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International Quarterly

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Court removes arbitrator based on justifiable doubts as to his impartiality

By Martin Ewen
Fenwick Elliott

A party may apply to the English court to remove an arbitrator on the grounds that circumstances exist that give rise to justifiable doubts as to his impartiality (section 24(1)(a), Arbitration Act 1996 ("the Act")).

The relevant test for an application under section 24(1)(a) of the Act is as follows:

> *"Whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased."*

Under section 73 of the Act, a party may lose the right to object to an irregularity affecting the tribunal or the proceedings if the objection is not raised promptly.

The facts

In *(1) Sierra Fishing Company (2) Said Jamil Said Mohamed (3) The Estate of Jamil Said Mohamed v (1) Hasan Said Farran (2) Ahmed Mehdi Assad (3) Ali Zbeeb* [2015] EWHC 140 (Comm), the English court had to consider whether to grant an application to remove an arbitrator under section 24(1)(a) of the Act, and whether the right to object had been lost under section 73 of the Act.

The claimants comprised a seafood supply company incorporated in Sierra Leone and its majority shareholders ("the Claimants"). During 2011 the Claimants entered into a finance arrangement with the first and second respondents. The first respondent, Mr Farran, was the Chairman of Finance Bank SAL ("the Bank"), a Lebanese bank.

During May 2012 the Claimants entered into a further loan agreement with Mr Farran and Mr Assad which provided for arbitration in Sierra Leone or London. When no repayments were made Mr Farran and Mr Assad commenced arbitration and proposed the appointment of the third respondent, Mr Ali Zbeeb, as arbitrator.

Thereafter the parties sought to settle the dispute in connection with which a number of draft settlement agreements were negotiated with the participation of Mr Zbeeb. None of these agreements were ever executed so in April 2013 Mr Farran and Mr Assad served notice of recommencement.

The Claimants initially objected to Mr Zbeeb acting on the basis that he was the appointee of one side only. However, Mr Zbeeb did not resign and continued with the arbitration, conducting procedural meetings in July and December 2013 despite the parties' absence and requests that these meetings should not go ahead.

The parties did attend a procedural meeting on 26 June 2014 at which the Claimants first raised concerns over Mr Zbeeb's independence and invited him to step down. The Claimants had learned that Mr Zbeeb's father had been a legal advisor to Mr Farran and the Bank for many years and that Mr Zbeeb had acted as Legal Counsel to the Bank during 2005—2006. Mr Zbeeb dismissed the Claimants' concerns. He asserted it was not his responsibility to volunteer details of his connections with the Bank and stated that he would proceed to issue his award notwithstanding the parties' requests that he should not do so.

On 19 September 2014 the Claimants issued an application to remove Mr Zbeeb as arbitrator under section 24(1)(a) of the Act, contending that there were justifiable doubts as to his impartiality. The application was based on the following grounds:

> (1) There was a legal and business connection between Mr Farran and Mr Zbeeb.
>
> (2) Mr Zbeeb was involved in the negotiation and drafting of the agreements.
>
> (3) Mr Zbeeb's conduct in relation to the Claimants' challenge to his impartiality gave rise to justifiable doubts as to his impartiality.

The issues

Having considered the facts, the court distilled the issues to be considered down to the following:

> (1) Are there circumstances which give rise to justifiable doubts as to Mr Zbeeb's impartiality?
>
> (2) If so, did the Claimants take part or continue to take part in the arbitration proceedings, without raising the objection forthwith, at a time when they knew or could with reasonable diligence have discovered the existence of such circumstances?

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The first issue: Circumstances which gave rise to justifiable doubts as to Mr Zbeeb's impartiality

The Claimants successfully relied on three aspects of the evidence as giving rise to justifiable doubts about Mr Zbeeb's impartiality for the purposes of section 24(1)(a) of the Act.

(1) *The legal and business connection between Mr Farran and Mr Zbeeb*

The connection alleged was first that Mr Zbeeb was engaged by the Bank as legal counsel in 2005/2006 at a time when Mr Farran was chairman of the Bank, and secondly that Mr Zbeeb's father had acted and continued to act for Mr Farran and was a member of the top executive management at the Bank.

After exploring the nature and extent of these connections, the court held that *"these connections would give rise to justifiable doubts as to Mr Ali Zbeeb's ability to act impartially"* and that *"the fair minded observer would take the view that this gave rise to a real possibility that Mr Ali Zbeeb would be predisposed to favour Dr Farran in the dispute in order to foster and maintain the business relationship with himself, his firm and his father, to the financial benefit of all three".*

The court was assisted by the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("the IBA Guidelines"). The IBA Guidelines contain guidance as to which situations do or do not constitute conflicts of interest. The "Red List" consists of two parts, a "Non-Waivable Red List" and a "Waivable Red List". The Non-Waivable Red List identifies situations where the arbitrator should always decline the appointment. This would include, for example, situations where the arbitrator has a significant financial interest in one of the parties. The "Waivable Red List" sets out situations where the arbitrator may only accept the appointment if the parties provide full consents. This would include, for example, a situation where the arbitrator has previously been instructed by one of the parties.

The court held that Mr Zbeeb's law firm, having acted for Mr Farran, and for the Bank, fell within one of only four situations identified in the "Non-Waivable Red List" in the IBA Guidelines that give rise to justifiable doubts about the arbitrator's independence and impartiality and in which an arbitrator should refuse appointment.

(2) *Mr Zbeeb's involvement in the negotiation and drafting of the agreements*

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Mr Zbeeb had been involved in advising the first and second respondents in relation to the draft agreements and the arbitration clause. The Non-Waivable Red List includes situations where *"the arbitrator has given legal advice … on the dispute to a party or an affiliate of one of the parties"* and/or "*the arbitrator has previous involvement in the case*". Accordingly, Mr Zbeeb ought not to have accepted the appointment or continued to act as arbitrator without first raising the issue with the parties and obtaining acceptance on the part of the Claimants to act as arbitrator in the dispute.

(3) *Mr Zbeeb's conduct of the section 24 application*

Mr Zbeeb's conduct lent further weight to the court's concerns as to the lack of impartiality on his part. Extraordinarily and despite the requests of both parties, Mr Zbeeb refused to postpone the publishing of his award until after the application was heard. The only reason his decision was not published was because he had demanded payment of his fees before issue. The parties did not pay and so the decision was not published.

The second concern the court had was the content and tone of Mr Zbeeb's communications with the parties. Mr Zbeeb had made arguments on behalf of the first and second respondents which they had not advanced for themselves, and had called into question the Claimants' good faith in bringing the section 24 application. The court had little hesitation in deciding that Mr Zbeeb had become too personally involved in the issues of impartiality and his jurisdiction to guarantee the necessary objectivity required to determine the merits of the dispute.

The second issue: Loss of right to object under section 73 of the Act

In essence, section 73 of the Act provides that if a party to arbitral proceedings takes part without promptly making any objection he may not raise that objection later unless he shows that, at the time, he did not know and could not with reasonable diligence have discovered the grounds for objection.

The court found that each of the three aspects of the evidence above was sufficient on its own to give rise to justifiable doubts about Mr Zbeeb's impartiality. Accordingly, the Claimants' right to object would only have been lost if the conditions in section 73 of the Act were satisfied separately in respect of each of the three sets of circumstances, which they were not.

The court granted the application for the removal of Mr Zbeeb.

Overview

The English court has made its position clear in relation to the duty of an arbitrator to disclose any facts or circumstances that may cast doubt on their impartiality. Further, this obligation can extend even where the parties could arguably have discovered the facts or circumstances through their own due diligence. Arbitrators should consider and familiarise themselves with the IBA Guidelines and how they may impact on a decision as to whether to accept an appointment or when a challenge is raised as to the appointment. In the event of a challenge to their impartiality, arbitrators should deal with this in a neutral and measured manner so as to demonstrate they are capable of an impartial determination of the merits of the dispute.

In the event that a party wishes to raise an objection it is crucial that it does so promptly, that is, as soon as it discovers grounds for doing so. A party may lose its right to object under section 73 of the Act if it takes part in proceedings when it could have discovered the grounds for the relevant objection "with reasonable diligence".

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ICC Launches New 2015 Expert Rules

By Nicholas Gould
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With thanks to Robbie McCrea of Fenwick Elliott for his assistance in preparing this paper.

The ICC has launched a new set of Expert Rules. The ICC's prior set of Rules for Expertise came into force on 1 January 2003. After careful consultation the 2003 Rules for Expertise have been updated and amended, resulting in three sets of rules for the appointment and administration of Experts and Neutrals, which came into effect on 1 February 2015 (the Rules).

The Rules have been designed to enhance the full-spectrum service offered by the ICC in relation to expertise in ADR and streamline the process, while still retaining the established format of the 2003 Rules. The Rules therefore provide three complementary sets of rules, one for each of the distinct services provided by the ICC, namely:

1. The identification and proposal of Experts or Neutrals;
2. The identification and appointment of Experts or Neutrals; and
3. The administration of expert proceedings.

The scope and purpose of the three rules are set out in each case in an explanatory preamble, which includes examples of when those services might be useful. In addition, parties can seek guidance and assistance from the ICC International Centre for ADR (the "Centre"), which administers the Rules, and from the ICC Standing Committee which provides a facilitative role in relation to each of the three services.

The new Rules

The Rules contemplate a broader scope of service for Experts than their predecessor. In particular, the Rules recognise that Experts with particular knowledge in technical, legal, financial and other fields may well be used in a variety of situations, from obtaining an expert opinion in the ordinary course of business, to international commercial arbitrations.

In addition, the Rules provide for the appointment of Neutrals, who are persons who might not have expertise in the technical subject matter of the dispute, but have other forms of expertise such as mediation, conciliation or legal training, making them suitable to assist parties to resolve differences or disputes.

There are also a number of amendments and additions designed to streamline the process and enhance the service. For instance, there is now an express provision in the administration rules that the parties and expert "shall make every effort to conduct the expert proceedings in an expeditious and cost-effective manner…"

Further, parties are now required to ensure that any request for a proposal, appointment, or administration is accompanied by detailed information so as to better inform the Centre when providing its services, such as proposing and appointing an appropriate Expert or Neutral, and to allow potential conflicts of interest to be identified at an early stage. In respect of this, the ICC is in a unique position as its network of 90 national committees around the world provides the ICC with access to a network of Experts and Neutrals in a wide range of fields internationally.

Three distinct services

Identification and proposal of Experts and Neutrals

Any person may ask the Centre to propose one or more Experts or Neutrals. The person requesting a proposal should provide detailed information about the type of work required, the scope of appointment, language, and location; the ICC will use this information to propose an Expert with qualifications that best match the stated criteria.

Before making a proposal, the ICC will require the Expert to sign a statement of acceptance, availability, impartiality, and independence, and disclose any facts or circumstances that might call his or her independence into question.

Appointment of Experts or Neutrals

The ICC may appoint an Expert where the parties have agreed that an Expert shall be appointed and that the Centre shall be the appointing authority, or otherwise where the Centre is satisfied that there is sufficient basis for appointing an Expert.

The requesting party must provide the same information as a request for a proposal, but must also include a copy of the parties' agreement or other foundation for the basis of the request. The ICC will only proceed to appoint an Expert once it is satisfied that both parties have given it the requisite authority to do so, or otherwise where it is satisfied that there is sufficient basis for appointing an Expert or Neutral.

Administration of expert proceedings

Either party may submit a request to the Centre to assist in the administration of expert proceedings, which should also include key details such as: a description of the dispute, the field of activity of the Expert to be appointed, any desired/undesired attributes of the Expert, and the anticipated scope of work to be carried out by the Expert.

The Centre will only process a request where

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it is based upon an agreement by the parties for the administration of expert proceedings, or if the Centre is otherwise satisfied that there is sufficient basis for administering expert proceedings.

By agreeing to appoint an Expert under the Rules, and to have the proceedings administered by the Centre, the parties will be bound by the following:

1. Non-participation by either party will not deprive the Expert of the power to make findings and render a report.
2. The parties agree to provide documents and facilitate the implementation of the Expert's "mission".

Once an Expert is appointed it must determine its "mission", in consultation with the parties. The Expert's mission sets out the scope of issues to be investigated and the procedure for doing so. This requires the Expert to take charge of the proceedings, identify the issues, set out a procedure and timetable, and then work to it. Modifications to the issues or procedures must be agreed with the parties, while adjustments to the timetable must be communicated to the parties and the Centre.

The Expert will proceed to produce a written report setting out its findings. The report must include reasons, and the parties must be given the opportunity to be heard and/or make written submissions before the report is finalised. In addition, the Centre must review and approve the Expert report, and it may require modifications to be made, before it is finalised.

All of the information given to the Expert by the Centre or disclosed during the course of the proceedings is to be treated as confidential. However, the Expert's report will be admissible in any judicial or arbitral proceedings between the same parties, unless both parties agree otherwise.

Other rules compared

There are a number of other established ADR bodies that provide for the appointment of experts, for instance the UNCITRAL Arbitration Rules, the AAA/ICDR International Arbitration Rules, and the LCIA Rules. However, none of these rules provide procedures for dealing with expert evidence, nor do they provide support services for proposing, appointing, or administering expert proceedings.

Practical considerations

While the use of experts and neutrals in relation to ADR is by no means new, it is a quickly growing trend. The Rules have responded to this trend by providing an expanded and enhanced service for the use of Experts and Neutrals in relation to ADR.

However, there are still a number of practical considerations that should be carefully considered by the parties when using the Rules, and in particular for international arbitration. These include: proper identification of issue(s) and procedures for developing the particular questions of the experts, timetabling, joint meetings of experts, joint expert reports on areas of agreement and disagreement, limiting and focusing the expert report, and the potential for witness conferencing at hearing.

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The Insurance Act 2015

By Matt Simson
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On 12 February 2015, the Insurance Act 2015 ("the Insurance Act") received Royal Assent. It represents the most significant statutory change to UK commercial insurance law in over 100 years, and it will have a substantial impact on insurance practice and procedures, as it will apply to every insurance policy and reinsurance policy that is written in England and Wales, Scotland and Northern Ireland, as well as any renewals and endorsements.

This article: (i) discusses the rationale behind the Insurance Act and summarises its key points; (ii) reviews the position at Australian law under the Insurance Contracts Act 1984;

(iii) considers the provisions of the Third Parties (Rights Against Insurers) Act 2010 ("the Third Parties Act") (which can now come into force as a result of the Insurance Act); and (iv) identifies the practice points that arise from both English Acts.

Rationale behind the Insurance Act

The current insurance law in the United Kingdom is based on the statutory framework of the Marine Insurance Act 1906, which is now outdated and no longer reflective of commercial reality and practice. Its replacement, the recently assented Insurance Act, has been introduced to modernise and simplify the law, to balance more fairly the interests of insurers and the insured, and to provide a new framework for an effective and competitive insurance market that is more sensitive to the needs of business.

Contrary to the usual position whereby new Acts of Parliament come into force shortly after receiving Royal Assent, the Insurance Act will not come into force until autumn 2016 in order to give the industry plenty of time to prepare, and for insurance policies to be made compliant.

Insurance Act: key points

Duty to make a "fair presentation" of the risk

The duty to make a fair presentation of the risk is probably the most substantial change to be effected by the Insurance Act, as it relates to the disclosure of material information which enables insurers to assess and therefore price the risk correctly.

The new duty requires the insured to either (i) disclose every material circumstance which he knows or ought to have known; or, failing that, (ii) disclose sufficient information to put a prudent insurer on notice of the fact that it needs to make further enquiries for the purposes of revealing those material circumstances. The disclosure has to be given in a manner which would be reasonably clear and accessible to a prudent insurer. Every material representation as to a matter of fact must be substantially correct, and every material representation as to a matter of expectation or belief must be made in good faith. It will no longer be possible to dump data on insurers indiscriminately without highlighting the key aspects, and insurers will have a new obligation to follow up on any unanswered questions, which represents a sea change to the existing law which places the burden of disclosure squarely on the insured.

Where the insured is an organisation, the relevant knowledge will be the knowledge of anyone who is part of the senior management of the insured (this will include the Board, the Risk Manager and anyone who plays a significant role in the making of decisions about how the activities of the insured are to be managed and/or organised), as well as anyone who is responsible for insurance. The knowledge of the insured is defined having regard to information that could be expected to be found by a reasonable search of information held by the insured, its agent(s), or co-insured. In practice, it is likely that the search will extend beyond senior management to those who perform a management role, or who otherwise possess relevant information or knowledge about the risk to be insured. This is particularly the case for large companies and organisations, but much will depend upon the structure and management arrangements of the insured.

As far as insurers are concerned, they will be deemed to have knowledge of anything that is known to them or any individual who participates on their behalf in the decision whether to take the risk and, if so, on what terms. In practice, this will be the knowledge of the underwriters, or insurers' claims staff if they are involved in the renewal process. Insurers are "presumed" to know anything that is common knowledge, and anything that an insurer offering insurance of the class in question to the insured in the field in question would reasonably be expected to know in the ordinary course of its business.

Warranties

The Insurance Act makes three changes to the way in which warranties (i.e. terms of the insurance policy) are dealt with. Under the existing law, as a general rule, insurers are discharged from all liability under an insurance policy following a breach of warranty of the insured, regardless of the subject matter or relevance to the actual loss suffered.

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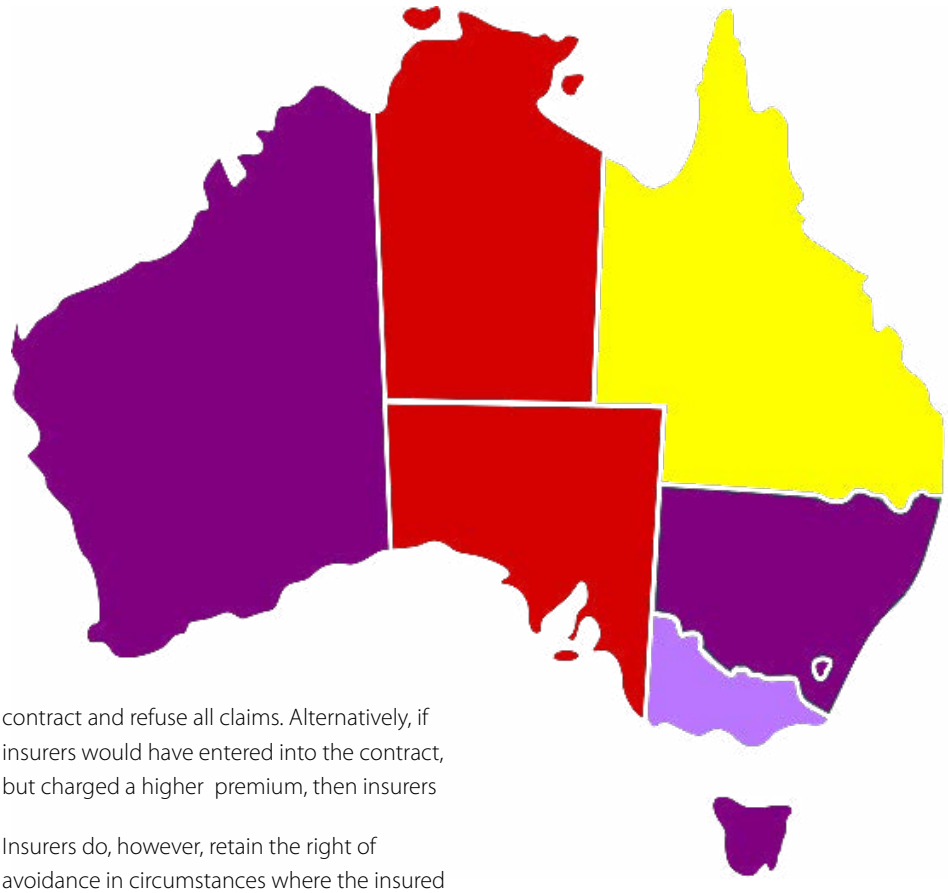
Under the new regime, first, warranties will operate as suspensive conditions, which means that insurers' liability to make payment will remain suspended until such time as any breach of warranty has been remedied, and insurers will remain liable for any losses prior to the breach of warranty. For any warranties that are subject to deadlines, if the deadline is missed, the insured will remain, and cannot cease to be, in breach, given that the critical time for compliance has passed, and insurers will therefore not be obliged to provide an indemnity in such cases.

Second, insurers will no longer be able to rely on a breach of warranty, condition precedent, exclusion clause, or any other term which did not increase the risk of, and was irrelevant to, the loss that occurred. So if, for example, there was a failure to put in place adequate measures for site safety, and the site was then subject to theft, insurers will still be obliged to make payment under the policy, whereas they currently have no such liability.

Finally, "basis of the contract" clauses, which can turn any pre-contractual statement from a policyholder into a warranty, will be abolished. This means that it will no longer be possible for insurers to avoid a claim on the basis of the insured's breach of a contract term in circumstances where the breach is completely irrelevant to the loss suffered by the policyholder.

Insurers' remedies

In the event that the insured fails to make a fair presentation of the risk, the Insurance Act offers a much more flexible and commercial approach than the existing regime. From August 2016, if an insured innocently fails to make a fair presentation of the risk, insurers will only be able to avoid policies if, but for the breach of duty to make a fair presentation, they would not have entered into the insurance contract at all. In such cases, insurers will have a new right to return the premium, avoid the



contract and refuse all claims. Alternatively, if insurers would have entered into the contract, but charged a higher premium, then insurers

Insurers do, however, retain the right of avoidance in circumstances where the insured has not been entirely truthful. If the insured knew it did not make a fair presentation, or did not care whether it had made a fair presentation, then it will be open to insurers to avoid the policy without returning the premium. In the case of outright fraud, insurers will now have the option to notify the insured that the insurance policy is terminated from the time of the fraudulent act (which renders the claim fraudulent), and can refuse liability in respect of a relevant event taking place after the fraudulent act. Valid claims made before any fraudulent act will, however, be unaffected.1

Contracting out

With the exception of basis of contract clauses, insurers may contract out of the Insurance Act provided: (i) they take sufficient steps to draw any disadvantageous terms to the attention of the insured or its agent before the contract is entered into or any variation is agreed; and (ii) the disadvantageous term is clear and unambiguous, having regard to the characteristics of the insured and the circumstances of the transaction. This is a potentially very wide test.

The term "sufficient steps" will depend upon the characteristics of the insured and the circumstances of the transaction. Steps that are sufficient for one insured may not necessarily be sufficient for another, and the extent to which insurers will need to spell out the consequences of a disadvantageous term will depend on the insured, and the extent to which it could be expected to understand the consequences of the provision. Contracting out of the Insurance Act is therefore likely to be an area ripe for dispute.

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The position in Australia: the Insurance Contracts Act 1984

Whilst many of the concepts in the Insurance Act are new to English law, they are grounded in and provided for by insurance contracts legislation in a number of overseas jurisdictions, including Australia, where the Insurance Contracts Act 1984 ("the Insurance Contracts Act") operates to limit insurers' traditional insurance avoidance defences and make remedies for an insured's non-disclosure and misrepresentation proportionate to the breach.

Section 28 of the Insurance Contracts Act sets out the remedies that are available to insurers for non-disclosure and misrepresentation by the insured, and restricts insurers' common law right of avoidance to instances where the insured has made a fraudulent non-disclosure or misrepresentation.

Where an insured has made an innocent or negligent non-disclosure or misrepresentation, the Insurance Contracts Act does not allow the insurer to avoid the insurance contract from the date of its creation, but instead, by virtue of section 60, entitles the insurer to cancel the contract.

Similarly to the Insurance Act, if, but for the insured's innocent or negligent non-disclosure or misrepresentation, insurers would not have entered into the contract on the same terms, but would have been prepared to enter into the contract had it provided for a higher premium, higher excess, or additional terms and conditions, then the Insurance Contracts Act 1984 provides that the insurer may reduce the amount it pays out in order to put itself in the position it would have been in but for the breach.

If the insurer would not have entered into the contract at all had the insured not made the non-disclosure or misrepresentation, then the insurer may reduce its liability to nil; that is, it may refuse to pay out on the insured's claim.

Third Parties Act

The Third Parties Act is of particular importance in the context of professional indemnity policies, which often contain an exclusion clause providing that insurers will not have any liability directly arising out of the insolvency or bankruptcy of the insured and/or that the policy will be automatically cancelled on the insolvency of the insured. Such exclusions are usually triggered in relation to, for example, a claim for unpaid fees by the supply chain during the course of the works against an insolvent contractor.

At common law, if a person who is insured under a liability policy incurs a liability to a third party but then goes into liquidation, any money subsequently paid out under the policy will form part of the insured's assets and will ultimately be distributed to creditors, leaving the party to whom the liability is owed with nothing.

The Third Parties Act will provide those with a liability claim against an insolvent insured with a recovery, by altering the position at common law and making it easier for parties with liability claims to bring a claim directly against the insurers of the insolvent insured. From Autumn 2015, it will be possible to join insurers as a joint defendant with the insolvent insured, without having to first establish a legal liability as against the insured in separate proceedings by a declaration or judgment of the court, arbitration award or settlement,2 as is the position under the Third Parties (Rights against Insurers) Act 1930, which represents the current law.

It is very important to note, however, that the ability to make a direct claim against insurers will be subject to any coverage issues that might arise,3 and coverage may look quite different in August 2016 when the Insurance Act comes into force. This makes it all the more important for those with liability claims against insolvent insured to be fully aware of the provisions of the Insurance Act that are discussed above.

Finally, in addition to making a direct claim against insurers possible, the Third Parties Act will also make it easier for parties with liability claims against insolvent insured to obtain information from the insurers or the broker on a pre-action basis. It will be possible to seek information about: (i) the identity of the insurer; (ii) whether there is a policy in place that might cover the alleged liability; (iii) the terms of the policy; (iv) whether the insurer has denied liability; (v) whether proceedings have been issued by the insured in respect of the cover; (vi) whether there is an aggregate limit of indemnity, and, if so, how much if anything has been paid out on other claims; and (vii) whether there are any fixed charges that would apply to any sums that might be paid out. The insurer or broker is under an obligation to provide the information requested within 28 days, and in circumstances where information is not available, explain why it cannot be provided and who else might have it. If the insurer or broker fails to comply, then the party with the liability claim may seek a court order requiring the information (or documents) to be provided.

Some practice points

- It is open to insurers to contract out of most of the provisions of the Insurance Act, and this contracting out may affect the rules against which you will be measured when you present your risk. Review any new policy in detail so that you understand how the policy will operate and what is required of you.
- Ascertain who needs to be consulted, both within your company or organisation and also externally, to ensure you have the right information from the right people so that you may fairly present your risk to

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insurers.

- If possible, try to contract out of the knowledge provisions in the Insurance Act and replace them with something that is tailored to fit the management structure of your company or organisation. Ideally, you should generically define who the knowledge-holders are for the purposes of the information obligations under the policy so that your obligations are clear.
- For the first time, the Insurance Act provides guidance on the placement process and you must present information (including complex information) in a manner that is clear, accessible and meaningful to a third party who may have no technical knowledge. Do not "data dump" on insurers indiscriminately, or overwhelm them with lots of irrelevant material.
- If you have a liability claim against a third party that is insolvent but has liability insurance, it is now easier for you to make a direct claim in respect of the third party's liability against its insurers under the Third Parties Act. You will be able to claim provided that (i) the insolvent insured meets the definition of "insolvent" under the Third Parties Act, and (ii) you have a valid liability claim against the insured.
- Prior to presenting a claim under the Third Parties Act, you should approach the insolvent party's insurers to request a copy of the policy to check whether there is liability cover, and ask for their confirmation that the policy will respond to your claim, if appropriate. If insurers confirm that cover has been declined, or proceed under a reservation of rights in relation to coverage, they are not obliged to communicate their reasons for not confirming an indemnity as this information will be confidential. Insurers may, however, be prepared to provide the information you seek and provide you with a copy of the policy on a voluntary basis if the declinature is valid in order to avoid the issue of legal proceedings. An informal approach to insurers in correspondence is therefore worthwhile prior to issuing proceedings.

Conclusion

Insurers, underwriters, brokers, and the insured will have much to do in advance of the introduction of the Insurance Act in August 2016. Insurers will have to review existing policy wordings; underwriters will have to amend their underwriting policies and procedures; and brokers will have to become familiar with the implications of the Insurance Act and the effect on commercial insurance. The insured will need to change the way they present risks, understand how warranties will operate under the new regime, and appreciate the new remedies that will be available to insurers in respect of fraud and in the event that the presentation of risk is unfair.

Much is set to change and only time will tell whether the Insurance Act will achieve its stated aims of modernising and simplifying insurance law. If its provisions are not commercially feasible, contracting out of the Insurance Act will likely become widespread, in which case extensive case law is likely to follow.

Footnotes

[1] In the case of a professional indemnity policy, for example, this would be the fraudulent notification of a claim, even though no loss would have occurred.

[2] Albeit many liability policies specifically exclude liability claims that have arisen purely as a result of agreement between the parties, in which case a declaration would be preferable to ensure that the Third Parties Act will bite.

[3] If, for example, the insolvent insured failed to make a fair presentation of the risk (as to which, see above) when taking out the cover, then insurers may decline the cover, or make a reduced payment.

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Challenging an arbitration decision: serious irregularity

By Jeremy Glover
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It would be fair to say that a party wishing to challenge an arbitration award, under the 1996 Arbitration Act, in England and Wales will as a general rule face an uphill struggle. Even where challenges are made, the courts tend to uphold the original award. This makes the recent decision of Mr Justice Akenhead in the case of *The Secretary of State for the Home Department and Raytheon Systems Limited*[1] all the more interesting.

Mr Justice Akenhead had to consider a challenge to an award on the grounds that there had been a serious irregularity under section 68(2) (d) of the 1996 Arbitration Act. As the Judge noted, there was:

> *"no previous authority which substantially mirrors the facts of the current case and, indeed, there are relatively few reported decisions on Section 68(2) (d)".*

Section 68(2) of the 1996 Arbitration Act provides that:

> *"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the grounds of serious irregularity affecting the tribunal, the proceedings or the award …*
>
> *(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant …*
>
> *(d) failure by the tribunal to deal with all the issues that were put to it;*
>
> *(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may —*
>
> *(a) remit the award to the tribunal, in whole or in part, for reconsideration,*
>
> *(b) set the award aside in whole or in part, or*
>
> *(c) declare the award to be of no effect, in whole or in part.*
>
> *The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."*

To succeed under section 68, an applicant must prove that there is:

(i) a "serious irregularity"; and

(ii) that the serious irregularity caused substantial injustice to the applicant.

The dispute itself related to an eBorders contract (or technology system, in order to reform UK border controls by putting in place an electronic system to vet travellers leaving and entering Britain by checking their details against police, security and immigration watch-lists). That contract had been terminated by the Home Office in July 2010. The case in question was a substantial international arbitration, with large legal teams. There had been a 42-day hearing which took place over six months. If the challenge succeeded, the resulting need to rerun such an arbitration would be a significant undertaking.

The tribunal decided that the Home Office had unlawfully terminated and thereby repudiated the contract and awarded Raytheon damages which included £126,013,801 for a claim known as claim A4 – Transfer of Assets. Other sums awarded amounted to £59,581,658 plus interest.

In short, it was the Home Office's case that there had been "serious irregularity" on the part of the tribunal in failing to deal with all the issues that were put to it, in particular important parts of its case on liability and quantum with regard to claim A4. Instead the tribunal had only addressed whether there was breach by the Home Office of a condition precedent in the termination clause. The Home Office also said that the tribunal had ignored its case on the value of assets transferred after termination as well as certain quantum issues.

Mr Justice Akenhead noted that section 68 reflected the:

> *"internationally accepted view that the Court should be able to correct serious failures to comply with the 'due process' of arbitral proceedings".*

He accepted that the threshold test for "serious irregularity" was a high one. The requirement that the serious irregularity has caused or will cause substantial injustice to the applicant was there to eliminate technical challenges. In the view of the Judge, section 68 should not be used to get around restrictions on appeals of law or fact. As noted at the start of this article, the courts will try and uphold arbitral awards where they can.

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The Judge made clear that what the court needs to do in deciding whether to remit or set aside is to:

> *"consider all the circumstances and background facts relating to the dispute, the award, the arbitrators and the overall desirability of remission and setting aside, as well as the ramifications, both in terms of costs, time and justice, of doing either".*

Therefore what is required is a

> *"pragmatic consideration of all the circumstances and relevant facts to determine what it is best to do but it necessarily covers the interests of justice as between the parties".*

It is important to note that if it is the case that the arbitrators have misdirected themselves on the facts, that does not amount to a failure to deal with an issue. However, that was not what was being argued by the Home Office here. First of all, the Judge held that the tribunal had not addressed whether or not all or substantially all of the delay was the actual fault or responsibility of Raytheon. Further, Mr Justice Akenhead was of the view that:

> *"if the tribunal had considered the issue in such terms, there is a real chance that it would have to reconsider some of its key findings".*

This was important, for to succeed with such an application the applicant must show that its position on that issue was "reasonably arguable" and further that had the tribunal found in his favour, it might well have reached a different outcome in the award. The way that this was addressed by the court can be seen with the quantum claim. Here, Mr Justice Akenhead considered that the Home Office had clearly raised with the Tribunal that when calculating quantum relating to unjust enrichment, due account should be taken of the extent to which the costs incurred related to any delay, disruption and inefficiency which was the fault of Raytheon. The tribunal apparently failed to do this. The result of overlooking this "important issue" was that an award in the sum of £126 million was made against the Home Office.

These two issues were described as being "important and indeed critical". There had been a serious irregularity and the Home Office's application was made out. The Judge then had to consider what steps to take. Should the award be remitted or sent back to the original tribunal? The Judge noted that a court needs to consider all the circumstances relating to the dispute, the award, and the arbitrators themselves. What were the effects in terms of time and costs? What were the interests of justice as between the parties? Further, whilst the Judge noted that this was not a point based on prior authority, he did consider that the relative importance or seriousness of the established irregularities was a factor to be taken into account on the decision to set aside. The more serious the irregularity the more likely it is that setting aside may be appropriate.

The key question for the Judge was this:

> *"one needs to consider whether there is a real risk, judged objectively, that even a competent and respectable arbitral tribunal, whose acts or omissions have been held to amount to serious irregularity causing*

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substantial injustice may sub-consciously be tempted to achieve the same result as before".

Taking everything into account, the Judge formed the view that this was a case where the award should be set aside in total and the matter resolved by a different arbitral tribunal. His reasons could be split into two parts:

(i) The nature of the irregularity and its effect on the tribunal:

- Both grounds were towards the more serious end of the spectrum of seriousness in terms of irregularity.
- The fact that the tribunal took some 16 months after final oral submissions to produce their award might lead a fair-minded and informed observer to wonder (rightly or wrongly) at least whether (subconsciously) the tribunal was seeking some sort of shortcut.
- It would be difficult for the tribunal to be required to set aside all its previous ideas. Therefore: *"If, albeit conscientiously and competently, the tribunal in effect reached exactly the same conclusions as before, that might well lead to a strong belief objectively that justice had not been or not been seen to have been done."*

(ii) It would not be necessary to re-hear many of the issues decided in the first arbitration, and if these issues were reopened, the party doing so would do so at the risk of sanction on costs:

- Much of the arbitration would not have to be reopened. On many of the individual issues on which each party lost, the Judge anticipated that the losing party would not seek to re-argue them. This would be because of the potential for a costs sanction. If a party which lost on a given factual or legal issue before the current tribunal argued it again and lost, the Judge made it clear that he would not be surprised if that led to an indemnity cost sanction, whatever the overall result.
- Further, much of the factual evidence, adduced before the current tribunal, would be redeployed before the new tribunal and, if anything, it could be rationalised to reflect concessions made by witnesses in cross-examination before the current tribunal.
- The experts, who are likely to have produced joint statements, were, in the view of the Judge, unlikely to change their views materially.

All of which meant that there would be no need for another 42-day hearing. Therefore, although most decisions are remitted to the original tribunal, here the Judge ordered that the dispute be referred back to a different tribunal.

Postscript

The Judge also granted permission to appeal, and we will keep an eye on whether there is any news of an appeal.

Footnotes

[1] [2015] EWHC 311 (TCC) and [2014] EWHC 4375 (TCC).

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News and events

Trends, topics and news from Fenwick Elliott

Issue 13, 2015

This edition

Fenwick Elliott's FIDIC seminars

We have been busy in the past few months travelling to various countries to host FIDIC focused seminars. Towards the end of 2014 we held a FIDIC related seminar in Bucharest. This seminar was very well received and we were asked to host a follow up session, again based on FIDIC, which we did in February with Nicholas Gould and Jeremy Glover delivering a full agenda of information. This was then followed by a talk at the *FIDIC International Contract Users' Conference in Abu Dhabi* and two seminars in Turkey, namely in Ankara and Istanbul.

In Abu Dhabi, Nicholas Gould and Jeremy Glover were talking about time bars and given that FIDIC are currently working on final changes to their new revised suite of contracts, they thought it would be a good time to ask the audience for their views. In response to a question about what should happen to the current sub-clause 20.1 time bar imposed on the contractor the audience's views were as follows:

Should FIDIC retain the 28-day time bar in sub-clause 20.1

- 23% Yes: it is fair and clearly worded so everyone knows where they stand;
- 43% Yes, but only if a clause similar to 20.1(a) of the Gold Book is introduced, to give the DAB scope to allow late claims in;
- 6% Yes: but it should be 14 days, its primary purpose to act as an early warning notice for the benefit of the project;
- 17% Yes: but the time period should be 42 days. That is fairer on the Contractor;
- 9% No: time bars are manifestly unfair, contrary to FIDIC's balanced approach and potentially mean the right to pursue a valid claim is lost.

That showed a clear majority in favour of some sort of time bar, albeit one which follows the comments of Mr Justice Akenhead last year in the Obrascon case where he suggested that he saw *"no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer".* [IQ Issue 10 - 'Termination by the Employer under the FIDIC form of contract'] There was also a small overall majority in favour of there being a more formal Employer time bar too.

Should FIDIC make sub-clause 2.5 a 28-day time bar?

- 30% Yes, now that's what I call a fair, balanced contract;
- 26% Yes, but only if the Employer is given a fair lengthy period, say 84 days, to make its claims;
- 28% No: the current approach is the fair one;
- 16% No: it would be a pointless exercise as every Employer will delete the clause and you would be left with nothing.

It will be interesting to see what FIDIC finally decide.

Fenwick Elliott Seminars in the Middle East

Nicholas Gould will be co-hosting a seminar with Wendy MacLaughlin of Hill International entitled "*How to deal with delays in your construction projects",* which will be held in May in Abu Dhabi and Dubai.

If you would like to attend, please email Lucy Marshall, lmarshall@fenwickelliott.com.

The new CIArb Dispute Board Rules and comparison table of Dispute Board Rules

The need for prompt, cost-effective and impartial dispute resolution can be found in many contractual relationships in many industries. In order to meet this need, the CIArb have issued the Dispute Board Rules, which cater to any medium or long-term project, whether construction, IT, commercial or otherwise. Nicholas Gould, partner at Fenwick Elliott and Chair of the CIArb Drafting Committee launched these new Dispute Board Rules at the *Dispute Appointment Services (DAS) Convention*. To see the full CIArb Dispute Board Rules, Practice and Standards Committee please visit www.fenwickelliott.com.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions jglover@fenwickelliott.com.

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