Kluwer Arbitration Blog

“Who will rid me of this turbulent arbitrator?” Applications to Remove Arbitrators under English Law – Part 2: Procedural Impropriety and Loss of the Right to Object

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Introduction

As noted in Part 1 of this two-part series, the ability to select an arbitrator is widely considered one of the most valuable characteristics of international arbitration.

While Part 1 focused on removal of arbitrators for apparent bias, this Part 2 focuses on the parties' ability to remove an arbitrator if he/she proves unable, or unwilling, to conduct the proceedings properly. It also includes some brief practice notes as to how to avoid losing the right to object to the arbitrator pursuant to section 73 of the Arbitration Act 1996 (the Act).

When can an arbitrator be removed for procedural impropriety?

<u>The test under section 24(1)(d)(i)</u>

Section 24(1)(d)(i) provides that a party may apply to court to remove an arbitrator on the ground “*that he has refused or failed…properly to conduct the proceedings…and that substantial injustice has been or will be caused to the applicant.*”

There is little authority as to the exact test to be applied. In *The Petro Ranger* [2001] 2 Lloyd's Rep. 348, Cresswell J held that “*careful regard*” should be had to paragraphs 105-106 of the Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law (the DAC Report) “*before any application is issued under s.24*”. In material part, those paragraphs provide as follows (emphasis added):

“[Section 24(1)(d)(i)] *should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the Court to substitute its own view as to how the arbitral proceedings should be conducted. Thus the choice by an arbitrator of a particular procedure, unless it breaches the duty laid on arbitrators by* [section] *33, should on no view justify the removal of an arbitrator, even if the Court would not itself have adopted that procedure.* <u>*In short, this ground only exists to cover what we hope will be the very rare case where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration as stated in the* [Act], *he is in effect frustrating that object.*</u>”

The additional requirement under section 24(1)(d)(i) to demonstrate "*substantial injustice*" (part of the section 68 test) represents a significant hurdle:

- In *Norbrook Laboratories v Tank* [2006] 2 Lloyd's Rep 485, the court held that no substantial injustice resulted from the arbitrator's unilateral phone calls with the parties, even where those calls were not wholly confined to administrative matters.
- Even if substantial injustice can be shown, a removal application under section 24(1)(d)(i) might still fail: see *Brake v Patley Wood Farm LLP* [2014] EWHC 1439 (Ch) at [166] per Tim Kerr QC: "*Even if I had found any substance in the challenges under section 68, I would have had to consider carefully whether to remit the relevant matters back to Mr Lee rather than removing him. Removal of an arbitrator is an extreme step and is only likely to occur in the rarest of cases.*"

Successful removals under section 24(1)(d)(i)

It follows that removals on grounds of procedural impropriety are very rare. Only in the most egregious cases have applications to remove an arbitrator been granted on this ground:

- In *Norbrook*, the arbitrator was ultimately removed on the basis that had unilaterally contacted witnesses and had failed to keep or disclose a record of what had been said.
- In *Wicketts v Brine Builders* [2001] CILL 1805, the arbitrator was removed on the basis that he had: (a) made a peremptory order without having the power to do so; (b) interfered inappropriately in the parties' settlement negotiations; and (c) made an order requiring both parties to give security for 100% of his anticipated fees, despite no application having been made for such an order and without reference to any evidence as to its necessity.

Enterprise v U-Drive

The case of *Enterprise v U-Drive* [2016] EWHC 1301 (QB) (considered in Part 1 in the context of allegations of bias) is a recent example of the reluctance to remove arbitrators under section 24(1)(d)(i).

Enterprise's application under section 24(1)(d)(i) was brought on the basis that he had acted contrary to his own orders, specifically:

- by refusing to dismiss U-Drive's claim, despite his previous direction to the effect that if it did not comply with a peremptory order "*the tribunal will dismiss the claim*", where U-Drive was seven days late in complying with that order; and
- by retrospectively extending time for U-Drive to comply with that order, despite having previously ruled that there would "*be no further extension of time for compliance*".

HHJ Moulder QC refused the application, holding that the tribunal had not acted contrary to his own orders, on the following bases:

- The arbitrator's statement that he "*will dismiss* [U-Drive's] *claim*" failing compliance was not self-executing, there being a distinction between the threat of an active future step being taken by the tribunal and the passive, self-executing wording used in "unless orders" in the English court (e.g. that a claim "*will be struck out and judgment entered*").

- A tribunal has full power to regulate proceedings (section 34(1) of the Act) and "*to fix the time within which any directions given by it are to be complied with*" and "*if it thinks fit extend the time so fixed (whether or not it has expired)*" (section 34(3)). The tribunal was therefore at liberty further to extend time despite his earlier direction; moreover, his reasons for doing so (*e.*, that it would represent a further waste of time and cost to force U-Drive retrospectively to apply for an extension) had been recorded expressly in a procedural order.

Loss of the right to object

Whatever the ground for removing an arbitrator, parties must always keep in mind section 73 of the Act. Section 73 provides that a party can lose the right to raise any objection to the arbitrator if it takes part in the proceedings whilst knowing, or whilst it could with reasonable diligence have discovered, the facts giving rise to those grounds, without raising an objection forthwith.

When considering a section n24 application, parties should bear in mind the following touchstones:

1. The application must be made as soon as the applicant is put on notice of circumstances giving rise to grounds for removal.
2. Where possible, therefore, the application should be made pre-award (although it may be difficult to show substantial injustice at that stage).
3. Where matters might, depending on the outcome of further investigations, give rise to an objection, the court may take the view that a party cannot lose the right to object where it is "*not in a position to decide whether there were grounds for objection until* [its] *information gathering was as complete as it was likely to be*" (see *Cofely* at [117]). The better course in these circumstances may be:

- to put the arbitrator on notice at once that circumstances exist which may give rise to an objection pending further investigation;
- to maintain that position pending the outcome of its investigations, ensuring that those investigations proceed expeditiously;
- to take no step in the arbitration process which invokes the arbitrator's jurisdiction – as to which, it was held in *Sierra Fishing v Farran* [2015] 1 All ER (Comm) 560 at [72]-[79] that a party's request to adjourn a procedural hearing, agreement to nominate its own arbitrator and discussion of the terms on which the proceedings would be stayed and recommenced did not lose it the right to object; and
- to raise a formal objection as soon as there is sufficient evidence to do so, or as soon as its investigations are as complete as they are likely to be.

Conclusions and practice notes

When advising parties as to whether they are likely to succeed in removing an arbitrator for failure properly to conduct the proceedings, the starting point must be that only in the most obvious cases of impropriety will such an application succeed.

Where the arbitration is being conducted under institutional rules, a party should seriously consider applying to the institution in the first instance. Not only is this likely to be cheaper than a full-blown application to the High Court, but it also may be more likely to succeed, particularly if the

institution does not consider itself bound by, or does not follow, the English authorities.

Whichever route is chosen, it is essential that parties raise their objections as soon as they are put on notice of circumstances giving rise to grounds for removal. If a party is not sure whether the circumstances are sufficient, it should raise its objection with the tribunal immediately, conduct its investigations expeditiously whilst taking care not to invoke the arbitrator's jurisdiction, and formally raise its objections as soon as it has sufficient evidence to do so.

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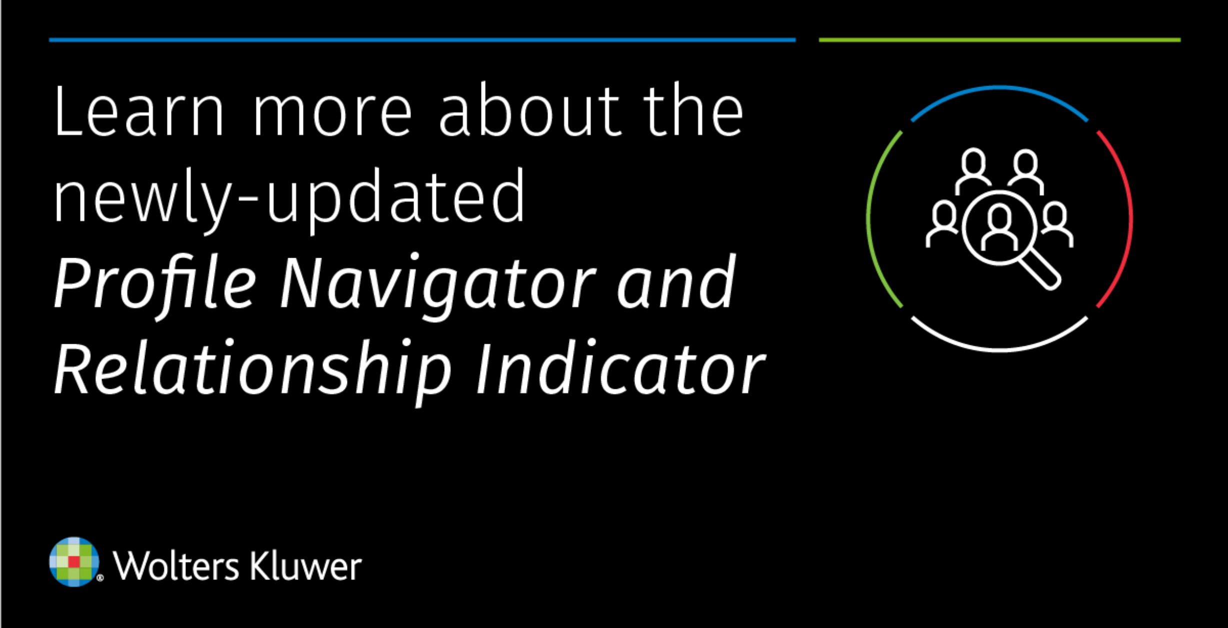

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