Every day is Independence Day – Two successful arbitrator challenges for "apparent bias"

By Markus Esly | September 30, 2024

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The independence and impartiality of arbitrators matters more than ever. Parties choose to have their disputes resolved by arbitral tribunals because they wish to have their differences decided by experienced decision-makers who can be trusted to apply the applicable law without fear or favour, rather than litigate before national courts – in particular those of the home state of their counterparty. While tactical or unmeritorious challenges to arbitrators, alleging lack of impartiality, are not uncommon in international arbitration, arbitral tribunals can generally be relied on to uphold these principles and live up to the high standards expected of them.

Sometimes though arbitrators slip up. They must remain vigilant to ensure they do not do so, be it unintentionally, for want of experience, or due to a lack of appreciation of the appearance that certain actions can create. In the last six months, the English Commercial Court has upheld challenges to two arbitrators for lack of impartiality, or 'apparent bias' as English law terms it, in (i) *H1, H2 v W, D, F* [2024] EWHC 382 (Comm) (February 2024) ("***H v W***") and (ii) *Aiteo Eastern E & P Company Ltd v Shell Western Supply and Trading Ltd* [2024] EWHC 1993 (Comm) (August 2024) ("***Aiteo v Shell***"). In *H v W*, Calver J was faced with a challenge arising out of unguarded and ill-advised statements made by a sole arbitrator at a procedural hearing, as to the weight of certain expert evidence: the decision illustrates the importance of not pre-judging the merits. In *Aiteo v Shell*, Jacobs J dealt with another, perhaps more common situation, namely where an arbitrator has previously been appointed or otherwise professionally engaged by the same firm of solicitors that is representing one of the parties to the arbitration. This article considers both these decisions, and the lessons that can be learnt from them.

The principles of independence and impartiality in international arbitration

These principles of independence and impartiality are enshrined in the leading institutional arbitration rules and national laws. Looking first at institutional rules, they bind the parties and also the arbitrators as a matter of contract, and is of course possible to undertake an obligation of independence and impartiality by agreement. Article 22(4) of the ICC Rules of Arbitration (2021) states that: "*In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.*" A breach by an arbitrator of that duty entitles a party to challenge him or her under Article 14(1) "… *for an alleged lack of impartiality or independence, or otherwise*." Similar provisions are found in the LCIA Rules of Arbitration, Article 10.1 which permit a party to challenge an arbitrator if he or she proves to be "unfit to act" or "*circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence*".

The UNCITRAL Model Law on International Commercial Arbitration, which forms the basis for many national arbitration laws worldwide, also imposes an ongoing duty on arbitrators to disclose without delay "… *any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.*" (Article 12(1)): a similar continuing duty of disclosure is imposed by the LCIA Rules

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(Article 5.4) and the ICC Rules (Article 11(3)). Where such justifiable doubts exist, an arbitrator may be challenged (Article 12(2) of the UNCITRAL Model Law).

Read the full article.

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