Neutral Citation Number: [2022] EWHC 1543 (Comm)

Case No: CL-2022-000154

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2022

Before :

MR JUSTICE FOXTON

- -

Between :

ARI	**Claimant**
- and -	
WXJ	**Defendant**

- -
- -

Paul Key QC and **Mark Tushingham** (instructed by **Addleshaw Goddard LLP**) for the **Defendant/Applicant**
James Leabeater QC and **Gideon Shirazi** (instructed by **Ince Gordon Dadds LLP**) for the **Claimant/Respondent**

Hearing dates: 10 June 2022
Draft judgment to parties: 14 June 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 20 June 2022 at 14:00 pm.

Mr Justice Foxton :

1. The Claimant and the Defendant are in dispute as to the constitution of the tribunal in a London Maritime Arbitrators Association (LMAA) Arbitration, it being:

    i) the Claimant's position that the Defendant did not (as it claims to have done) validly appoint JJJ as its arbitrator by 5 January 2022, with the result that the Claimant's appointed arbitrator (GGG) is now the sole arbitrator; and

    ii) the Defendant's position that GGG should be removed because justifiable doubts exist as to their impartiality.

    There are also issues as to the constitution of the tribunal in a number of related LMAA Arbitrations.

2. These issues are currently set down for a three-day hearing. However, the Defendant has sought summary judgment on the issue at [1(i)] above. At the end of the argument, I informed the parties that I had concluded that the Defendant had validly appointed JJJ as its arbitrator by 5 January 2022. This judgment sets out my reasons for that conclusion.

The background facts

3. The Claimant and related shipowning companies chartered vessels to the Defendant over a number of years, on bareboat terms. In 2018, a Reconciliation Agreement was entered into or purportedly entered into between the Claimant and the Defendant in relation to those vessels currently subject to charter, and which also provided for instalment payments by the Defendant of outstanding amounts. Clause 6 of the Reconciliation Agreement provided:

    > "(1) For the purpose of executing this Agreement, the governing law is the law that currently governs the Bareboat Charters in force.
    >
    > (2) In case of any dispute or impasse that may arise regarding the execution or implementation of this agreement, the parties elect the forum stipulated in the Bareboat Charter contracts for the resolution of disputes."

4. The relevant Bareboat Charters were on the BARECON form, clause 30(a) of which provides:

    > "This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 …
    >
    > The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.
    >
    > The reference shall be to three arbitrators. *A party wishing to refer a dispute shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint in its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator*

> *unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator* and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement."

(emphasis added).

5. I should record at this point that the Defendant has formally reserved its position as to whether the arbitration agreement in clause 30 of the Bareboat Charters was incorporated into the Reconciliation Agreement. Mr Key QC did not seek to develop that argument at this hearing.

6. The arbitration agreement in the BARECON form (like those in the BALTIME and ASBATANKVOY forms) requires a party to appoint its own arbitrator in order to commence an arbitration, and also imposes a time limit on the other party's right to appoint its own arbitrator in response.

7. On 22 December 2021, the Claimant sent the Respondent a notice of appointment of an arbitrator stating that it had appointed GGG as an arbitrator and stating that if the Defendant did not appoint its own arbitrator and give notice that it had done so within 14 days, it would appoint GGG as sole arbitrator.

8. Following exchanges between the Defendant and JJJ which I will return to, on 5 January 2022 (the last day of the 14-day period triggered by the Claimant's notice of 22 December 2022), the Defendant sent the Claimant a notice, copying GGG and JJJ, giving notice that it had appointed JJJ as arbitrator in connection with the arbitration commenced by the Claimant's notice of 22 December 2021.

9. In subsequent correspondence between JJJ and GGG which was provided to the parties once the dispute about JJJ's appointment had emerged, JJJ referred to the need to agree the terms of their appointment and remuneration with the Defendant's legal representatives, and on 1 February 2022 JJJ said that they would not be able to participate in the arbitration because the maximum rate of compensation fell significantly below the level of their firm's charge-out rates. The Defendant sought to appoint a replacement arbitrator, and the Claimant to appoint GGG as sole arbitrator. This crystallised the present dispute as to whether JJJ had in fact been appointed when the Defendant sent its notice of 5 January 2022 to the Claimant. If JJJ had not been appointed by 5 January 2022, the Defendant does not suggest that this position changed at any subsequent point. As a result, the issue between the parties turns on the interpretation of a few emails exchanged between the Defendant and JJJ between 3 and 5 January 2022.

The context

10. Under s.16(1) of the Arbitration Act 1996, the parties "are free to agree on the procedure for appointing the arbitrator or arbitrators". As noted above, there are some forms of arbitration agreement which require a party to appoint its arbitrator as part of the process of commencing an arbitration. In those cases, the issue of whether and when an

arbitrator has been appointed may have significant implications for limitation purposes. This is particularly likely to be the case in the maritime context in which there are usually shorter time periods for bringing claims. For example, the CENTROCON clause, which is often incorporated into voyage charterparties and contracts of affreightment, provides:

> "Any claim must be made in writing and claimants' arbitrator appointed within [ ] months of final discharge, and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred"

(a provision which often specifies a three-month limit, although periods of 9 months or more are more common).

11. In addition, where (as in this case) the appointment is responsive to the notification of an appointment by the other party, the date when an appointment is completed will be important in determining whether the other party is entitled to designate its arbitrator as sole arbitrator.

12. In both contexts, the appointment of an arbitrator may be conducted against a background of significant time pressure. In addition, in cases where the arbitration tribunal is required to make orders in the dispute at an early stage (for example in dealing with an application for urgent relief), the date when an arbitrator's appointment is effective will be important in determining whether the tribunal is properly constituted at the point when it is asked to act.

13. Finally it has been noted, when construing s.14 of the Arbitration Act 1996, which sets out the steps which need to be taken to commence an arbitration, that a broad and non-technical approach should be adopted because "notices are given by international traders and businessmen" (*Seabridge Shipping AB v AC Orssleff's EFTF's A/S* [1999] 2 Lloyd's Rep 685, 619) and "arbitration is widely used by commercial parties, often acting without the benefit of legal advice" (*Atlanska Plovidba & Anor v Consignaciones Asturianas SA (The Lapad)* [2004] EWHC 1273 (Comm), [17]). The court has had regard to the same factors when construing notices said to have commenced an arbitration as well as s.14 itself (see for example Cockerill J in *Agarwal Coal Corporation Pte Ltd v Harmony Innovation Shipping Pte Ltd* [2017] EWHC 3556 (Comm), [81] and Calver J in *Lavender Shipmanagement Inc v Ibrahima Sory Affretement Trading SA (The Majesty)* [2020] EWHC 3462 (Comm), [50]-[54]). I am satisfied that the issue of whether an arbitrator has been "appointed" for the purposes of a clause such as clause 30 of the BARECON form should be approached with similar considerations in mind. Even when lawyers are involved in appointing an arbitrator, the process frequently involves no more than the exchange of a small number of very brief communications, which essentially involve the party asking the arbitrator if they are willing to accept the appointment, the arbitrator confirming their willingness to do so, and the appointment then being notified to the other party, with the arbitrator copied in. That is particularly the case in maritime arbitrations such as those conducted under the rules of the LMAA. That rapid and informal process suits the needs of both parties to the interaction. As I have stated, the appointing party may well be under time pressures, and be unable to engage in any lengthy interactions with potential arbitrators prior to appointment. The arbitrator will generally be keen to accept the appointment, rather than risk it going elsewhere while they deliberate whether or not to do so.

The applicable legal principles

14. The issue of what "appointment" requires in the present context is ultimately a question of the construction of clause 30 of the BARECON form. However, the process of appointment involves an interaction between one party (or alleged party) to the arbitration agreement, and a non-party, the arbitrator it is seeking to appoint. The submission of Mr Leabeater QC was that there would only be an appointment for the purposes of clause 30 where the interactions between the appointing party and the putative arbitrator had resulted in a concluded contract between them, or something very close thereto.

15. The legal nature of the relationship between an appointing party and its arbitrator can be analysed on a number of alternative bases, including as a matter of contract or as a matter of status (see the discussion in Sir Michael J Mustill and Stewart C Boyd, *Commercial Arbitration* 2nd edition, 220-223). It seems clear that there can be a contractual relationship between an appointing party and the arbitrator it is appointing, particularly with regard to the arbitrator's right to remuneration (see for example s.28(5) of the Arbitration Act 1996 which provides that "nothing in this section affects … any contractual right of an arbitrator to payment of his fees and expenses"). That does not necessarily entail, however, that the issue of whether an arbitrator has been appointed for the purposes of commencing an arbitration under an arbitration agreement such as this one is to be determined by a contractual analysis of the dealings between the appointing party and the arbitrator it has approached. That analysis brings with it the attendant possibility of complications on issues such as identification of the applicable law and its content and any hidden obstacles to a valid appointment (whether in terms of formality or the agreement of "essential" terms) which might follow under that system of law. In my view, the issue of whether there has been an appointment in a context such as this is one which the court will wish to approach pragmatically, rather than doctrinally, and which should readily offer a clear answer without the need for extensive analysis or enquiry.

16. That pragmatic approach is clearly demonstrated in *Tradax Export SA v Volkaswagenwerk AG (The Loma)* [1970] QB 537, a case in which one party had notified its appointment of a particular individual as arbitrator to the other party without having first secured confirmation of that individual's willingness to act. The Court of Appeal held that there had been no valid appointment. Lord Denning MR said that three things were necessary to constitute the appointment of an arbitrator – it was necessary to tell the other side; to tell the appointee himself and the appointee "should be willing to act and have intimated his willingness to accept the appointment" (p.544). He stated that the arbitrator could be told of the nomination at the same time as the other party (p.545). Salmon LJ formulated the same three-fold test in slightly different terms (for example stating that the arbitrator "must express his willingness to act") and in a different order (pp.545-6)). He also made it clear that there might be cases in which the arbitrator confirmed their willingness to accept the appointment before the arbitrating party had committed themselves to making it:

> "If consent has been given in advance, it is enough to communicate the appointment to the arbitrator, and then give the other party the appropriate notice."

17. Edmund Davies LJ referred to the fact that "acceptance" of the appointment by the arbitrator was necessary, approving a passage in the-then current edition of *Russell on Arbitration* that "an appointment should not be considered effective until the person appointed has agreed either expressly or tacitly to exercise the functions of the office."

18. The analysis in *Tradax* is not explicitly contractual, although of course many of the factors which would preclude the conclusion of a contract under most system of laws would also preclude a finding that the arbitrator had "accepted" the appointment. Thus, if the arbitrator's response on being approached had been "I am willing to accept the appointment subject to conditions X and Y being satisfied," there would be no acceptance until those conditions were satisfied (as in *Hannaford v Smallacombe* (1995) 69 P&CR 399, 404-405).

19. Mr Leabeater QC submitted that "the contractual nature of the [arbitrator's] appointment " is clear from *K/S Norjarl v Hyundai* [1991] 1 Lloyd's Rep 524, in which the Court of Appeal held that arbitrators who had accepted appointment were not thereafter entitled to insist upon the payment of a commitment fee as a condition of discharging their functions, absent a sufficient change in the nature of the commitment. In considering those parts of the case which reason by reference to the position of a contracting party who seeks to alter the terms of the bargain after it has been concluded, it is important to note that Leggatt LJ and Sir Nicholas Browne-Wilkinson appear to have adopted the analysis of Hobhouse J in *Compagnie Europeene de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301, 306 that the effect of the appointment of an arbitrator is the arbitrator become a party to an arbitration contact with the parties for the conduct of that particular reference:

> "It is the arbitration contract that the arbitrators become parties to by accepting appointments under it."

Thus at p.531, Leggatt LJ observed that an attempt to insist on a commitment fee after the arbitrators had entered upon the reference "would constitute a variation of the arbitration agreement under which the arbitrators are entitled to reasonable fees, but not without the consent of the parties to any commitment fee" (a reference to s.19(2) of the Arbitration Act 1950). Sir Nicolas Browne-Wilkinson expressly referred to Hobhouse J's analysis at pp.536-7. The references to a contract between the parties and the arbitrator in *Hashwani v Jivraj* [2010] EWCA Civ 712, [14] (Moore-Bick LJ); [2011] UKSC 40; [2011] 1 WLR 1872. [23], [45] (Lord Clarke) and [76]-[77] (Lord Mance) are also to the tripartite contract which comes into existence between the parties and the arbitrators when all the elements of a valid appointment have been completed.

20. While the *Norjarl* case makes it clear that it is open to an arbitrator before appointment to reach a special agreement with the appointing party as to their remuneration as a condition of accepting the appointment, I do not read the majority judgments as determining that the issue of appointment turns on whether a contract has been concluded between the appointing party and the arbitrator.

21. One advantage of the tripartite contract analysis is that it better coheres with what is a reasonably common occurrence, in which an arbitrating party sends out a number of requests to potential arbitrators asking if they are willing and available to accept the appointment (to allow for the possibility that some may respond in negative terms), before notifying the identity of the chosen arbitrator to the other party and the

"successful" candidate. Mr Leabeater QC was forced to argue that, in such a case, the appointing party has undertaken a contractual commitment to the first arbitrator who notified their willingness to accept the appointment and had no unilateral right to communicate the appointment of anyone else to the other arbitrating party. That analysis, however, seems unreal, and inconsistent with the fact that communication of the identity of the arbitrator to the other party is a pre-requisite to a valid appointment (see [16] above).

22. For these reasons, I have concluded that the better view is that the question for the court when determining whether the arbitrator has accepted the appointment for the purposes of a clause such as clause 30 of the BARECON form is whether there has been a clear and unconditional communication of acceptance of the appointment by the arbitrator which is then notified to the other party, or communication of an unconditional willingness by the arbitrator to accept the appointment, which the appointing party then acts upon by communicating the appointment to the appointee and the other party (the situation contemplated by Salmon LJ in *Tradax*). I am not persuaded that any wider contractual analysis is necessary.

23. If I am wrong, and it is necessary for the court to determine whether a binding contract has been concluded between the appointing party and the arbitrator, then I am satisfied that, as a matter of English law at least, this is a context in which it will ordinarily behove the arbitrator to specify any conditions of their willingness to accept the appointment if they are to operate as a bar to appointment, failing which the arbitrator's confirmation of their willingness to act (either in response to the arbitrating party's offer of the appointment or where this is followed by that party's confirmation of the appointment) are sufficient for the required contract to come into existence.

The factual position

24. I now turn to the handful of communications on which this issue turns.

25. Having received the Claimant's notice of its appointment of GGG on 22 December 2022, the Defendant emailed JJJ on 3 January regarding a "*Possible appointment URGENT*". The email stated:

> *"We write to enquire about your availability and willingness to be appointed as an arbitrator in an LMAA arbitration in London…*
>
> *Unfortunately we have a relatively tight deadline (5 January 2022) for the appointment so we would be very grateful to receive your response as soon as possible.*
>
> *… We hope that the above provides sufficient information for you to assess your interest in the matter, together with any possible conflicts…"*

It would have been apparent from this email that the Defendant was under pressure of time to appoint its arbitrator.

26. JJJ responded stating that "*subject to conflicts"* they were *"available for this assignment"* but that their associate was checking the conflicts position. JJJ concluded "*we'll revert as soon as the conflicts are done and we appreciate your schedule*"

(signalling that they were aware of and their response would be informed by the tight deadline). This response was clearly made subject to a condition (clearing conflicts), and therefore there was no unconditional confirmation of JJJ's willingness to accept the appointment at this stage.

27. On 4 January 2022, the Defendant stated *"subject to your final confirmation that you are conflict-free, we are planning to write to counsel for [the Claimant] tomorrow (Wednesday 5 January) providing your contact details ... Once your appointment is confirmed we hope to reach out to discuss the appointment of the presiding arbitrator. We very much look forward to your confirmation (hopefully today) that you are conflict free to act in this matter and we look forward to working with you."* It would, objectively, have been clear to JJJ from the terms of this communication, and from the deadline outlined in [25] above, that if they confirmed that they were conflict free, the Defendant would regard themselves as free to communicate the nomination of JJJ as arbitrator to the Claimant by the 5 January deadline.

28. It was in that context that JJJ sent an email to the Defendant later on 4 January stating "*Good evening and it appears that I can act here without any firm conflicts.*" So far as the contact details which the Defendant had stated it wanted to provide to the Claimant are concerned, JJJ said "*kindly ask [the Claimant's] counsel to also cc*" JJJ's associate. This removed the only condition which JJJ had ever imposed on their willingness to accept the appointment, and clearly signalled that JJJ was content for their appointment to be communicated to the Claimant at that point. I do not accept that, at this stage, JJJ was objectively to be understood as keeping their options open, such that the Defendant was not in fact in a position to communicate the appointment of JJJ to the Claimant by the 5 January deadline (of which JJJ was fully aware).

29. The Defendant then replied "*Thank you for your confirmation. We will… confirm your appointment and the way forward in due course after tomorrow.*" I accept that in this communication, the Defendant was signalling that it had yet to confirm the appointment. However, it was also making it clear that it was proceeding on the basis that it was entitled unilaterally to proceed to do so by notifying the Claimant. There was no response from JJJ.

30. On 5 January 2022, the Defendant emailed the Claimant, copying JJJ and GGG, stating *"[the Defendant] gives notice that it appoints [JJJ] as arbitrator in connection with [the Claimant's] Notice*". That communication clearly communicated the Defendant's confirmation of JJJ's appointment following JJJ's unconditional confirmation of their willingness to act, both to JJJ and to the Claimant. At that point, I am satisfied that all the requirements for a valid appointment had been satisfied:

    i) JJJ had unconditionally communicated their willingness to accept the appointment.

    ii) Following that confirmation, the Defendant had unequivocally communicated its appointment of JJJ both to JJJ and the Claimant.

    That satisfied the requirements for a valid appointment set out at [22]-[23] above, even if that issue is to be approached contractually.

31. While it appears from subsequent communications that JJJ may have been proceeding, subjectively, on the basis that their appointment would not become effective unless and until terms of engagement were agreed and signed with the Defendant, neither that subjective understanding, nor those subsequent communications, are of any relevance in circumstances in which all of the requirements of a valid appointment for clause 30 purposes had been satisfied by 5 January 2022.

32. Mr Leabeater QC also submits that no relevant contract had been concluded because the parties had not "agreed upon all essential terms," which I understand to be a reference to the failure to agree the financial terms later raised by JJJ. However, unless JJJ made acceptance, or confirmation of their willingness to accept, the appointment conditional on agreement as to particular terms of retainer, the fact that there had been no discussion of the financial or other terms on which JJJ would act did not preclude JJJ's appointment as arbitrator. Indeed, it is relatively common for arbitrators to accept appointments without any express agreement as to fees, in particular in LMAA arbitrations (see Ambrose, Maxwell and Collett, *London Maritime Arbitration* (4th, 2018), [10.58]).

Conclusion

33. For these reasons, I am satisfied that the Defendant appointed JJJ as its arbitrator within the 14-day period, with the result that the Claimant was not entitled to appoint GGG as sole arbitrator. The parties have agreed the terms of the declarations necessary to give effect to those conclusions, and I have resolved the consequential issues which arise.