Kluwer Arbitration Blog

Failure To Appear At A Hearing – A Risky Tactic?

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An English court recently ruled on important questions relating to arbitration due process. In *Interprods Ltd v De La Rue International Ltd*, [2014] EWHC 68 (Comm), the Queen's Bench Division of the High Court dismissed an application to annul an arbitral award rendered by a sole arbitrator sitting in London. The circumstances that gave rise to the challenge included the applicant's failure to attend a procedural conference-call and the evidentiary hearing that were held in this case.

Non-attendance is often feared by arbitrating parties on the basis that it may allegedly jeopardise the enforcement of the award. From an arbitrator's point of view, the absence of a party at a hearing may impact on her/his role at the hearing. In particular, it has been argued that the tribunal should go as far as stepping into the shoes of the absent party in respect of testing the present party's evidence. Yet arbitrators are bound by their duty to act fairly and impartially and the absence of a party at a hearing does certainly not justify a departure from that sacrosanct obligation. The question is therefore how the tribunal's duty to act fairly should be discharged in circumstances where one party is absent.

By way of background, the dispute related to an agency agreement ("Agreement") under which Interprods Ltd ("Interprods") had been acting as an agent and distributor for the bank note supplier De La Rue International Ltd ("De La Rue") in Nigeria. De La Rue terminated the Agreement on the basis of an alleged representation by Interprods that commission paid by De La Rue to Interprods would be used to bribe the Nigerian authorities. De La Rue thereafter commenced LCIA arbitration against Interprods with a view to obtaining a declaration that it was entitled to terminate the Agreement on that basis and that outstanding commission under the Agreement was no longer due. After hearing the parties' respective submissions on bifurcation, the Arbitrator ordered that two issues be determined as preliminary issues. Following two consecutive adjournments of the evidentiary hearing on the preliminary issues, both of which were sought by Interprods, De La Rue suggested that a conference-call be held for the purpose of fixing the hearing. The Arbitrator suggested two dates for the conference-call and enquired about parties' availability on these dates. Despite Interprods' alleged inability to participate in the conference-call on either of the suggested dates, the procedural conference-call took place without any participation by or on behalf of Interprods. During that conference-call the Arbitrator provided two dates for the evidentiary hearing from which Interprods was able to choose, with a default date in case Interprods failed to make a choice. Interprods complained about the Arbitrator's decision and attempted to have him removed. The Arbitrator's challenge was dismissed by the LCIA Court and the evidentiary hearing

went ahead before the Arbitrator. Interprods submitted an unsigned and undated witness statement from its CEO on the eve of the hearing and did not appear at the hearing without giving any reasons. Around two months after the evidentiary hearing, the Arbitrator rendered a partial award in relation to the two preliminary issues in favour of De La Rue.

Amongst other grounds relied upon for the annulment application, Interprods invoked three serious irregularities within the meaning of Section 68 of the Arbitration Act 1996. Two of these alleged serious irregularities related to the fixing and holding of hearings and conduct thereof in the absence of one party. Interprods submitted that the Arbitrator had made a procedural irregularity by holding the conference-call in circumstances where Introprods had advised him that it would not be able to attend such conference-call and/or by conducting the evidentiary hearing in the manner he did. More specifically, it was argued that the Arbitrator should have asked De La Rue's witnesses "significant questions", that he had accepted their evidence uncritically and that he should have taken into account the unsigned and undated witness statement of Interprods' absent witness. The Court ruled that none of these actions or failures amounted to a serious irregularity.

In relation to the Arbitrator's decision to go ahead with the conference-call, the Court considered whether this decision was reasonable in light of the circumstances of the case. Relevant factors included the previous adjournments of the evidentiary hearing, the purpose of the conference-call which was purely procedural and "simple", and Interprods apparent ability to have someone attend the conference-call or instruct lawyers to attend the conference-call on its behalf. In this regard, it should be noted that, in the case of both the conference-call and the evidentiary hearing, the reasons (or lack thereof) provided by Interprods for not attending were of particular importance. This is in line with the position under the UNCITRAL Rules which provide at Article 30.2 that "*[i]f a party, duly notified under these Rules, fails to appear at a hearing,* ***without showing sufficient cause for such failure****, the arbitral tribunal may proceed with the arbitration*" [emphasis added].

In respect of the conduct of the evidentiary hearing, the Court agreed with the Arbitrator's approach towards the examination of De La Rue's witnesses. As they would not be cross-examined, the Arbitrator had asked Counsel for De La Rue to lead them through some of their testimony. After what was effectively an examination in chief, the Arbitrator asked one question to De La Rue's first witness and none to De La Rue's second witness. To this point, the Court answered that whether, in the absence of the other party, an arbitrator must put points to a witness, depends on all the circumstances and that it cannot not be said that an Arbitrator must always do so.

In terms of the Arbitrator's decision on the merits based on the evidence before him, the Court was also satisfied that by expressly discussing whether the participating party's witness evidence was credible, the Arbitrator did not accept it uncritically. Further, the Court indicated that whilst the Arbitrator could have addressed the statement of Interprods' CEO in his award, he was not under the obligation to do so, in light of Interprods' non-appearance at the hearing and the fact that the statement was undated and unsigned. On this question, no reference is made in the judgment to the issue of whether the presence of Interprods' witness had been requested by De La Rue or the Arbitrator. Although the unsigned and undated statement had been submitted on the eve of the evidentiary hearing, assuming that Counsel for De La Rue had received a copy of the statement prior to the hearing, Counsel for De La Rue might have requested that Interprods' witness be available at the hearing for cross-examination. In this hypothetical scenario, Article 4.7 of the IBA Rules on the Taking of Evidence in International Arbitration may have been of assistance. This

provision – not mentioned in the judgment – addresses this eventuality in mandatory terms. It provides that "*[i]f a witness whose **appearance has been requested** […] fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal **shall** disregard any Witness Statement related to that Evidentiary Hearing by that witness in exceptional circumstances, the Arbitral Tribunal decides otherwise*" [emphasis added].

In conclusion, the decision in *Interprods Ltd v De La Rue International Ltd* seems helpful whether it is looked at from the perspective of a party, arbitrator or counsel.

In particular, the Court's ultimate decision to uphold the award should provide reassurances to arbitration users as to the certainty and integrity of the arbitral process. A party's strategic decision not to appear may be a vestige of the view that arbitrators do not have as much 'teeth' as national courts do when it comes to enforcing the rule of law and procedural rules in particular. In this regard, the Court's decision would appear to fall within a general tendency for arbitral tribunals to demonstrate an increasingly robust attitude towards recalcitrant or delaying parties, and for national courts to support such an attitude.

Further, by circumscribing arbitrators' duties in the event of non-appearance of a party, the Court examined the principle of procedural fairness in its essence. Fairness of course must be assessed from the perspective of both the absent party and the participating party. However, in order to be seen as fair to the absent party, arbitrators may be tempted to do more than what is reasonable and as a result be unfair to the participating party. From that point of view, the decision provides useful guidance to arbitrators regarding the fine line between being robust and unfair.

Finally, the Court's decision will be useful to counsel for the purpose of inviting a tribunal faced with an absent party to act in a way which would make the resulting award enforceable and challenge-proof. It may also come in handy to counsel advising their clients on the implications of non-appearance and other risky tactics…

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