ARI v WXJ: pragmatism in arbitral appointments

Alexander Uff

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In ARI v WXJ, the English High Court adopted a "pragmatic approach" to determine whether an arbitrator had been validly appointed in a London-seated arbitration, holding that an appointment required first, that the arbitrator had given a "clear and unequivocal communication of acceptance", and secondly, that the appointing party acted on the acceptance by communicating the appointment to the opposing party (paragraph 22).

The dispute in ARI arose when an arbitrator refused to participate in a London Maritime Arbitrators Association (LMAA) arbitration, citing the insufficiency of the applicable fee, after the arbitrator had confirmed availability and the appointing party had notified the appointment to the opposing party.

Taking a pragmatic approach, the court rejected the argument that the validity of the appointment depended on whether a contract was formed between the arbitrator and the appointing party. On this approach, it was argued, where there was no agreement on the arbitrator's fee or, potentially, other essential terms, no contract was formed and there could be no valid appointment. Rejecting this analysis in favour of a pragmatic approach, the court noted the informality and brevity that typically characterise exchanges preceding arbitral appointments.

The issue had potentially far-reaching repercussions because an invalid appointment would constitute a default causing the appointing party to lose its right to select an arbitrator. Under the arbitration agreement at issue, which echoed section 17 of the Arbitration Act 1996 (AA 1996), the adverse party could then designate its chosen arbitrator as the sole arbitrator. Under many other institutional rules, such as the ICC, the appointing authority can be called on to select an arbitrator on behalf of a defaulting party.

Unsurprisingly, the court's sympathies in ARI were with the party who thought it had made a valid appointment and had no basis to doubt this at the time when it made the appointment.

Although the court was not called to address the position of the arbitrator who refused to proceed with the reference, the consequence of ARI would seem to be that, since the appointment was valid, the arbitrator could only properly refuse to proceed by resigning. Under section 25 of the AA 1996, subject to any agreement between the arbitrator and the parties, an arbitrator may obtain relief from a court only where the resignation was "reasonable". While moot here, an unreasonable resignation could expose the arbitrator to liability to the parties and loss of fees. Arbitral institutions may also play a role. For instance, under the ICC Rules, an arbitrator's resignation must be accepted by the ICC Court, further underscoring that a resignation should be justified.

In light of ARI, a party's appointment of an arbitrator who has not confirmed their willingness to serve would not constitute a valid appointment. Thus, if the appointing party has not made appropriate enquiries of the arbitrator, or the candidate does not respond to a party's enquiries (both circumstances have been known to arise), and the appointing party goes on to communicate the appointment to the opposing party, there is a risk that there would be no valid appointment of an arbitrator.

In line with the court's pragmatic approach, it might be possible (depending on the circumstances) to treat the same communication as simultaneously constituting the two elements required for an appointment, that is, both an enquiry as to the arbitrator's availability and willingness to serve, and notification of the arbitrator to the adverse party provided that the arbitrator then accepts the appointment.

However, in this scenario, the appointing party risks being in default if the arbitrator were to refuse the appointment.

Certain arbitral institutions require parties to nominate arbitrators, while providing that arbitrators are "appointed" or "confirmed" by an authority within the institution (for example, the LCIA Court, the ICC Court or Secretary General, or the President of the SIAC Court). As part of that process, such institutions also confirm nominees' availability, independence and

impartiality. While it is advisable for a party to check these matters, it might be argued that the nomination of an arbitrator for an institutional appointment can be distinguished from the situation in ARI (or the UNCITRAL Rules) where the parties were called on to "appoint" an arbitrator. Reflecting this, where an arbitral institution decides not to appoint or confirm a party's nominee, it normally invites the party concerned to make a fresh nomination.

ARI also sounds a caution to candidate arbitrators to raise any issues regarding the terms of their appointment, for example as to their fee, before accepting the appointment. Since the candidate in ARI raised no such questions before communicating their acceptance, the court considered that they were validly appointed even applying the contractual analysis it had disapproved. While this is in principle a sensible enquiry, no one size fits all. In institutional arbitrations, arbitrators' fees are normally set by the institution, often by reference to the amount in dispute or hourly rates set by the institution. On the other hand, in many unadministered arbitrations, it will fall to the arbitral tribunal to establish terms of appointment with the parties, including fee arrangements, once the tribunal is constituted, and an early enquiry to one party may provide little enlightenment.

The pragmatism of ARI is to be welcomed, while it also serves to illustrate potential hazards in the arbitral appointment process.

Alexander Uff

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Alexander Uff specialises in international commercial and investment treaty arbitration. Originally qualified as a barrister, Alexander was a partner in an elite global arbitration practice at Shearman & Sterling for several years before joining Quadrant Chambers in 2021. He provides advice, representation and advocacy to corporations, States and State-owned entities in complex international commercial and investment treaty arbitrations. His work has focused in recent years on disputes in the energy, mining and infrastructure sectors, investment treaty claims and commercial disputes, while his experience covers numerous other industries and subject matters including IP and licensing, M&A, shareholder and joint venture disputes, pharmaceuticals, retail, food industries, aviation and agribusiness, among others. He has conducted arbitrations under the ICSID, ICC, LCIA and CRCICA Rules, as well as ad hoc arbitrations including under the UNCITRAL Rules.

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alexander.uff@quadrantchambers.com