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Why Are We Still Not Done With The Rule In Browne v Dunn?

Sapna Jhangiani (Clyde & Co Clasis Singapore Pte Ltd) and Gerald Leong (Herbert Smith Freehills) · Monday, September 9th, 2019 · Clyde & Co.

It is often said that flexibility is a cornerstone of international arbitration and that the tribunal (typically in consultation with the parties) is the master of how the proceedings are to be conducted. Yet, it remains unsettled whether certain specific rules of procedure or evidence must be complied with in arbitration – sometimes, at the risk of an award being set aside for non-compliance.

One such example is the following common law rule of evidence first formulated in 1894 by the English Court of Appeal in *Browne v Dunn*:

> *"where it is intended to suggest that a witness is not speaking the truth on a particular point, [counsel is] to direct [the witness'] attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit".* (Browne v Dunn [1894] 6 R 57 at 70 to 71)

In other words, it is only fair to witnesses that if their evidence is to be disbelieved, they must be given a fair opportunity to deal with the allegation.[1)] This has come to be known as the rule in *Browne v Dunn*. On a strict application of *Browne v Dunn*, a party can be deemed to have accepted as truthful the evidence of a witness which it has not challenged.

The English decision in *P v D*

Counsel may sometimes overlook this discrete English rule of evidence, which could have grave consequences. In fact, the English courts recently set aside an arbitration award for non-compliance with the rule in *Browne v Dunn*. In *P v D* [2019] EWHC 1277 (Comm), company D claimed for sums which it had loaned to company P. P claimed that the sums were not due as its Mr E and D's principal, Mr D, had orally agreed to extend the loan repayment date to January 2020.

In his witness statement, Mr E set out the background to the August 2015 meeting where the extension was orally agreed. Mr D's witness statement made no mention of the circumstances of the meeting and only contained a bare denial of the oral agreement. Both Mr E and Mr D attended and were cross-examined at the hearing. However, D's counsel did not directly cross-examine Mr E on the August 2015 meeting, save for one passing reference. (*P v D* at [16]) D failed to cross-examine Mr E on the crucial August 2015 meeting despite the presiding arbitrator reminding D's Counsel that he had yet to cover "*the core issue*".[2)]

In its award, the tribunal ruled that P had failed to prove that repayment of the loan was extended to January 2020. Having found that Mr D was a thoroughly unhelpful witness, the tribunal focused on Mr E's testimony. (*P v D* at [19]) However, they attached particular importance to one part of Mr E's testimony in which he said that the extension was part of a restructuring package, which in the tribunal's view meant that D could not have granted an outright extension. (*P v D* at [24])

P successfully applied to the High Court of England and Wales to challenge the award for serious irregularity under Section 68 of the English Arbitration Act ("**EAA**"). Specifically, P claimed that the arbitrators breached their duties under Section 33 of the EAA to "*act fairly and impartially*" and to give "*each party a reasonable opportunity of putting his case and dealing with that of his opponent*". The Court found, based on D's pleadings and the very brief reference to the August 2015 meeting in Mr E's cross-examination, that D was not deemed to have accepted the truth of Mr E's testimony as to what happened at the meeting. (*P v D* at [34]) Nevertheless, the Court found that there had been a breach of the rule in *Browne v Dunn,* and a breach of natural justice, given that serious imputations to the witness' integrity were being made in relation to a core issue, and he had not been given an opportunity to deal with the allegations. (*P v D* at [34])

Does the rule in *Browne v Dunn* actually apply in international arbitration?

What was perhaps most surprising about *P v D* was that the Court did not actually consider whether the rule in *Browne v Dunn* applied in international arbitration (or this point was not argued before it). It appears that the parties and the Court assumed that it did. In our view, there are strong arguments that the rule does not apply in international arbitration.

In the context of English-seated arbitrations, Sections 34(1) and 34(2)(f) of the EAA provide that, subject to the parties' agreement, the tribunal shall decide all procedural and evidential matters, including whether to apply strict rules of evidence. In other words, the rule in *Browne v Dunn* does not apply unless the tribunal decide to apply it or the parties agree to. This section was born out of the belief that difficult evidential doctrines need not concern an arbitral tribunal.[3)]

There are similar, if not stronger, arguments in Model Law jurisdictions including Singapore and Hong Kong.[4)] Article 19 of the Model Law specifically empowers the tribunal to conduct the arbitration in such manner as it considers appropriate, including the power to determine the admissibility, relevance, materiality and weight of any evidence. In Singapore's case, Parliament deliberately precluded most parts of the Evidence Act from applying to proceedings before an arbitrator. (S 2(1) of the Evidence Act) While the rule in *Browne v Dunn* is not specifically contained in the Evidence Act, it reflects a broader wish by the Singapore government to avoid national laws shackling parties' quest for a commercial and practical outcome to their dispute in

arbitration, and to preclude the application of laws and procedures with which they may not be familiar.[5)]

The statutory positions above are consistent with the prevailing view in practice that the rule in *Browne v Dunn* does not apply in arbitration.[6)] In addition, the rules of some of the major arbitral institutions make it clear that strict rules of evidence do not apply by default. For example, the current version of Article 22.1 (vi) of the LCIA Rules specifies that a tribunal has the power to decide whether or not to apply any strict rules of evidence, but only after giving the parties a reasonable opportunity to state their views on the issue. Rule 19.2 of the SIAC Rules goes one step further – the tribunal is not required to apply the rules of evidence of any applicable law in making such determination.

Should we be done with the rule in *Browne v Dunn*?

The question of whether the rule in *Browne v Dunn* applies is more than theoretical. As shown by *P v D*, the rule is often assumed to apply in common law jurisdictions. The authors are aware of instances where tribunals have specifically excluded the rule in *Browne v Dunn*, suggesting an underlying assumption that it does – or at least may – apply, if not excluded. We suggest that tribunals and parties have a thoughtful discussion at the first case management conference to decide and make clear whether or not the rule should apply to that arbitration, and if so, to what extent. Even if the rule in *Browne v Dunn* is applied, the authors suggest that it may be applied with some flexibility, thereby avoiding repeated questions to witnesses by counsel along the lines of "I put it to you that you are lying!".

There are arguments for and against applying the rule in *Browne v Dunn* in arbitration. It can be argued that the rule is a principle of procedural fairness and natural justice and therefore must be abided with in order that the arbitration is conducted with utmost propriety. This appears to be the reasoning of the Court in *P v D*. (*P v D* at [29], [30] and [31]).

On the other hand, there are serious arguments that the rule is outmoded. It was conceived 125 years ago, at a time when witnesses only gave evidence orally on the stand. Today, the modern commercial dispute typically involves a wealth of documents and correspondence and witnesses usually tender witness statements (including a reply witness statement) in advance of the hearing. Therefore, it would be plain to all involved where the main points of challenge are even when they are not put to a witness, and both parties would have an opportunity to explain any contradictions even before the hearing begins. If a tribunal considers that fairness demands that a witness should be given an opportunity in oral evidence to address a specific point which is challenged in opposing party's evidence, then the tribunal may ask the witness to address it, whether or not opposing counsel elect to cross-examine the witness on that point.

Further, the rule in *Browne v Dunn* may not be suitable in international arbitration, especially when the parties come from different legal backgrounds and cultures. As observed by the Singapore court in one of its decisions: "*To a businessman from a civil law country, concepts like the parol evidence rule, the hearsay rule, common law discovery or the rule in Browne v Dunn (1893) 6 R 67 do not make much sense*". (*BQP v BQQ* [2018] 4 SLR 1364 at [126]) It is for this reason that the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**") were conceived. The application of the IBA Rules does not trump mandatory national rules of evidence.

However, as discussed above, most jurisdictions do not mandate the type of evidential rules that must apply to arbitration. As the IBA Rules represent a balanced compromise between the notions of evidence and procedure from the major legal traditions, it has become widely accepted in practice, and stakeholders in arbitration are far more likely to be familiar with the IBA Rules than anachronistic evidential rules.

Conclusion

The recent decision in *P v D* is a timely reminder that one must critically consider whether the rule in *Browne v Dunn* should apply in arbitration – whether by assumption, agreement, or the tribunal's direction after consulting with the parties. We believe there is little or no place for it in arbitration. In other words, we are finally done with the rule in *Browne v Dunn* – or we ought to be.

References

?1 *Markem Corp v Zipher Ltd* [2005] RPC 31 at [56].

?2 The brief exchange between Mr E and counsel is quoted at [15] of the *P v D* judgment.

?3 Sutton *et. al.*, *Russell on Arbitration* (24th ed, 2015) at [4-082].

?4 At last count, the Model Law has been adopted by 75 jurisdictions.

?5 *BQP v BQQ* [2018] 4 SLR 1364 at [126].

?6 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* at page 917, fn 99 ("The rule [in *Browne v Dunn*] itself does not apply in arbitration…").

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