

Arbitration—appointment of arbitrators—challenge—communications with arbitrators—disclosure (*Gunga v Sonangol*)

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Arbitration analysis: A dispute arose as to the appointment of arbitrators and the constitution of the tribunal. The claimant's position is that the respondent failed to appoint its arbitrator within time and the first appointed arbitrator should be confirmed as sole arbitrator. The respondent claims that its arbitrator was appointed within time, if not it seeks an extension of time for doing so. The respondent has also sought to challenge the appointment of the first arbitrator on the grounds of apparent bias. The English court's decision concerns applications for disclosure of (1) communications between the respondent and their putative arbitrators; and (2) information regarding the identity of the claimant. The court applied the following principles: (1) The applicant must demonstrate that the arbitration claim has a real prospect of success; (2) The documents sought must be strictly necessary for the fair disposal of the arbitration claim; (3) In exercising its discretion, regard must be given to the overriding objective with particular regard to the context of arbitration. Written by Andrew Rigden Green, partner, head of International Arbitration, Greater China at Stephenson Harwood.

Gunga Shipping Co NV v Sonangol Shipping Angola (Luanda) Ltd (transcript) [\[2022\] EWHC 1372 \(Comm\)](#)

What are the practical implications of this case?

The English court is highly supportive of arbitrators and arbitration process. It will not lightly order disclosure of documents and will take into account the difference between court process and arbitration process when making its rulings.

In particular, the court while considering the overriding objective will rarely exercise its discretion to order disclosure in arbitration claims because:

- there should be minimal court intervention
- arbitration is underpinned by principles of speedy and final dispute resolution
- if the parties have explicitly or implicitly agreed with each other or the tribunal that documents would remain confidential, they should remain so

The court will seek to narrow any application for disclosure on the basis of these principles and in particular seeking to address the question as to whether the documents are strictly necessary for the resolution of the arbitration claim in question.

What was the background?

The claimants commenced arbitration and appointed Mr Simon Gault as arbitrator on 22 December 2021. The agreed applicable arbitration rules are the London Maritime Arbitrators Association (LMAA) Terms 2022. Pursuant to those rules the respondent was required to appoint their arbitrator by 5 January 2022, failing which the claimant may call on the first arbitrator appointed to be the sole arbitrator.

On 3 January 2022, lawyers for the respondent contacted Judge Freeh to enquire if he would be willing to take the appointment. On 1 February 2022, Judge Freeh said that he could no longer participate in the arbitration.

Shortly thereafter the claimant served notice to appoint Mr Gault as sole arbitrator. The respondent refused to accept this notice and appointed or purported to appoint Mr Gary Born as co-arbitrator. The respondent also requested disclosure from Mr Gault the number of appointments by the claimant's lawyers over the previous ten years.

In short, the parties have been unable to agree whether Mr Gault has been appointed as sole arbitrator or whether Mr Born has been appointed as co-arbitrator. The parties agree that this turns on whether or not Judge Freeh accepted his appointment as arbitrator or not. Given that the tribunal has not been constituted, recourse under the English [Arbitration Act 1996](#) is to the High Court.

What did the court decide?

The court held that the principles set out in *P v Q* [\[2017\] EWHC 148 \(Comm\)](#) were relevant to the applications.

Merits

At this stage the judge could not form any view on the merits but nevertheless proceeded on the presumption that there was a real prospect of success.

Necessity

(a) The appointment of Judge Freeh

It was agreed between the parties that the question of whether Mr Gault could be confirmed as sole arbitrator turned on whether or not Judge Freeh had been appointed by 5 January 2022. The test for whether an arbitrator has been appointed set out in *Tradax Export v Volkswagenwerk* [\[1970\] 1 QB 537](#) is whether:

- the other side has been informed of the appointment
- the appointee has been informed, and
- the appointee is willing to act and has said so

(b) The appointment of Mr Born

It was argued that the communications between the respondent and Mr Born were relevant to the application for an extension of time for the appointment, in the event that Judge Freeh had not been appointed. The judge ruled that the question of whether a substantial injustice would be caused if time were not extended would not turn on communications between the respondent and Mr Born. The application was refused.

(c) The identity of the claimant

The respondent made applications for extensive discovery of information regarding the claimant ostensibly to allow the arbitrator to clear conflict. The claimant resisted the application on the basis that it was a fishing expedition, but nevertheless were willing to provide certain documentation. The judge declined to order the disclosure saying that it could not be said that this information was strictly necessary for the purposes of the appointments. If the arbitrators needed such information they could request it, but the court would not order it.

Discretion and arbitration context

The judge considered that these orders would provide a speedy resolution with minimal court intervention and therefore met the overriding objective within an arbitration context.

Case details:

- Court: King's Bench Division, Business and Property Courts of England and Wales, High Court of Justice (Commercial Court)
- Judge: Mr Justice Butcher
- Date of judgment: 13 May 2022

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