GUIDANCE ON DRAFTING ARBITRATION AGREEMENTS CONTAINING ARBITRATOR EXPERIENCE REQUIREMENTS

In the recent English case of *Allianz Insurance Plc and Sirius International Insurance Corporation v Tonicstar Limited* [2018] EWCA Civ 434, the English Court of Appeal revisited the question of whether a contractual requirement for an arbitrator to have "*experience of insurance or reinsurance*" could be satisfied by lawyers whose only experience of insurance or reinsurance is derived through their legal practice. The English Court of Appeal's answer: yes, it can. This case highlights the due care and attention required to draft arbitration agreements, particularly those containing arbitrator qualification requirements.

Key issues

- The English Court of Appeal in *Allianz Insurance v Tonicstar* has found that an arbitration agreement's requirement that arbitrators have "experience of insurance or reinsurance" may be satisfied by appointing lawyers who advise on insurance or reinsurance matters.
- In making its decision, the English Court of Appeal overruled *Company X v Company Y*, an English Commercial Court judgment based on materially identical facts.
- *Allianz Insurance* highlights the potential for challenging an arbitrator due to an imprecisely drafted arbitration agreement containing arbitrator experience requirements.
- This briefing concludes with some guidance on drafting arbitration agreements that include an experience requirement for arbitrators.

THE FACTS

Allianz Insurance Plc and Sirius International Insurance Corporation (the Reinsurers) entered into a reinsurance contact with Tonicstar Limited (Tonicstar). The business ultimately reinsured by the contract included insurance contracts that had been subject to claims against the Port of New York by persons injured during the 9/11 attack on the World Trade Centre. The Port of New York settled the claims and in turn made a claim under its liability insurance. This claim gave rise to Tonicstar's claims against the Reinsurers.

Tonicstar commenced arbitration proceedings against the Reinsurers under the contract that incorporated a standard form set of "Excess Loss Clauses" prepared by the Joint Excess Loss Committee (JELC). Clause 15.5 of the JELC terms states: "*Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance*".

As their party-appointed arbitrator, the Reinsurers appointed Alistair Schaff QC, a London-based barrister with over 30 years' experience of advising on and acting in insurance or reinsurance disputes. However, Tonicstar challenged this appointment on the basis Mr Schaff QC did not have experience in the business of insurance or reinsurance - but rather only of insurance or reinsurance law. Tonicstar relied on an unreported English Commercial Court decision (*Company X v Company Y* (17 July 2000)) which held that Clause 15.5 was intended for a "trade arbitration" (and therefore required appointment of an industry arbitrator, not a lawyer providing services to the industry). Tonicstar argued that the English High Court should remove Mr Schaff QC as arbitrator

pursuant to its power under Section 24(1)(b) of the Arbitration Act 1996 to remove an arbitrator who "*does not possess the qualifications required by the arbitration agreement*".

At first instance, in the English High Court, Teare J held that Mr Schaff QC was not a person from the trade or business of insurance and reinsurance and he was bound to follow precedent. As a result, following *Company X v Company Y*, Teare J found that Mr Schaff QC could not sit as an arbitrator in the current case.

Tonicstar appealed against Teare J's decision.

THE ENGLISH COURT OF APPEAL'S DECISION

The English Court of Appeal reversed the English High Court's decision for the following reasons:

1. The practical and legal aspects of insurance and reinsurance are so intertwined that both lawyers and market professionals can have the skills required to make them suitable arbitrators.
2. Parties incorporating Clause 15.5 of the JELC would have understood a barrister with ten or more years' experience in insurance or reinsurance to have the requisite experience.
3. The judgment in *Company X v Company Y* was erroneous.
4. Notwithstanding the judgment in *Company X v Company Y*, Clause 15.5 of the JELC may be interpreted to allow for the appointment of Mr Schaff QC as an arbitrator within the terms of the arbitration agreement.

COMMENTARY

Allianz Insurance v Tonicstar raises two important issues that have an impact on the drafting of arbitration agreements. Firstly, in relation to the qualification requirements for arbitrators, at a general level, it shows a willingness on the part of the English courts (or the English Court of Appeal, at least) to construe such requirements broadly. Nevertheless, considering the difficulties that arose out of Mr Schaff QC's appointment, the safest course of action for parties drafting arbitration agreements is to ensure that they use clear language to express the nature and scope of the experience or qualifications their arbitrators will require.

As the English Court of Appeal noted, the JELC appears to have recognised this because the latest version of the JELC Excess Loss Clauses (effective 1 January 2018) is modified so that the experience requirement is: "*The arbitrators shall be persons (including those who have retired) with not less than 10 years' experience of insurance or reinsurance or as lawyers or other professional advisors within the industry*".

In the light of *Allianz Insurance v Tonicstar*, parties wishing to include an experience requirement in their arbitration agreements should give thought as to whether the wording unintentionally includes or excludes any class of arbitrator candidate. Parties should also understand that, if they include an experience requirement in their arbitration agreement, the losing party may seek to raise non-satisfaction of that experience requirement in opposing the enforcement of the award (under Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention), the enforcement of an award may be refused where the "*composition of the arbitral authority*" was "*not in accordance with the*

agreement of the parties"). This same ground is provided in section 89(2)(e)(i) of the Hong Kong Arbitration Ordinance (Cap 609) for refusing to enforce an award; and a materially identical ground is contained in section 81(1) of the Hong Kong Arbitration Ordinance (Cap 609) for setting aside an arbitral award.

The second important feature of this case for arbitration is the distinction the English Court of Appeal drew between insurance and reinsurance and other professional activities. The Court specifically referred to sports, engineering and telecommunications. Lord Justice Leggatt accepted that had a similar arbitration agreement experience requirement existed for the arbitrator to have experience of sports, engineering or telecommunications, such a requirement would not be satisfied by showing that the arbitrator had experience advising and acting as a lawyer in sports, engineering or telecommunications disputes. He observed that those three spheres of activity are clearly distinct from the law regulating them; they were different to insurance and reinsurance because negotiators and drafters of insurance contracts needed to have some understanding of insurance law.

Some readers may find this distinction problematic. While there are certainly synergies between law and insurance, all arbitrations necessarily involve the existence of a legal dispute so, depending of course on the wording of the relevant contract, it may be possible that the parties did indeed contemplate, for example, that a construction lawyer could be appointed to hear their engineering dispute. Care will obviously need to be taken to clarify the experience requirement in arbitration agreements.

CONCLUSION

Allianz Insurance v Tonicstar is an example of the willingness of English courts to take a commercial rather than a technical and narrow approach to interpreting arbitration agreements. Although English cases are not legally binding in Hong Kong, they remain highly persuasive authority. It is likely that the approach adopted in *Allianz Insurance* will be followed in Hong Kong given the pro-arbitration stance taken by Hong Kong Courts.

This case highlights the need to draft arbitration agreements with care and attention, particularly if they include an experience requirement for an arbitrator. The consequences of expressing the experience requirement without clarity are manifold: it may restrict the pool of qualified candidates, as well as give an opposing party an opportunity to challenge an arbitrator, set aside the award or object to the award's enforcement.

In relation to drafting insurance and reinsurance contracts, the problems encountered in the *Allianz Insurance* case may be overcome if more specific arbitrator experience requirements are considered for inclusion in the arbitration clause, such as the above noted JELC Excess Loss Clause: "*The arbitrators shall be persons (including those who have retired) with not less than 10 years' experience of insurance or reinsurance or as lawyers or other professional advisors within the industry*."

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