THE CHALLENGE OF EXPERIENCE: *ALLIANZ INSURANCE PLC AND SIRIUS INTERNATIONAL INSURANCE CORPORATION V TONICSTAR LIMITED* [2018] EWCA CIV 434

In the recent case of *Allianz Insurance Plc and Sirius International Insurance Corporation v Tonicstar Limited* [2018] EWCA Civ 434, the 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 Court of Appeal's answer: yes, it can. In addition to providing guidance on qualification requirements for arbitrators, the Court of Appeal's judgment contains some noteworthy reasoning, including in relation to the doctrine of *stare decisis*.

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 Mr 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 does not have experience *the business* of insurance of reinsurance - but rather only of insurance or reinsurance law. Tonicstar relied on an unreported decision

Key issues

- The High Court interpreted a requirement for arbitrators to have "*experience of insurance or reinsurance*" as being satisfied only by arbitrators with experience of the insurance or reinsurance industry (and not merely professional advisors to the industry).
- The Court of Appeal reversed the High Court's decision finding that the experience requirement *could* include lawyers who advised on insurance or reinsurance matters.
- Nevertheless, arbitrator qualification requirements that mandate experience in a particular industry may be construed as excluding candidates whose experience is limited to the provision of advisory services.
- Care needs to be taken when drafting arbitration agreements with arbitrator qualification requirements.
- In making its decision, the Court of Appeal appeared to suggest that, consistent with the principle of providing legal certainty, first instance courts need not consider themselves strictly bound by unreported judgments that are obviously mistaken.

(*Company X v Company Y*) dated 2000 which held that Clause 15.5 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 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 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 Teare J's decision.

THE COURT OF APPEAL'S DECISION

The Court of Appeal reversed the 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

This case raises several interesting and important issues. 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 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 Court of Appeal noted, the JELC appears to have taken this advice 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 light of the Tonicstar decision, 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*, 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*").

The second particularly interesting feature of this case is the link the Court of Appeal drew between the industry of insurance and the business of law. Lord Justice Leggatt accepted that had a similar experience requirement existed for the arbitrator to have not less than 10 years' experience of sports, engineering or telecommunications such a requirement would *not* be satisfied by showing that the arbitrator had over 10 years' experience advising and acting in sports, engineering or telecommunications disputes. 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.

Finally, the Court of Appeal's comments on the doctrine of precedent merit comment. In the judgment, Lord Justice Leggatt spends some time setting out authorities confirming that, driven by the need to deliver commercial certainty, a later court must act consistently with the decisions of an earlier court. However, his own wording of this principle (at paragraph 21) seems deliberately open: "*later courts may think it right to adhere to the interpretation previously adopted, even if, had they been deciding the question for the first time, they would have taken a different view*." The corollary to this statement appears to be that later courts may also *not* think they need to follow an earlier interpretation. Lord Justice Leggatt goes on to say that while certainty is important, "*so too is the ability of a legal system to correct error, and contracting parties may be taken to know that a decision of a court of first instance is not immutable and is capable of being overruled*." In this context, the judgment discounted *Company X v Company Y* because that case was not reported and there was no evidence to suggest the parties had taken it into account when entering into the reinsurance contract. Lord Justice Leggatt concludes that "*if a decision is not one on which significant reliance is likely to be placed or if the consequences of such reliance are unlikely to be significant the importance of certainty is diminished. And if a decision is untenable it should not in any case be allowed to stand*." All of this appears to give lower courts some ground, where circumstances permit, to make the call that despite the existence of a precedent, they may not need to slavishly follow it - and if they do and get it wrong, the appeal court is there to correct them.

CONTACTS

Audley Sheppard QC
Partner, London

T +44 20 7006 8723
E audley.sheppard@cliffordchance.com

Ben Luscombe
Partner, Perth

T +61 8 9262 5511
E ben.luscombe@cliffordchance.com

Sam Luttrell
Partner, Perth

T +61 8 9262 5564
E sam.luttrell@cliffordchance.com

Philip Hill
Partner, London

T +44 20 7006 8706
E philip.hill@cliffordchance.com

Peter Harris
Senior Associate, Perth

T +61 8 9262 5581
E peter.harris@cliffordchance.com