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# International Arbitration Report

## **English Court Removes Arbitrator For Lack Of Impartiality, Points Out His Tone And Intemperate Language**

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# Commentary

## English Court Removes Arbitrator For Lack Of Impartiality, Points Out His Tone And Intemperate Language

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Unlike in the United States, where the courts generally do not intervene in ongoing arbitrations to entertain questions on arbitrator impartiality, English law specifically allows a party in an arbitration proceeding to seek judicial removal of an arbitrator for lack of impartiality.<sup>1</sup> Section 24(1)(a) of the English Arbitration Act provides that a party may apply to the court to remove an arbitrator on the ground that "circumstances exist that give rise to justifiable doubts as to his impartiality."<sup>2</sup>

In *Sierra Fishing Company and others v. Hasan Said Farran and others*, the English High Court of Justice removed the sole arbitrator pursuant to Section 24 of the English Arbitration Act.<sup>3</sup> In applying Section 24, the Court considered whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the arbitrator is biased. The Court found that the Arbitrator's personal and business connections with one of the Defendants, his participation in negotiations and

drafting of the agreements between the parties, and his conduct during the arbitration each independently raised doubts about the Arbitrator's impartiality, thereby justifying his removal.

The Court confirmed that it is the arbitrator's duty to disclose the circumstances that may give rise to justifiable doubts about impartiality, even if the parties could discover the circumstances on their own.

The Court also confirmed that an arbitrator's reaction and response to a party's challenge may itself serve as a ground for removal. The Court found in this case that the tone and content of the Arbitrator's correspondence gave rise to doubts about his impartiality. This ground for challenging an arbitrator is rarely invoked, and seldom successful. The Court noted that the Arbitrator was "vehement" in defending the Defendants' position and put forth arguments not raised by the Defendants. He "disparaged" the Claimants' judicial removal application in "intemperate language," and questioned the Claimants' good faith. The Court concluded that the Arbitrator had become too personally involved in the issue of impartiality and jurisdiction to guarantee the necessary objectivity required of him.

### **Sierra Fishing Company and others v. Hasan Said Farran and others**

Sierra Fishing Company and others entered into a loan agreement with two of the three Defendants to finance the purchase of two fishing vessels.<sup>4</sup> When Claimants failed to make payments, the two Defendants initiated arbitration proceedings in London.

The Defendants appointed the third Defendant, Mr. Ali Zbeeb as arbitrator, and requested that the Claimants appoint their own arbitrator.<sup>5</sup> The parties subsequently entered into loan repayment agreements, and suspended arbitration. The Claimants then failed to fulfill their obligations under the repayment agreements. As a result, the two Defendants recommenced the arbitration proceedings, asserting that Mr. Ali Zbeeb was the sole arbitrator, as the Claimants had previously failed to appoint an arbitrator.<sup>6</sup>

The claimants objected to Mr. Ali Zbeeb acting as arbitrator on the grounds of his lack of independence. Mr. Zbeeb rejected the Claimants' challenge. The Claimants continued to challenge Mr. Zbeeb's jurisdiction and impartiality at each stage of the arbitral proceedings. Mr. Zbeeb continued to reject the challenges.<sup>7</sup>

Before Mr. Zbeeb rendered an award, the Claimants applied to the High Court of Justice to remove Mr. Zbeeb as arbitrator under Section 24(1)(a) of the English Arbitration Act 1996.<sup>8</sup> The Claimants argued that the following circumstances gave rise to doubts as to Mr. Zbeeb's impartiality:

- (1) the Arbitrator, as well as his father and his law firm, had personal and business connections with the Defendant, Dr. Hassan Said Farran;
- (2) the Arbitrator was involved in negotiating and drafting the repayment agreements between the parties that were at issue in present arbitration;
- (3) the Arbitrator refused to postpone the publishing of his arbitral award pending the outcome of the Claimants' Section 24 judicial removal application; and
- (4) the Arbitrator and his law firm had close connections with the Defendants' counsel.

The Court concluded that each of the first three circumstances independently gave rise to justifiable doubts as to the Arbitrator's impartiality, and removed Mr. Zbeeb.<sup>9</sup>

### **Arbitrator's Personal and Business Connections with the Defendant**

Claimants alleged that the Arbitrator, Mr. Ali Zbeeb, was legal counsel to the Finance Bank at a time when one of the Defendants, Mr. Farran, was the chairman of the bank. In addition, Claimants argued that the

Arbitrator's father and co-partner in the Arbitrator's law firm also acted and continued to act as legal counsel to both Mr. Farran and the Finance Bank, where the Arbitrator's father held a top management position.<sup>10</sup>

According to the Court, a fair minded observer would conclude that there was a real possibility that Mr. Zbeeb's role as counsel to the bank was a substantial one. Further, there was a real possibility that the Arbitrator's law firm derived and continued to derive significant financial benefit through the Arbitrator's father's ongoing representation of the Defendant and the Finance Bank in substantial commercial matters. Thus, the Court concluded, with "little hesitation" that these connections gave rise to justifiable doubts as to Mr. Zbeeb's ability to act impartially in a dispute in which the Defendant, Dr. Farran, was a party.<sup>11</sup> There was a real possibility that the Arbitrator would be predisposed to favor the Defendant in the arbitration in order to foster and maintain the business relationship with himself, his firm and his father, to the financial benefit of all three.<sup>12</sup>

The Arbitrator insisted that it was not for him to do due diligence on behalf of the Claimants. The Court stated that this was an erroneous denial of the Arbitrator's duty of disclosure to the Claimants, and moreover, it "reveal[ed] an attitude which would reinforce a fair minded observer's doubts as to his impartiality."<sup>13</sup> According to the Court, it was incumbent on Mr. Zbeeb to voluntarily disclose to the parties any relationship which might give rise to doubts as to his lack of independence, no matter what due diligence steps may have been available to the Claimants to discover these circumstances for themselves.<sup>14</sup>

### **Arbitrator's Involvement in Negotiating and Drafting Agreements at Issue in Arbitration**

Claimants also pointed out that Mr. Zbeeb advised and assisted the two Defendants in their previous settlement negotiations with the Claimants, which resulted in the agreements that were at issue in the present arbitration. In addition, although both Claimants and Defendants were aware of Mr. Zbeeb's role in drafting these agreements, the Defendants were now relying on them, and were invoking the arbitration clauses in these agreements to confer jurisdiction upon Mr. Zbeeb.<sup>15</sup> The Court concluded that there was a real possibility that the Arbitrator would want to decide the jurisdictional issues in favor of the Defendants because he had advised them on the same issue.<sup>16</sup>

### **Arbitrator's Conduct and Reaction to Claimants' Challenge**

Claimants also attacked many aspects of Mr. Zbeeb's conduct during the arbitration proceeding. The Court concluded that two aspects of Mr. Zbeeb's conduct justified doubt as to his impartiality.

First, Mr. Zbeeb refused to refrain from publishing his award pending the outcome of the English Court proceedings, despite requests by both parties that he do so. However, his award was not published by the time of the court proceedings due to nonpayment of the arbitrator fees. The Court reasoned that only in exceptional circumstances should an arbitrator ignore the parties' expressed desire to postpone issuance of an award until after a court challenge that may affect the tribunal's jurisdiction.<sup>17</sup>

Second, the Court highlighted the content and tone of the Arbitrator's communications with the parties and with the Court. The Court noted that some of Mr. Zbeeb's correspondence were argumentative in style, and advanced points against the Claimants which had not been put forward by the Defendants. The Court explained that an arbitrator must be careful not to appear to take sides, so as to be unable subsequently to judge impartially the arguments in the case.<sup>18</sup> In this case, the content and tone of Mr. Zbeeb's communications were on the wrong side of the line. The Court noted that Mr. Zbeeb made "detailed and vehement" arguments against the Claimant's position. The Court also pointed out that the Arbitrator disparaged Claimants' removal application to the Court in intemperate language, and questioned the Claimants' good faith in filing the judicial removal application. In sum, the Court noted that the Arbitrator gave "the appearance of having descended into the arena and taken up the battle on behalf of [the Defendants]."<sup>19</sup> Thus, the Court concluded that the Arbitrator had become too personally involved in the issue of impartiality and jurisdiction to guarantee the necessary objectivity required of him.

challenges after the award is rendered in a proceeding challenging the award.

2. Section 24 can be used even when applicable institutional rules provide arbitrator challenge procedures and the institution has rejected the challenge. After an award is rendered, a party challenging the arbitrator's impartiality would not rely on Section 24, but rather would be seeking annulment of an award under Section 33 of the English Arbitration Act on the ground that the arbitrator failed to comply with his or her duties.
3. *Sierra Fishing Co. & others v Farran & others*, [2015] EWHC (Comm) 140 (January 30, 2015).
4. [2015] EWHC (Comm) 140 (30 January 2015), at ¶ 5.
5. *Id.* at ¶ 7.
6. *Id.* at ¶ 15.
7. *Id.* at ¶¶ 29-32.
8. *Id.* at ¶ 41.
9. *Id.* at ¶¶ 60, 61, 65, 81. With respect to the fourth ground, the Court noted that the connection between the Arbitrator and the Defendant's counsel was nothing more than the fact that both served as advisers to the Finance Bank, and found that this was not enough to raise doubts about Mr. Zbeeb's impartiality. *Id.* at ¶ 62. Defendants argued that pursuant to Section 73 of the English Arbitration Act, the Claimants had waived their right to challenge the Arbitrator for taking part or continuing to take part in arbitration proceedings when they could have discovered through due diligence the grounds for challenging Mr. Zbeeb. The Court rejected this argument on the specific facts of the case.
10. *Id.* at ¶ 53.
11. *Id.* at ¶ 57.
12. *Id.* The Court relied for guidance on the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), which

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### **Endnotes**

1. Absent extreme, limited circumstances, the courts in the United States will generally consider arbitrator

provides illustrates circumstances that are considered to give rise to an arbitrator's conflicts of interest or apparent bias. The Court found that the relationship between Mr. Zbeeb and the Defendant Mr. Faran fell within the Red List and Orange List of categories of conflicts under the IBA Guidelines, meaning that they could give rise to justifiable doubts about the arbitrator's impartiality or independence. Id. at ¶¶ 58-59.

13. Id. at ¶ 60.

14. Id.

15. Id. at ¶ 61.

16. Id. The Court noted that these circumstances fell within the Red List category under the IBA Guidelines: "the arbitrator has given legal advice . . . on the dispute to a party or an affiliate of one of the parties" and "the arbitrator has previous involvement in the case." Id.

17. Id. at ¶ 64.

18. Id. at ¶ 65.

19. Id. ■



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