Qualification to be an Arbitrator

In *Allianz Insurance Plc v Tonicstar* [2018] EWCA Civ 434 the Court of Appeal examined an arbitration clause in a standard reinsurance contract which required particular experience as a qualification to be appointed as an arbitrator.

The clause stated that "unless the parties otherwise agree, the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance and reinsurance". The dispute was over what constituted 10 years' experience of insurance and reinsurance. Was it, as the commercial court ruled in 2000 and followed in 2017, 10 years' experience of working in the insurance and reinsurance industry? Or as the appellant contended, was it appropriate to appoint a Queen's Counsel who had practised as a barrister specialising in the field of insurance and reinsurance law for more than 10 years?

The arbitration clause was contained in the JELC Clauses which are used in the London insurance market for excess of loss reinsurance contracts. Disputes concerning the contract must be the subject of arbitration in London. The underlying reinsurance dispute concerned the aggregation of losses arising out of the 9/11 attack on the World Trade Center. In 2011 the Port of New York settled claims made by around 10,000 firefighters and others involved in rescue and recovery operations who inhaled dust and suffered respiratory injuries (see *Simmonds v Gammell* [2016] EWHC 2515 (Comm) on the analysis of the aggregation issue in which Andrew Burns QC appeared for the reinsured).

The reinsured appointed an experienced former underwriter as an arbitrator. However the reinsurers appointed a commercial QC. The reinsured objected saying the QC had legal experience, but not experience of insurance and reinsurance. The Commercial Court agreed and removed him as an arbitrator under section 24(1)(b) of the Arbitration Act 1996 on the ground that he did not possess the qualifications required by the arbitration agreement. Teare J considered he was bound to follow *Company X v Company Y* (17 July 2000) in which Morison J construed the same clause 15.5 of the JELC Clauses as requiring persons appointed as arbitrators to have not less than 10 years' experience of working within the insurance or reinsurance industry. He held that the context meant that the common intention of the parties who adopt the committee rules is that there should be a 'trade arbitration'.

The Court of Appeal disagreed. They held that the clause did not impose any restriction on the way in which 10 years' experience has been acquired. In particular, the clause did not say that the relevant experience must have been gained from working in the industry. Leggatt LJ held that the relevant experience could be gained from providing legal or other professional services to insurers or others in the industry.

The fact that the JELC Clauses were drafted by a trade body did not mean that only members of the trade are considered suitable to arbitrate disputes between parties who incorporate the clauses in their contract. Nor did the fact that a default power of appointment was conferred on the Chairmen of the Lloyd's Underwriters' Association and the International Underwriting Association of London signify that the clause contemplated members of those associations as default arbitrators such that only persons who have worked within the industry are qualified for appointment.

The Court of Appeal said that if experience of sports, engineering or telecommunications had been specified then a clear distinction could be drawn between the activity and the law regulating the activity. However no similar distinction could be drawn between insurance and reinsurance law and insurance and reinsurance itself. This was because insurance contracts create legal rights and obligations and those whose business it is to negotiate and draft insurance contracts need to have some understanding of insurance law.

These reasons were strong enough to overcome the fact that following an established interpretation has the value of certainty in commercial law (*Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No 2)* [1982] AC 724). Also the Court of Appeal did not think the unreported 2000 decision was part of the relevant background against which the parties contracted in early 2001 (*Sunport Shipping Ltd v Tryg Baltica International (UK) Ltd (The Kleovoulos of Rhodes)* [2003] 1 Lloyd's Rep 138).

The Court of Appeal held that it is a safe inference that a lawyer who has specialised in insurance and reinsurance cases for at least 10 years will have acquired considerable practical knowledge of how insurance and reinsurance business is conducted. They reversed the order removing the commercial QC as an arbitrator. Good news for commercial lawyers who are ambitious to conduct JELC arbitrations. Bad news for those in the reinsurance industry who thought that the JELC clauses required market people to resolve disputes in the market. The case also highlights the dangers of specifying a qualification in an arbitration clause which is open to interpretation rather than allowing parties to pick the best arbitrator for a particular dispute as and when they know the issues involved in that dispute.

Andrew Burns QC appeared for Tonicstar, instructed by DLA Piper.

http://www.bailii.org/ew/cases/EWCA/Civ/2018/434.html