WHITE & CASE

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Court of Appeal Clarifies the Meaning of Section 15 of the English Arbitration Act 1996 on the Appointment of the Arbitral Tribunal

The Court also strengthens the principle that leave of the first instance court is required to appeal against judgments on arbitration claims.

The recent Court of Appeal decision in *Itochu Corporation v Johann M. K. Blumenthal & another* [1] has established that *ad hoc* arbitrations without an appointing authority under the Arbitration Act 1996, unless the parties agree on the number of arbitrators, a sole arbitrator will be appointed even if the arbitration agreement suggests that the parties contemplated more than one arbitrator.

White & Case represented the successful claimant (the respondent at the appeal stage).

Background

In 2008, Blumenthal and Itochu entered into an arbitration agreement stipulating that any dispute was to "*be submitted to arbitration held in London in accordance with English law, and the award given by the arbitrators shall be final and binding on both parties.*" There were no provisions for any set of rules or appointing authority.

A dispute arose between the parties in 2010/11. Blumenthal sought Itochu's consent to the appointment of a sole arbitrator. It relied on section 15(3) of the Arbitration Action 1996, which states that "[i]*f there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator*." Itochu refused to consent, and so Blumenthal applied to the High Court for an order appointing a sole arbitrator under section 18(3)(d) of the 1996 Act.

Itochu contested the application. It submitted that the reference in the arbitration agreement to arbitrators clearly showed the parties' intention to appoint more than one arbitrator, and therefore multiple arbitrators would have to be appointed. Accordingly, this should be understood as referring to either a two or a three-member tribunal. In its submission, section 15(2) of the 1996 Act therefore applied. That section provides that "[u]*nless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any even number shall be understood as requiring the appointment of an additional arbitrator as Chairman of the Tribunal.*" On this basis, Itochu asked the High Court for a three-member tribunal. It alleged that to rule otherwise would go against the principle of party autonomy.

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[1] [2012] EWCA Civ 996

Itochu sought to rely on the case of *Fletamentos Maritimos S.A. v Effjohn International B.V.*[2] It claimed that this case indicated that where an unspecified plural of arbitrators is provided for by the arbitration agreement, it is to be understood as meaning either a two-member or a three-member tribunal. However, as the claimant pointed out, the case had been decided under the Arbitration Act 1950, and the regime was different under the 1996 Act.

In a brief, unpublished judgment dated 3 February 2012, Mr Justice Andrew Smith sided with Blumenthal, making an order under section 18 appointing a sole arbitrator.

The Appeal

Itochu applied to Andrew Smith J for permission to appeal to the Court of Appeal. This was refused. Section 18(5) provides that any appeal against a judgment under that section requires the leave of the High Court. Notwithstanding that, Itochu sought permission from the Court of Appeal itself. It argued that, while the order had been made under section 18, its substance was concerned with the interpretation of section 15. This, the respondent contended, raised a "*jurisdictional threshold question*" separate from the Court's powers to appoint an arbitrator under section 18. Therefore, the leave of the High Court should not be required. Itochu disagreed.

Based on a comprehensive review of available authorities, the Court unanimously refused to give permission to appeal. As Gross LJ put it, "[t]*he Judge's decision was made under s.18, even if his reasons (necessarily) encompassed s.15. It is the decision which is the key to the applicability of s.18(5).*"

Albeit *obiter*, Gross LJ also considered the merits of the case. He found that Andrew Smith J had made the correct decision. Section 15(3) was not ambiguous, and had been inserted in the 1996 Act with a view to "*reducing the cost and burden imposed on parties to the arbitration*", who would otherwise end up with more expensive multi-member tribunals. There needed to be such a rule to keep an arbitration going when the normal appointment procedure fails. The default provision for the appointment of a sole arbitrator was hence "*an example of Court support for arbitration, not an unwarranted infringement on party autonomy*."

Conclusions

Where parties to an *ad hoc* arbitration under English Law indicate that a number of arbitrators should be appointed, but do not fix that number, a sole arbitrator will be appointed. The case indicates that *Fletamentos* is no longer good law in this respect.

This outcome underlines the importance of drafting precise and unambiguously worded arbitration agreements. It also shows that adopting a set of rules – or at least naming an appointing authority – helps avoid initial difficulties in the appointment procedure where the parties are not cooperative.

In terms of appealing against arbitral awards or arbitration-related judgments, the Courts continue their longstanding policy of viewing such appeals critically and interpreting grounds for them narrowly.

[2] [1995] 1 Lloyd's Rep. 311

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