales may apply to the court to remove an arbitrator on the grounds that circumstances exist that give rise to justifiable doubts as to the impartiality of that arbitrator.

In English law, the courts, when considering applications based on the bias of the tribunal, apply the common law test of whether “the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”.

Background

The applicants and the first and second respondents (“the Respondents”) were parties to a loan agreement containing an arbitration clause. When the applicants failed to make repayments, the first and second respondents appointed the third respondent as an arbitrator (“the Arbitrator”).

The parties suspended the arbitral proceedings and subsequently entered into agreements for the repayment of the loan, including an agreement for the transfer of shares in satisfaction of the debt. The Arbitrator gave advice to the first and second respondents on the terms of that agreement and assisted in drafting it.

Upon the restarting of the arbitral proceedings, the applicants filed an application to remove the Arbitrator on the grounds that he could no longer be impartial. The Arbitrator had been employed by a bank of which the first respondent was chief executive and for which the Arbitrator’s father still worked, the Arbitrator’s father had previously represented the first respondent, and the Arbitrator had a pecuniary interest in his father’s law firm. The Arbitrator rejected the challenge to his impartiality and repeatedly communicated his reasons for so doing to the court.

Decision

The court granted the application and removed the Arbitrator from the arbitral proceedings.

The circumstances surrounding the Arbitrator's close commercial and personal connections to the Respondents would lead the fair-minded observer to conclude that there was a real possibility of bias on the part of the Arbitrator.

In reaching this conclusion, the court also drew support from a number of other factors, including:

- (a) the circumstances surrounding the Arbitrator's close connections to the Respondents clearly fell within the IBA Guidelines on Conflicts of Interest in International Arbitration's "non-waivable red list" of situations that give rise to justifiable concerns over an arbitrator's impartiality;
- (b) the Arbitrator had failed in his duty to disclose the connections;
- (c) the Respondents were relying on the settlement documents drafted by the Arbitrator;
- (d) despite being asked to postpone the publishing of the final award by both parties, the Arbitrator had refused to do so;
- (e) in his communications with the court, the Arbitrator had advanced arguments on behalf of the first and second respondents which they had not themselves put forward, and had used language indicative of bias towards the Respondents.

These were all serious matters each of which individually was capable of giving rise to serious concerns over the Arbitrator's impartiality.

The court also considered the Respondents' objections to the application pursuant to Section 73 of the English Arbitration Act 1996 on the grounds that the applicants had lost the right to rely on these circumstances by having previously taken part in the arbitration without objection to the Arbitrator. The court rejected these objections holding that neither the decision to suspend the arbitral proceedings nor the decision to restart them could amount to an unequivocal act of "taking part" in the proceedings.

Concluding Remarks

The decision highlights that all parties to arbitration proceedings must have regard to the provisions of national procedural law and international legal guidelines concerning the appointment of arbitrators that are free from conflicts of interest.

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