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BE CAREFUL WHAT YOU WISH FOR WHEN IT COMES TO INCLUDING LUXURY HOTEL "INDUSTY EXPERIENCE" AS AN ARBITRATOR QUALIFICATION

Madalina Dumitrescu,[1] Roderick Cordara QC[2] and Laurie Frey[3]

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A main attraction of arbitration is that it allows parties to choose arbitrators with knowledge and experience of the relevant industry to hear their disputes. The ability to select decisionmakers familiar with market practices has made arbitration popular in the luxury hotel industry, particularly for long-term or business-critical contracts such as hotel management agreements. It is not uncommon to see such contracts with arbitration clauses containing, for example, "at least [x] years of experience in hotel operation, management, ownership or leasing" as an arbitrator qualification requirement. A recent decision by the English Court of Appeal serves as a reminder that parties should proceed with great caution when including such "industry experience" criteria in their contracts.

THE FACTS OF *ALLIANZ INSURANCE PLC AND SIRIUS INTERNATIONAL INSURANCE V TONICSTAR LIMITED [2018] EWCA CIV 434 ("TONICSTAR")*

The *Tonicstar* case involved a reinsurance contract providing for a panel of three arbitrators to hear disputes thereunder and stipulating "that the arbitral tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance". When a dispute arose, the reinsurers sought to appoint an English barrister, Mr Alistair Schaff QC, as their party-appointed arbitrator. Tonicstar objected to Mr Schaff's appointment and applied to the English court for his removal as arbitrator under section 24(1)(b) of the Arbitration Act 1996 on the ground that he did not possess the qualifications required by the arbitration agreement. Although Mr Schaff had over 10 years' experience acting as legal counsel in insurance and reinsurance cases, Tonicstar argued that the arbitration agreement required experience in the insurance or reinsurance trade itself, and not experience of insurance or reinsurance law.

In the High Court, the Honourable Mr Justice Teare granted Tonicstar's application to remove Mr Schaff. The judge considered himself bound to follow a prior, unreported High Court decision on substantially the same facts because, although he was sceptical of the precedent's reading of the arbitrator qualification language, he was not convinced that the earlier decision was "obviously wrong". Nonetheless, he granted the reinsurers leave to appeal the decision.

THE COURT OF APPEAL DECISION

The Court of Appeal allowed the appeal and overturned the judgment granting Tonicstar's request to remove Mr Schaff as arbitrator. It rejected the argument that experience in the insurance or reinsurance industry would not include experience of insurance or reinsurance law. Importantly, the Court of Appeal's reasoning emphasised the "intertwined" nature of the "practical and legal aspects of insurance and reinsurance" and that the insurance and reinsurance industry "itself" is a matter of contracts creating legal rights and obligations. The Court of Appeal distinguished insurance and reinsurance from "sports, engineering and telecommunications, which are clearly distinct from the law regulating those activities".

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[1] Madalina Dumitrescu is a partner at Constantine Cannon LLP in London.

[2] Roderick Cordara QC is a top-ranked barrister at Essex Court Chambers.

[3] Laurie Frey is an associate at Constantine Cannon LLP in London.

TAKEAWAYS FOR THE LUXURY HOTEL INDUSTRY

Although the Court of Appeal found that legal experience would qualify as "industry experience" when it comes to insurance and reinsurance, it left open the question whether a potential arbitrator's experience of the law regulating an industry would similarly qualify as "industry experience" in an industry where the "business" and the "law" are more easily distinguished. Like the examples of sports, engineering and telecommunications cited in the Court of Appeal's judgment, the practical and legal aspects of luxury hotel management and operations can differ significantly. A lawyer or barrister specialising in hotel or hospitality cases is likely to have a separate, if overlapping, knowledge and experience set from a luxury hotel owner, manager or operator. The decision in *Tonicstar* leaves unanswered whether a lawyer would be excluded by the common formulation requiring an arbitrator to have hotel industry experience.

Contracting parties should consider carefully whether they want to risk the exclusion of lawyers from their pool of potential arbitrator candidates. It may seem attractive to prioritise an arbitrator's industry experience, as such an arbitrator likely will require less time to understand the underlying facts of a case and may be better suited to decide in accordance with the parties' expectations based on market practice. However, in many cases, disputes arise that involve purely questions of contractual interpretation, and that therefore may be best handled by a lawyer rather than an industry expert. Moreover, if an arbitrator selection clause is too industry-specific, it may be difficult to find a willing arbitrator matching the criteria and suited to the dispute at hand. Therefore, the benefits of industry-specific arbitrator qualification requirements may be outweighed by the loss of flexibility in selecting an arbitrator best suited to handle a dispute once it has actually arisen.

The underlying point is that hotel disputes can be of many types, not just those related to the running of the hotel. For example, a dispute may concern the pre-opening construction phase – which is a construction-industry dispute (for example defective fittings for bathrooms, or delays in completion, etc.); or it may concern a dispute between owners and managers under a hotel management agreement (for example, the meaning of a formula for calculating fees, or a termination provision, or the quality of service); or it may be a dispute with suppliers, etc. In some of these situations, the issue will be well-fitted for a lawyer, but in others an industry specialist will be appropriate.

Accordingly, if parties do wish to include such a clause in their arbitration agreement, they should consider carefully the range of possible disputes that could arise and tailor their arbitrator qualifications to avoid binding themselves too tightly. One option for hotel contracts might be to require "familiarity with" rather than "experience of" the hotel industry. Another, not yet tried in the hotel industry but prevalent in other areas, is a twin-track solution. This involves having an arbitration clause (with a wide gateway of qualification) plus another clause for specialist 'expert' determination where the resolving the dispute requires technical skills peculiar to the industry.

Whichever path is chosen, it is well worth carefully considering the arbitration clause before finalising agreements - in the long run all parties benefit by having a well-tailored dispute resolution arrangement.