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Tui v Griffiths: The Importance of Putting Your Case to Witnesses and Experts in Cross-Examination

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The UK Supreme Court ("UKSC") in *Tui UK Ltd v. Griffiths* [2023] UKSC 48 recently considered the question whether a party must challenge a witness and expert evidence in cross-examination if it wants to have that evidence discredited or disregarded. The Supreme Court affirmed the rule in *Browne v Dunn* that a party must "put" its case on a particular point to a witness who has given contrary evidence so that the witness has an opportunity to "deal" with it. A party who fails to do this will be deemed to have accepted as truthful witness evidence, and unable to challenge it.

The rule has been accepted in England (*Browne v. Dunn* (1893) 6 R. 67, H.L), Canada (*R v. Quansah*, 2015 ONCA 237, and Australia (*Allied Pastoral Holdings Pty Ltd v. Federal Commissioner of Taxation* (1983) 44 ALR 607). However, most civil law practitioners, as well as U.S. practitioners, would not accept the notion that a witness must be cross-examined for his testimony to be challenged. The UKSC in *Tui* has now confirmed that the rule applies "in the adversarial system of litigation and arbitration in English law." The decision has important implications for arbitration.

This article considers, in light of *Tui*, the scope of application of the rule in *Browne v Dunn* in international arbitration.

What Is the Rule in Browne v Dunn?

The rule in *Browne v Dunn* is a long-standing English law rule of evidence: if counsel intends to rely on a version of events contradictory to a witness's testimony then counsel must put that version of events to the witness on cross-examination. If unchallenged, the witness's evidence will be accepted.

The Supreme Court in *Tui* approved the following explanation of the rule in *Phipson on Evidence*:

"In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases …"

The rule is intended to stop parties from failing to engage with key disputed issues and to ensure that the witnesses are given the opportunity to explain any inconsistencies in their evidence before

it is rejected. In this sense, the rule is directed towards enhancing the quality and reliability of evidence before a tribunal.

The UKSC in *Tui* explained that the rule in *Browne v Dunn* is "directed to the integrity of the court process itself." Its rationale is to "preserve the fairness of the trial" which includes (a) "fairness to the witness [or expert] whose evidence is being impugned"; and (b) "enabling the judge to make a proper assessment of all the evidence to achieve justice in the case." The UKSC acknowledged that the "rule should not be applied rigidly." Instead, its application "depends upon the circumstances of the case as the criterion is the overall fairness of the trial."

Importantly for arbitral proceedings, which generally operate on a chess-clock system, the UKSC acknowledged that where the judge has "set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule." Other circumstances where the rule may not apply include where the witness is put on notice of an allegation in advance, and so there is an adequate procedure in place for the full ventilation of issues, and where a witness's evidence is inherently incredible or concerns peripheral issues.

The UKSC recognized that the classic circumstances where the rule applies is when a party seeks to challenge the honesty of a witness or discredit a witness on a material point. However, the UKSC rejected the submission that the rule was confined to allegations of dishonesty and acknowledged that it can apply in any case where a party submits that the evidence of any witness on a material point should not be accepted for whatever reason.

Does the Rule in Browne v Dunn Apply in International Arbitration?

In *Tui*, the UKSC observed that the rule applies "in the adversarial system of litigation and arbitration in English law." That observation is consistent with a line of authority where courts have assumed the rule in *Browne v Dunn* may apply in London-seated arbitrations (*see P v. D* [2019] EWHC 1277 (Comm); *BPY v MXV* [2023] EWHC 82 (Comm)). These authorities, however, do not identify the legal basis for application of the rule to international arbitration.

In English-seated arbitrations, the English Arbitration Act 1996 ("EEA 1996") provides that tribunals are not bound by domestic procedural and evidentiary rules. Instead, under Section 34(1), a tribunal has the power "to decide all procedural and evidential matters subject to the right of the parties to agree any matter." That power includes whether to apply the strict rules of evidence on admissibility, relevance and weight of any evidence (Section 34(2)(f) of the EEA 1996). The application of the rule in *Browne v Dunn* is discretionary: the tribunal is vested with the authority to apply (or not apply) the rule unless the parties have agreed otherwise.

Even in non-English seated arbitrations, a tribunal may still apply the principle of fairness enshrined in the *Browne v Dunn* rule. Under most arbitral rules, a tribunal is vested with the authority to decide whether or not to apply any strict rules of evidence (see LCIA rules (Article 22.1(vi)), the ICC rules (Article 22) and the SIAC rules (Rule 19.2)). Similarly, Article 19 of the Model Law empowers a tribunal to determine the admissibility, relevance, materiality and weight of any evidence. These provisions leave it at a tribunal's discretion to apply rules of evidence. Consequently, even in non-English seated arbitrations, it will be open to a tribunal to invoke the principle enshrined in the *Browne v Dunn* rule , and require a party to put its case to a key witness

on a material point.

In sum, a tribunal (whether seated in England or not) will generally have the power to apply the rule in *Browne v Dunn*. This is because it is a rule of evidence and tribunals are vested with broad discretion, both under most major institutional rules and the Model Law, with respect to what rules of evidence to apply to arbitral proceedings.

Should a Tribunal Exercise Its Discretion to Apply the Rule in Browne v Dunn?

The applicability of the rule in *Browne v Dunn* in international arbitration remains controversial. This is because the customary approach to the taking of evidence in international arbitration does not lend itself well to the application of the rule in *Browne v Dunn*. There is a tendency towards chess-clock proceedings in international arbitration, which means that hearings are shorter with limited time for cross-examination. Those who argue against its application in arbitration point out that the rule cannot be fairly applied when a counsel is pressed for time, or has run out of time.

The IBA Rules on the Taking of Evidence (the "IBA Rules") are designed with chess-clock proceedings in mind. The IBA Rules provide that: (a) witnesses are only cross-examined upon request by a party (IBA Rules, Article 8.1) and (b) if a party does not request to cross-examine a witness, it shall not be deemed to have agreed to the correctness of that witness's witness statement (IBA Rules, Article 4.8). There is undoubtedly a tension between the IBA Rules and the rule in *Browne v Dunn*.

The IBA Rules are not, however, sufficient to prevent a tribunal from applying the rule *Browne v Dunn*. The IBA Rules do not purport to override mandatory law, and are generally only used by tribunals as non-binding "guidelines" with respect to the determination of evidentiary issues. As such, the IBA Rules do not limit a tribunal's general discretion with respect to the application of rules of evidence.

Ultimately, therefore, the scope of its application will depend on the discretion of the tribunal. In this respect, the observations of the UKSC in *Tui* as to when the rule should apply provides important guidance on how a tribunal should exercise its discretion (*Tui*, paras. 61-70). Applying *Tui*, the case for a more relaxed application of the rule is stronger in an arbitration where: (a) there is limited time to cross-examine multiple witnesses on multiple issues; (b) the tribunal has not provided directions on what issues should be addressed in cross-examination; and (c) it would be disproportionate to cross-examine a witness at length. The case for applying the rule is much stronger where a party fails to cross examine a key witness on a core issue despite directions from a tribunal and having adequate time to do so.

Ultimately, when applying the rule in *Browne v Dunn* in arbitration, a balance must be drawn between competing considerations of procedural fairness: on one hand, the need to give a witness the opportunity of explaining a contradiction in his evidence before it is discredited; and, on the other hand, recognition that in arbitration a party will generally not have time to challenge all evidence presented by the other side in cross-examination. In striking this balance, as acknowledged in *Tui*, the overriding criterion should be the overall fairness of the arbitration.

Lesson for Practitioners

The broad discretion afforded to the tribunal with respect to the application of the rule in *Browne v Dunn* tends towards uncertainty. It will often be the case that the tribunal's approach to evidentiary rules will only become evident at the hearing. This is particularly problematic where counsel, parties and arbitrators all come from different legal traditions.

This uncertainty is undesirable but can be easily resolved at the outset of proceedings. The tribunal and the parties are free to agree, for example in the terms of reference, how witness evidence that has not been challenged will be treated (*i.e.*, whether a presumption about the weight of unchallenged witness evidence applies). This is desirable as it achieves clarity, fairness and reduces the likelihood of a challenge to the award based on the application, or non-application, of the rule in *Browne v Dunn*.

Ultimately, the UKSC's decision in *Tui* highlights a key lesson for practitioners. There is an inevitable risk that if a witness's evidence on a material point is not challenged, it will be accepted by the tribunal. This risk is greater in English-seated arbitrations that involve claims for fraud, conspiracy or dishonesty. It is also present in non-English seated arbitrations particularly if the tribunal has an English-law background. Practitioners from all jurisdictions are, therefore, advised to keep the rule in *Browne v Dunn* in mind when preparing a cross-examination.

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