Kluwer Arbitration Blog

Why numbers matter

Sabrina Pearson (Lalive) · Thursday, September 6th, 2012 · YIAG

In the recent case of *Itochu Corporation vs. Johann M.K. Blumenthal GMBH & Co KG & Anr* [2012] EWCA Civ 996 (*"Itochu vs. Blumenthal"*), the English Court of Appeal decided *obiter* that – in the absence of an agreement on the number of arbitrators – a sole arbitrator should be appointed even when the arbitration clause suggested that the parties contemplated more than one arbitrator.

In this case, a dispute had arisen between the parties under a Letter of Guarantee containing an arbitration clause which provided as follows:

> Any dispute arising out of this LETTER of GUARANTEE shall be submitted to arbitration held in London in accordance with English law, and the award given by the arbitrators shall be final and binding on both parties.

While Blumenthal argued that the clause provided for a sole arbitrator, Itochu argued that the tribunal should be composed of three arbitrators given the reference to "arbitrators" in the arbitration clause.

Blumenthal subsequently applied to the English Commercial Court for an order under section 18 (3)(d) of the English Arbitration Act 1996 ("the Act") that a sole arbitrator be appointed. Itochu contested the application and argued that the Court should instead give directions under section 18(3)(a) of the Act for the appointment of a tribunal of three arbitrators.

The Commercial Court considered that the relevant issue to be decided in this case was whether section 15(3) of the Act – which provided that "[i]f there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator" – applied despite the fact that the parties contemplated a tribunal of more than one arbitrator. The answer, in short, was yes. The Court recognized that its decision represented an "apparent departure from the principle of parties' autonomy generally adopted by the … Act" but laid emphasis on the purported aim of section 15 to ensure the efficiency of the arbitral proceedings as well as the unambiguous wording of section 15(3) of the Act.

Itochu appealed and argued before the Court of Appeal that effect ought to be given to

the parties' intention that the tribunal would be comprised of more than one arbitrator. Itochu contended that the arbitration clause envisaged three arbitrators, or if it contemplated two arbitrators, an additional arbitrator as Chairman would be required to be appointed in accordance with section 15(2) of the Act.

Although the Court of Appeal held that it did not have jurisdiction to hear the appeal, it nonetheless stated that it agreed with the conclusion reached by the Commercial Court. While the Court accepted that the parties had contemplated more than one arbitrator, it held that it was impossible to read into the clause an agreement as to the number of arbitrators and that absent such an agreement, section 15(3) of the Act provided unambiguously for the appointment of a sole arbitrator. The Court pointed out that the purpose of this rule was to prevent the stalling of an arbitration when there was a failure in the appointment procedure and was an example of Court support for arbitration and not an infringement on party autonomy.

The appointment of a sole arbitrator in this case sits uncomfortably with the parties' clear intention in the arbitration clause to appoint more than one arbitrator. The Court of Appeal held that it was impossible to read into the arbitration clause an agreement as to the number of arbitrators. However, while there was indeed no agreement on the exact number of arbitrators, there was an agreement that there should be more than one arbitrator.

Section 15(3) of the Act sets out a presumption in favour of a sole arbitrator when the parties have not agreed on the number of arbitrators as the drafters did not want to impose on the parties the burden of paying for three arbitrators (*see* DAC Report on the Arbitration Bill, para. 79). However, in this case, the parties had clearly contemplated the possibility of more than one arbitrator and that they would have to pay for more than one arbitrator. As a result, such presumption should have been rebutted in favour of the only other choice in practice, which was three arbitrators.

Different national laws take different approaches with respect to the number of arbitrators to be appointed in the absence of an agreement between the parties. While common law jurisdictions generally tend to be in favour of sole arbitrators, civil law jurisdictions tend to lean towards the appointment of a three member tribunal. Hence, in the U.S., Hong Kong, India, and Singapore, a sole arbitrator is appointed by the court in the absence of an agreement (U.S. FAA §5, Hong Kong Arbitration Ordinance, Art.8; Indian Arbitration and Conciliation Act, Art. 10(2); Singapore International Arbitration Act, §9). Conversely, in Belgium, Austria, Japan and Denmark, three arbitrators are to be appointed in the absence of an agreement (Belgian Judicial Code, Art. 1681(3); Austrian ZPO, §580; Japanese Arbitration Law, Art. 16(2); Danish Arbitration Act, §10(2)). A third approach adopted by the courts in the Netherlands is to leave it up to the discretion of the judge to decide (Netherlands Code of Civil Procedure, Art. 1026(2)). A similar provision in the English Arbitration Act would most certainly have led to a different conclusion in *Itochu vs. Blumenthal*. While a reform of the English Arbitration Act 1996 is obviously not on the cards in the near future, a similar provision to the one adopted in Article 5(4) of the LCIA Rules would maintain the presumption that a sole arbitrator be appointed in the absence of an agreement on the number of arbitrators but nonetheless endow the court with discretion to appoint a three member tribunal when this is appropriate in the circumstances.

For now, in light of the *obiter dicta* of the Court of Appeal in this judgment, parties wishing to submit any dispute under their contract to *ad hoc* arbitration under English law would be well advised to expressly state the number of arbitrators to be appointed in their arbitration agreement.

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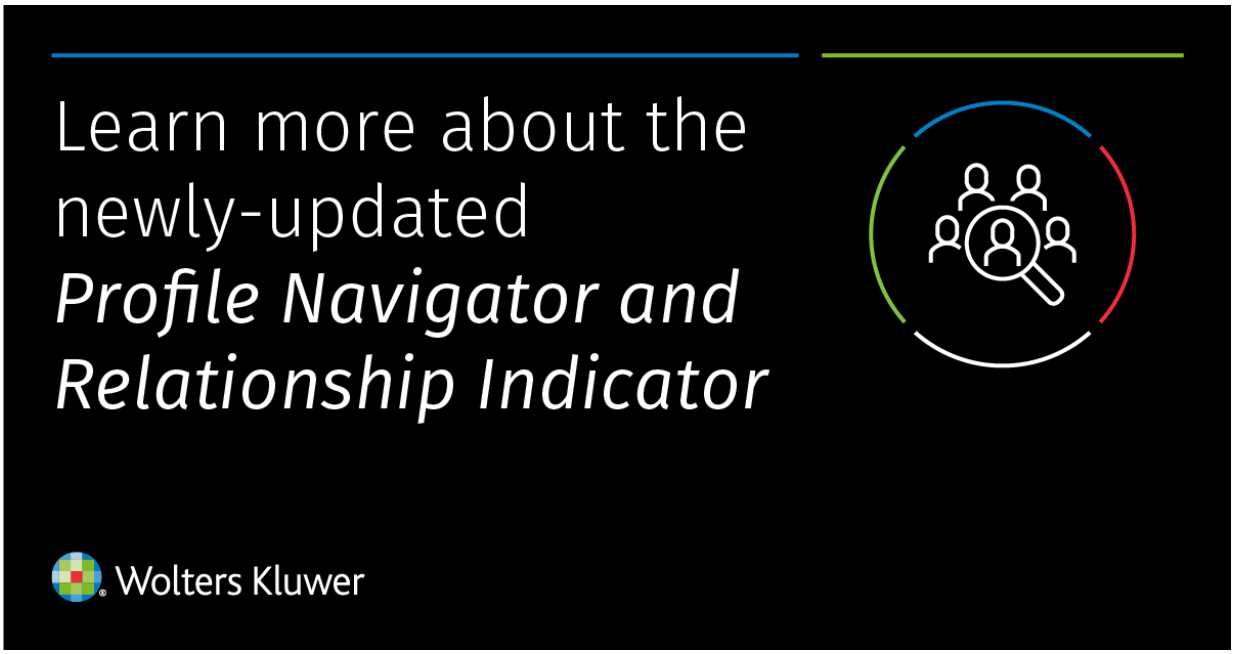

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