Legal Briefing

A and others v (1) B (2) X

[2011] EWHC 2345, (Comm) Mr Justice Flaux

The Court considered an application to remove a sole arbitrator and set aside an award for serious irregularity on grounds that there were justifiable doubts as to the arbitrator's impartiality.

The Facts

A dispute arose under a share sale and purchase agreement dated 26 July 2006 ("SPA") between the Claimant ("A") and First Defendant ("B"). On 31 March 2009 B commenced arbitration proceedings under the Rules of the London Court of International Arbitration ("LCIA"). The parties' solicitors agreed to appoint an appropriate QC to act as sole arbitrator (the "Arbitrator"). The Arbitrator had previously been instructed by both parties' solicitors in unrelated matters, once by A's solicitors (initially SJ Berwin, then White & Case) in 2005 and twice by B's solicitors (Dewey & LeBoeuf) in 1999 and 2004.

In respect of the Arbitrator's instruction from Dewey & LeBoef in 2004 this had resulted in unrelated litigation before the commercial court ("Y litigation"). The Y litigation settled in 2008 and was stayed under a Tomlin order. The partner with conduct of the Y litigation, and generally the firm's legal team, was different to that engaged in the arbitration proceedings.

On 8 May 2009, the Arbitrator signed a statement of independence, in compliance with the LCIA Rules, confirming that he was impartial and independent. The arbitration proceeded during 2009 and 2010 with a final hearing in September 2010.

In late November 2009 the Y litigation had been reactivated and the matter was listed for trial in late November 2010. The Arbitrator was instructed by Dewey LeBoeuf to advise their clients which he did.

In early December 2010 the Arbitrator wrote to the parties informing them of his involvement in the Y litigation.

The Arbitrator's letter did not immediately provoke an adverse response from A's solicitors, however, when the Arbitrator issued his partial award primarily in favor of B, A's solicitors applied to the LCIA to remove the Arbitrator under Article 10(3) of the LCIA Rules. The application was rejected and A applied to the Court to remove the Arbitrator under s24 of the Arbitration Act 1996 ("AA 1996") and to challenge the award on grounds of serious irregularity under s68(2)(a) of the AA 1996.

The Issues

There were two issues:

(i) Whether a fair-minded and informed observer would conclude that there was a real possibility of unconscious bias; and alternatively

(ii) whether the Arbitrator's non-disclosure of the Y litigation constituted a serious irregularity under section 68 of the AA 1996 and breach of Article 5(3) of the LCIA Rules.

The Decision

The application to remove the Arbitrator and set aside the award was dismissed. The Judge considered that the fair-minded and informed observer would conclude that there was no real possibility of apparent or unconscious bias on the facts of the case before the Court.

The Judge was not of the view that a fair-minded and informed observer, who was presumed to know how the legal profession worked, would consider that because the Arbitrator acted as counsel for one of the firms of solicitors acting in the arbitration, (whether in the past or simultaneously with the arbitration) there was a real possibility of apparent bias.

As to non-disclosure until late in the day, the Judge commented that this failure was clearly inadvertent and a fair minded and informed observer would not consider that the delay would have a bearing on whether there was apparent or unconscious bias. The non-disclosure did not constitute a serious irregularity, not least because of the high threshold that was required to be satisfied to set aside an award on such grounds.

Comments

The Court acknowledged that the issue of whether there is a real possibility of apparent bias is considered on the material before the Court and adopted a common sense approach in its reasoning explaining that,

> *"It is a fact that judges of the Commercial Court (whether through having been instructed by particular firms of solicitors whilst at the Bar or through experience of case management and trial of cases as judges) build up a picture of the strengths and weaknesses of particular firms of solicitors or indeed of individual solicitors, just as they do of individual members of the Bar. Accordingly they will have more confidence in some firms or individual solicitors (or members of the Bar) than in others. No-one could sensibly suggest that a judge should have to recuse him or herself in such situations. Were that so, there would be no judges sitting."*

This decision is a reminder to parties to be mindful of potential conflicts not just at the outset of a dispute resolution process but also throughout the proceedings.

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October 2011