In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No.

BETWEEN:-

S

Plaintiff

-v-

T

Defendant

REDACTED RULING

(In Camera)

Arbitration Act 1986 – appointment of third arbitrator – whether jurisdiction to appoint Chief Justice – factors to take into account when making appointment

Date of hearing: 27th November 2017
Date of ruling: 12th December 2017

Mr David Edwards QC and Mr Alexander Potts, Kennedys Chudleigh Ltd, for the Plaintiff

Mr Nathaniel Turner, ASW Law Limited, for the Defendant

Introduction

1. The Plaintiff is an exempted insurance company incorporated in Bermuda and the Defendant is a company incorporated in the United States. By a summons dated 29th September 2017, the Plaintiff seeks an order appointing a third arbitrator in the arbitration proceedings which the Defendant has commenced against the Plaintiff. The nature of the dispute is known to the parties. By convention, the third arbitrator acts as Chair.

The Policy

Arbitration

2. Article V (o) of the Policy deals with arbitration. The relevant part of the article provides:

> "*Any dispute, controversy, or claim arising out of or relating to this Policy, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in Bermuda under the provisions of the Bermuda Arbitration Act of 1986, as amended.*
>
> *Either party to the dispute … may notify the other party of its desire to arbitrate the matter in dispute and at the time of such notification the party desiring arbitration shall notify the other party of the name of the Arbitrator nominated by it. The other party who has been so notified shall … nominate an other Arbitrator and notify the party desiring arbitration of the name of such second Arbitrator. …*
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> . . . . .
>
> *The decision of the Arbitrators shall be final and binding upon the parties and the parties hereby agree to exclude any right of appeal under Section 29 of the Arbitration Act of 1986 against any award rendered by the arbitrators and further agree to exclude any application under Section 30(1) of the Arbitration Act of 1986 for a determination of any question of law by the Supreme Court of Bermuda.*"

3. The Defendant gave Notice of Arbitration in which they nominated an experienced US litigator. The Plaintiff gave Notice of their nominated arbitrator, who was a retired High Court Judge from England and Wales.

4. The Policy provides that the party-appointed arbitrators shall appoint a third arbitrator. However the parties decided that, rather than delegate this task to the party-appointed arbitrators, they would attempt to agree upon a third arbitrator themselves, through discussion between their lawyers. These attempts have proved unsuccessful. Hence the Plaintiff's application to the Court.

5. The Court's jurisdiction to appoint a third arbitrator derives from section 15 of the Arbitration Act 1986 ("the 1986 Act"). This provides in material part that where the parties are required to appoint a third arbitrator and do not appoint him, any party may serve the other parties with a written notice to appoint or concur in appointing a third arbitrator. If the appointment is not made within fourteen clear days after the service of the notice, the Court may, on the application of the party who gave the notice, appoint a third arbitrator, who will have the same powers to act in the arbitration and make an award as if he had been appointed by consent of all parties.

6. Although I was not referred to the notice to appoint or concur in appointing a third arbitrator, the Defendant did not suggest that they had not been served with one. It was common ground that the Court had jurisdiction to appoint a third arbitrator and that it should exercise this jurisdiction as the parties had reached deadlock.

Governing law

7. Article V (q) of the Policy deals with "*Governing Law and Interpretation*". It provides:

"***Governing Law and Interpretation***

This Policy shall be governed by and construed in accordance with the internal laws of the State of New York (with the exception of Section (o) of this Article V, which shall be governed by and construed in accordance with the Bermuda Arbitration Act of 1986), except insofar as such laws may prohibit payment in respect of punitive damages hereunder and except insofar as such laws pertain to the issuance, delivery, renewal, nonrenewal or cancellation of policies of insurance or the regulation by the Insurance Department of the State of New York of insurers doing insurance business within the

State of New York; provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between the insured and the insurer; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the insured or the insurer and without reference to parol evidence)."

8. Thus the substantive law of the Policy is New York State common law, albeit subject to certain modifications, and the curial law of the Policy, ie the law governing the conduct of the arbitration, is Bermudian.

Case law

9. I was referred to several authorities on the appointment of an arbitrator by the court.

10. Manley Management Inc v Everest Capital Inc [1999] Bda LR 22 SC involved an application by the plaintiff for an order under section 15 of the 1986 Act "*confirming*" the appointment of a non-legally qualified arbitrator to arbitrate a dispute over consultancy fees. Mitchell J noted that under section 15 the Court's task was not to confirm but to make an appointment. He described his task as "*simply to look at the alternative nominations and then choose the person whom I regard as being most appropriate*". That person was a Bermudian qualified lawyer, rather than an accountant, with experience of conducting arbitrations in Bermuda and a formal qualification as an arbitrator.

11. In Re XL Insurance Limited v Toyota, 14th July 1999, unreported, QB, concerned an application to appoint a third arbitrator in a dispute between an insurance company which had provided excess liability cover and a motor vehicle manufacturer. The power of appointment arose under both section 18 of the Arbitration Act 1996, which was analogous to section 15 of the 1986 Act, and the arbitration clause in the policy. It was, like the power of appointment under the 1986 Act, unfettered (save that the power of

appointment under the 1986 Act is subject to the Constitution and the Human Rights Act 1981). Aikens J (as he then was) stated:

"*In those circumstances it seems to me that the court has to look at all the relevant circumstances of the case before deciding who it should appoint. [T/s 8G.] …*

. . . . .

Having considered these factors it seems to me that the overriding consideration for the court in exercising its discretion is to choose the best person for the job bearing in mind these factors. The qualities needed in the present case, as perhaps in every case, are threefold. First, the third arbitrator, who will inevitably be chairman, must be able to deal properly with the substantive issues that arise in the arbitration [which were governed by the internal laws of the State of New York, but subject to certain restrictions]. Secondly, he must be able as chairman to deal with any procedural issues that arise in the course of the reference as best he can. In this context one has to bear in mind that the arbitration is in London and will be governed by English law as the curial law. Thirdly, the third arbitrator as chairman must command the full respect and confidence of both sides. I think that none of these three qualities is more important than the other two. They all bear equal weight. [T/s 10G – 11D.]"

12. Aikens J whittled the nominees down to two leading candidates: Lord Mustill and Judge Renfrew, a former United States District Judge. They both had all the qualities which he had identified. Having considered the matter carefully, he ordered the appointment of Lord Mustill as the third arbitrator. One of his reasons for doing so was that one of the parties, the insurer, objected to Judge Renfrew (the other was that Toyota's reasons for wanting a US lawyer as the third arbitrator did not stand close examination):

"*… XL have objected to Judge Renfrew. I have already referred to the grounds upon which they have objected to him. They are not, in my view, good grounds, but I do not think that it is proper that in a large and serious arbitration such as this the matter should go forward with one party feeling from the outset unhappy about the identity of the chairman of the tribunal. There is no similar personal objection to Lord Mustill on Toyota's part.*"

13. In Montpelier Reinsurance Ltd v Manufacturers Property & Casualty Limited [2008] Bda LR 24 SC the parties had referred certain disputes to arbitration which arose under two Interest and Liabilities Contracts under which the plaintiff, a Bermudian insurer, was reinsured by the defendant, a

Barbadian reinsurer. The arbitration was governed by the UNCITRAL Model Law on Commercial Arbitration and the applicant applied under article 11(4) of the Model Law for an order appointing a third arbitrator. Both the substantive law of the contracts and the curial law were Bermudian. Kawaley J (as he then was) stated at para 46 that pursuant to section 6(8) of the Constitution, which guarantees the right in civil cases to an independent and impartial tribunal, under Bermuda law a party is entitled to an independent and impartial arbitrator.

14. Princess Cruise Lines Ltd v Matthews [2011] Bda LR 63 SC was another case in which Kawaley J was asked to decide an application to appoint a third arbitrator under article 11(4) of the UNCITRAL model law, this time in relation to the plaintiff's personal injury claim against her employer. He noted at para 10 that article 11(5) of the Model Law requires the Court in appointing a third arbitrator to take into account the desirability of appointing an arbitrator of a nationality other than those of the parties. Although there is no such requirement under section 15 of the 1986 Act, this is something which the Court can, to the extent it judges appropriate, take into account when appointing a third arbitrator under that Act.

15. The substantive law of the contracts was US law and the curial law was Bermudian law. Kawaley J accepted "*in general terms*" at para 13 the proposition that in an arbitration governed by Bermuda procedural law it was important that the arbitrator be familiar with Bermudian procedure. This was relevant when it came to the assessment of damages. He stated at para 14:

> "*It did not appear to me to be necessary to cite authority in support of what I understood to be a trite rule of private international law applicable not just to Bermuda, but possibly to most of the common law and civil law world as well. Nevertheless, I accepted Mr Attride-Stirling's submission that the principles applicable to assessing damages was a remedial rather than substantive question which fell to be governed by the procedural law of the arbitration, not the governing substantive law of the contract: Chaplin v Boys [1971] AC 356* ."

The nominees

16. Although the Plaintiff put forward three nominees – one of them very late in the day – I need only consider their preferred nominee, Michael Collins QC, who has extensive experience chairing Bermuda Form arbitrations. That is because the Defendant opposes all three of the Plaintiff's nominees on the same ground, namely that they are English barristers or retired judges, and that the inclusion of a second arbitrator with this background would unbalance the panel. The Defendant has no preference for either of the Plaintiff's other two nominees over Mr Collins,

17. The Defendant has put forward two nominees. One, Judge Stephen Crane, is a retired judge who had extensive experience of applying New York law during his 24 year tenure on the New York Supreme Court. The other is Kawaley CJ (as he now is), who has extensive knowledge and experience of Bermuda procedural law.

18. David Edwards QC, who appeared for the Plaintiff, suggested that the appointment of Kawaley CJ as the third arbitrator would raise what he described as "*additional legal complexities*". First, he questioned whether the 1986 Act would permit the Chief Justice to accept the appointment. The relevant provision is section 17, which appears to be based on section 13A of the Arbitration Ordinance of Hong Kong. It provides in material part:

> "*(1) Subject to the following provisions of this section, a judge, magistrate or public officer, may, if in all the circumstances he thinks fit, accept appointment as a sole or joint arbitrator, or as umpire, by or by virtue of an arbitration agreement.*
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> *(2) A judge or a magistrate shall not accept appointment as an arbitrator or umpire unless the Chief Justice has informed him that he can be made available to do so.*
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> . . . . .
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> *(5) The Schedule shall have effect for modifying, and in certain cases replacing, provisions of this Act in relation to arbitration by a judge as a sole arbitrator or umpire and, in particular, for substituting the Court of Appeal for the Court in provisions whereby arbitrators and umpires, their proceedings and awards, are subject to control and review by the Court.*

(6) … any jurisdiction which is exercisable by the Court in relation to arbitrators and umpires otherwise than under this Act shall, in relation to a judge appointed as a sole arbitrator or umpire, be exercisable instead by the Court of Appeal."

19. In my judgment, interpreted both literally and purposively, "*judge*" in sections 17(1) and 17(2) includes the Chief Justice. It would be surprising if it did not, given that as the most senior judge of the Commercial Court the Chief Justice is the judge most likely to be offered an arbitral appointment. Thus, under section 17(2), it is for the Chief Justice to decide upon his own availability.

20. Under sections 17(5) and 17(6) the jurisdiction exercisable by the Court in relation to the arbitration shall be exercisable instead by the Court of Appeal where a judge accepts an appointment as a sole arbitrator, but not where a judge accepts an appointment as a third arbitrator. Thus were Kawaley CJ to be appointed as third arbitrator, a situation could arise where a Puisne Judge would be required to sit in judgment over him. I agree with Mr Edwards that this would be an undesirable situation. I have no doubt that a Puisne Judge in that position would exercise robust and independent judgment. However, if the Court ruled in his favour a reasonable bystander, not to mention the disappointed party to the application, might suspect that, no doubt unconsciously, the ruling was influenced by the Chief Justice's hierarchically superior status.

21. But were Kawaley CJ to be appointed, I see very limited scope for this situation to arise. That is because, as noted above, under article V (o) of the Policy the parties have agreed to exclude any right of appeal under Section 29 of the 1986 Act against any award rendered by the arbitrators and any application under Section 30(1) of the 1986 Act for a determination of any question of law by the Court. It is true that under section 34(1) of the 1986 Act, where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him. But I consider the likelihood of such an allegation to be so remote that it need not influence my decision making. That leaves section 33, which provides that in all cases of reference to arbitration the Court may remit an award for reconsideration. That is not

the same thing as setting the award aside. The possibility that the Court might be asked to exercise that jurisdiction is in my judgment not sufficient reason not to appoint Kawaley CJ if he would otherwise be the best qualified candidate.

22. Mr Edwards questioned whether, given his role as Chief Justice and judge of a busy Commercial Court, Kawaley CJ would have sufficient availability. To which the short answer is that he is the best judge of his availability, and he has indicated that he would be available to accept the appointment.

Discussion

23. I am satisfied that all three nominees would be independent and impartial third adjudicators and that they are all suitable for the position. Any one of them would be an excellent choice.

24. I therefore reject the Plaintiff's position (although they didn't quite put it this way) that the third arbitrator should necessarily be an English Queen's Counsel or retired English judge and should on no account be a retired US judge, just as I reject the Defendant's position that the third arbitrator should on no account be an English Queen's Counsel or retired English judge. Neither the appointment of Mr Collins nor Judge Crane would in my judgment create an unbalanced tribunal. Neither party would have reasonable grounds to complain were I to appoint either one of them. Of course I shall take account of the parties' preferences and objections but I will not be governed by them. In particular, I do not regard the Plaintiff's formal objection to the appointment of Judge Crane, which was raised very late in the day, as in effect vetoing his possible appointment. In the present case, and notwithstanding the *dictum* of Aikens J, it is sadly inevitable that the arbitration will go forward with one party feeling from the outset unhappy about the identity of the chairman of the tribunal.

25. I propose to adopt a modified version of the threefold test formulated by Aikens J. I shall ask who is best qualified: (i) to deal with the substantive issues; (ii) to deal with the procedural issues; and (iii) to act as Chair. In this

arbitration both substantive and procedural issues are likely to prove important. In the unredacted version of this judgment I have considered the qualifications of the nominees at greater length and given my detailed conclusions in relation to each of these headings.

26. Each of the nominees has particular strengths and weaknesses. In my judgment the best all round candidate is Mr Collins. He is well equipped to deal with issues arising under both the substantive and the procedural law of the arbitration, and will bring to the tribunal his particular strengths as a skilful and experienced Chair. I therefore appoint him as the third arbitrator.

27. I shall hear the parties as to costs.

Dated this 12th day of December, 2017

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Hellman J