# Kluwer Arbitration Blog

## P v Q: A Principled Approach to Disclosure from Arbitrators?

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The English High Court has reinforced its pro-arbitration stance in two recent judgments in the case of *P v Q* [2017] EWHC 148 (Comm.) and [2017] EWHC 194 (Comm.). Much attention has been devoted to the failed application under section 24 of the English Arbitration Act 1996 (the "Act") to remove the arbitral tribunal on the basis of alleged "over-delegation" of their duties to their secretary (see, for example, here). However, this article focuses on the application brought for disclosure of documents passing between the arbitral tribunal and the LCIA secretary. The Court had a relatively carte blanche given the competing approaches put forward by the parties and that, as the judge noted, *"the researches of counsel have not identified any case in which an arbitrator has been ordered to give disclosure in connection with a removal application…"*.

**Background to the case**

The case involved a challenge to the tribunal which arose after the Chairman of an arbitral tribunal inadvertently sending an email to P's legal team intended for the Tribunal Secretary asking for the Tribunal Secretary's reaction to the email. Full details of the background to the case can be found here.

**The disclosure application**

P's challenge, brought under section 24 of the Act, was made with an ancillary application for disclosure of a range of communications between the Tribunal and the Secretary relating to the Secretary's role and tasks delegated to him.

First, P submitted that the relevant principles governing the disclosure application were those found in the English Civil Procedure Rules (the "CPR"), CPR 31.12 i.e. an application for specific disclosure. In other words, as long as the documents sought were relevant (applying the test in CPR 31.6), the Court has discretion to order their disclosure. P's lawyers accepted that the substance of the Tribunal's deliberations would need to be redacted.

Secondly, the co-arbitrators' counsel put forward a different test. The starting point was that a party cannot seek disclosure from a decision maker in the context of a challenge to such a person's impartiality citing the case of *Locabail (UK) Limited v Bayfield Properties Ltd* [2000] QB 451. In addition, Article 30.2 of the 1998 version of the LCIA Rules, which governed the arbitration, also provided protection for the confidential nature of an arbitral tribunal's deliberations. As such, the parties had contracted out of any jurisdiction the Court may have to order disclosure of the documents in issue.

Thirdly, Q submitted that disclosure should only be granted in rare and compelling cases and then only where: (i) there was a strong prima facie case on the merits of the connected section 24 application and (ii) disclosure was strictly necessary for the fair disposal of that application

**The principles to be applied**

Faced with these three competing views, the judge posed three questions:

**1.** Should the Court apply any merits threshold and, if so, what should the threshold be?
**2.** Should the Court apply a heightened test of relevant and, if so, what should the test be?
**3.** How should the Court approach the exercise of its discretion to order disclosure?

As to the first question, the Court noted that in an arbitration context it is not always realistic to expect a respondent to engage a summary procedure for strike-out or dismissal of an application – unlike in High Court litigation. However, the judge. saw no reason to depart from the default position that the Court does not address the merits of a substantive dispute when determining an interim application. The judge explicitly stated that, while he was not opening the door to the filing of evidence on the merits of the substantial disputes in applications such as the present one, the relevance and nature of the material sought could be taken into account by the Court when it exercises its discretion to order disclosure.

On the relevance question, the Court agreed with Q that the documents sought should be strictly necessary for the fair resolution of the section 24 application. The Court was satisfied that an application to remove an arbitrator under section 24 of the Act was an interlocutory application. The judge noted that interlocutory proceedings needed to be conducted in accordance with the overriding objective. If the Court started to award disclosure in support of interim applications then the risk of satellite litigation and increased delay and expense would only rise.

The judge held that the Court was required to resolve disputes arising in an arbitration context without unnecessary delay or expense and with minimal Court-intervention. This further justified a heightened standard of relevance.

Furthermore, the Court equated an application for disclosure from an arbitrator with an application against a non-party in Court proceedings, which also imported a test of necessity. Although a slightly odd comparison, the Court did acknowledge that an arbitrator is in a different position from a non-party on the receiving end of an application for disclosure of certain documents (in English procedure, referred to as a *Norwich Pharmacal* application and often made to enable a party to plead a claim). In particular, the arbitrators need to respond to the application in a way that maintains fairness and impartiality between the parties given the possibility they will maintain an on-going role in the substantive dispute.

Finally, the Court turned to the issue of how to exercise its discretion to order disclosure of the documents. In addition to the default considerations necessitated by the overriding objective – such as time, expense and proportionality – the judge identified a number of other relevant considerations arising from the disclosure application. These were:

**1.** The proceedings were brought under Part 8 of the CPR. Part 8 is an alternative procedure for bringing claims where there is usually no substantial dispute in fact. This was an indicator – though not determinative – that disclosure will normally be inappropriate. Furthermore, the notion of minimal intervention from the Court meant that disclosure in the context of arbitration claims

should only be awarded in exceptional cases.
**2.** If an arbitral institution has been vested by the parties with the power to order the disclosure being sought and declines to do so then the Court should be reluctant to order disclosure.
**3.** An application in support of a strong claim – in this case the section 24 application – may potentially justify disclosure in support even though this could result in the parties incurring additional costs.
**4.** It can only be in the rarest of cases that arbitrators should be required to give disclosure. The *Locabail* case granting immunity to a judge from such disclosure applies equally to members of an arbitral tribunal to allow them the freedom to carry out their functions.

**Commentary**

The Court dismissed the disclosure application. The Court did not accept the argument put forward by the co-arbitrators that the LCIA Rules had excluded in its entirety the Court's jurisdiction to award disclosure. Nonetheless, P had failed to meet the requisite elements of the test – the documents were not strictly necessary to determine the section 24 application, there were no compelling reasons to depart from the *Locabail* principle, and under the parties' agreement in the form of the LCIA Rules that the arbitrator's deliberations should be confidential from the parties. The Court recognised that ordering the disclosure could have wider repercussions for international arbitration. In particular, it could discourage potential arbitrators from serving on tribunals as well as potentially affecting their ability to carry out their adjudicative role properly. The fact that the application was defended by the co-arbitrators' counsel may be seen as indicative of the general feeling of the arbitration market.

The Court was not persuaded by P's arguments that there was a distinction between the substance of deliberations and more procedural communications relating to the role of the Tribunal Secretary or tasks to be delegated to the Tribunal Secretary. However, the judgment does not indicate significant analysis of the question of whether the documents sought actually fell within the meaning of "deliberations" in Article 30.2. It could be suggested that, if the LCIA Rules intended to cover procedural communications, such as those at issue in P v Q, the drafters could have used a phrase like "all communications" or "all documents". The Court did not consider this when relying on the wide scope of the *Locabail* principle such that all communications for the purposes of the process of deliberation and all documents brought into existence for such purpose are immune from disclosure to the parties.

The Court's approach has policy advantages in light of the potential problems that could arise if courts or tribunals had to consider process versus substance arguments each time an application for disclosure was made. However, the approach is not wholly satisfactory given that the protection in Article 30.2 derives from the parties' agreement rather than public policy considerations.

Moreover, the Court proceeded on the basis that the *Locabail* principle applies as much to arbitral tribunals as it does to judges. Judges perform an important public function and their jurisdiction derives in a very different way to that of an arbitral tribunal. Arbitrators "contract in" to the role and, whilst their function is quasi-judicial, the genesis of their jurisdiction is the parties' agreement. It cannot be said that there is a complete overlap in the functions of a judge and an arbitrator. Judges are largely compelled to follow rigid civil procedure rules whereas arbitrators are expected to manage the arbitral process. In this sense, arbitrators have both an adjudicatory function as well as a procedural or administrative function. This, and the private nature of the arbitrator's role, may justify differences in treatment between judges and arbitrators. For example,

whilst section 29 of the Act gives an arbitrator immunity for anything done in the discharge of his function as arbitrator unless he or she is acting in bad faith, in many civil law jurisdictions, legislation relating to judicial liability does not apply to arbitrators who enjoy only qualified immunity (and in some jurisdictions, no immunity), and can be held liable for breaches of contract in relation to the discharge of their duties. It therefore did not necessarily need to follow that *Locabail* would apply to arbitral tribunals or apply so widely. Disclosure of the arbitrator's documents would likely have probative value in the context of any claim against the arbitrator.

The principles adopted by the Court are largely to be welcomed as respecting the principle of party autonomy. However, the Court's reasoning begs the question as to whether parties engaging in ad hoc arbitrations are at a disadvantage when it comes to such applications on the basis that there may be no party agreement on the confidentiality of deliberations. Although it is just one factor to be taken account by the Court when exercising is discretion – and would unlikely on its own change the outcome – more guidance would be welcome.

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