Kluwer Arbitration Blog

# I Know the Witnesses and I Will Believe Them; There is No Need for Cross-Examination: A Rare Example of Arbitrator Bias Before English Courts

Peter Ashford (Peter Ashford Ltd) · Monday, June 10th, 2024

In a recent judgement rendered in *H1 and another v W and others* [2024] EWHC 382, the English Commercial Court removed a sole arbitrator under section 24 of the English Arbitration Act 1996 (the "EEA"). This removal was based on statements made by the arbitrator regarding the way he would treat expert witness evidence that gave rise to justifiable doubts as to his impartiality. This blogpost considers the facts, discusses the law applied by the Court and its findings, and sets out the decision's key takeaways.

**The Factual Background**

The dispute arose between a film company and their insurer who had issued a policy in connection with filming. Following an accident whilst filming, the film company submitted a claim under the insurance policy, which the insurer declined. The film company challenged this denial of coverage, and the parties eventually proceeded to arbitration in London. A central issue was whether, according to market practice applicable to the case, the stunt coordinator or the insured had ultimate responsibility for safety on set. Both parties submitted a number of expert reports: the insured had three experts, who disclosed the extent of their relationship with the arbitrator at the time of a first procedural hearing. At that stage, the insurer did not request any further details of these relationships.

At the second procedural hearing, when discussing the evidence, the arbitrator – a film and television producer with no legal training – essentially indicated that he did not need to hear the evidence of the insured's expert witnesses or hear their cross-examination because he knew them very well, they were exceptional in their fields, they were the best, and he knew what they would be saying. He added that he did not know the insurer's expert witnesses and he did not think their underwriter expert added much. He later also stated that while he would reserve judgment, he knew the professionals involved very well and already knew what he thought.

**The Law and the Court's Findings**

The Court found that the arbitrator's remarks as to "how he would approach the evidence of the expert witnesses" gave rise to "the appearance of bias in the sense of appearing to pre-judge [the issue of safety responsibility] by reference to [the expert's] status." The Court considered that "the suggestion that it was unnecessary to call any expert witnesses was plainly not an expression of a balanced and impartial view, or merely a concern about the hearing over-running, or an attempt by the arbitrator to impose an orderly and economical procedure on the parties." Instead of "pre-judging the merits," the arbitrator ought to have "[kept] an open mind." The arbitrator's comments showed that he would believe the expert "come what may."

The law in relation to apparent bias is well settled. The case was a straightforward application of the relevant legal test under section 24(1) of the EAA, set out in the Supreme Court judgement *Halliburton v Chubb* [2020] UKSC 48 (see previous coverage here) nuanced by the particular facts of a non-lawyer arbitrator. As ever, the essential question was whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. In this context it is important to recall that bias is not used in a pejorative sense, rather it means the absence of demonstrated independence and impartiality (*Yiacoub v The Queen [2014] UKPC 22*).

The Court specifically considered a number of authorities on prior relationships: First, in *Morrison v AWG* [2006] EWCA Civ 6, where the judge had a 30-year relationship with a witness the Claimant proposed to call (but as a compromise proposed that others could give the same evidence), the court held that "[…] disqualification of a judge for apparent bias is [not] a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not [….]" Further, the Court considered *AS Sourcing Cameroun v LMBS* [2023] EWHC 150 (Comm) (cocoa) and Rustal v Gill & Duffus [2000] 1 Lloyd's Rep 14 (sugar) where it was held that in trade arbitrations the parties are taken to accept that arbitrators, as traders themselves, will have had commercial dealings or business relationships. Consideration was also given to Norbrook v Moulson [2006] EWHC 1055 (Comm). Here it was decided that an arbitrator appointed for his technical skill and knowledge might not demonstrate the same management regime as an experienced legally qualified arbitrator, specifically *ex parte* communications with one party were genuine attempts to impose an orderly and economical process. *Ex parte* contact with witnesses, however, was different and would lead to removal. Another case relevant for the Court was *Fox v Wellfair* [1981] Lloyd's Rep 514 where it was held that a party who voluntarily takes no part in the arbitration cannot expect an arbitrator to form opinions without recourse to the evidence. Trade expertise is to assist in understanding technical evidence, not to provide evidence for a party who has chosen not to participate. Finally, of relevance for the Court was *Bubbles & Wine v Lusha*[2018] EWCA Civ 468. The decision elaborated that indicating a provisional view is acceptable unless it constitutes suggesting a final view before all the evidence and argument are heard; it was held that even 'inept' behaviour might not give rise to an apprehension of bias.

Although not cited, the objective nature of the test for apparent bias was set out by the House of Lords in *Helow v S/S for Home Department* [2008] UKHL 62: "The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. […] She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially."

The *Helow* approach is consistent with the statement of principle of the Privy Council in *Miller v*

*Dickson* [2001] UKPC D 4: "The appearance that justice is being done is as important as the actual doing of justice. The independence of the judiciary is not an empty principle which can be forgotten simply because one thinks that a correct conclusion has been reached. Rightly or wrongly there is always room for an uneasy fear that there might have been some improper influence affecting the mind of the judge where he lacks independence. The principle is far too important to allow it to be passed over [….]"

The arbitrator's remarks, the Court found, undoubtedly "[show] the inexperience of the arbitrator." This was not a case where the arbitrator was merely expressing a predisposition towards a particular outcome, giving the parties an opportunity to persuade him that his initial assessment was wrong. Rather, it was a case where the arbitrator gave the firm impression of having already allowed extraneous factors to influence his assessment of evidence which he had not yet heard and, moreover, of not even appreciating that that was an unfair approach to adopt. The arbitrator's conduct gave rise to a real possibility of bias and that the arbitrator had pre-judged the merits of the dispute.

**Takeaways**

This is a rare case of a successful challenge and on unusual facts (hopefully not to be encountered again). The courts will generally take a cautious approach to interfering with the appointment of an arbitrator who will be afforded a degree of latitude especially for trade arbitrators and the inherent connections that a trade arbitrator will have: after all that is an inevitable consequence of the parties' arbitration agreement. A fair-minded and informed observer would understand that arbitrators in a relatively small industry are likely to have formed acquaintances with others in that same industry, and that parties would take "a fairly robust view" of such matters, and not regard them to impact an arbitrator's ability to act objectively. The arbitrator's remarks about the witnesses, as the Court pointed out, showed an unfortunate lack of experience in his approach to legal procedure. The Court further commented that the arbitrator's apparent bias "is particularly concerning in a case such as this, where the arbitrator is a sole inexperienced arbitrator (without the tempering influence of two other co-arbitrators), making findings of fact which are not susceptible to appeal (his decision would only be subject to a section 68/69 challenge)." It follows that where the experience and expertise of a trade arbitrator is sought it might well be appropriate, especially in a high value case, for there to be a legally qualified president, sitting with two trade arbitrators.

*The views expressed in this post are the author's own.*

---

This entry was posted on Monday, June 10th, 2024 at 8:03 am and is filed under Apparent bias, Arbitration, Arbitration Act 1996, Arbitrator Bias, Arbitrator Challenges, Arbitrators, England, English courts, English Law, International arbitration, UK
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.