Unilateral Communications between a Party-Appointed Arbitrator and Counsel

In an interesting decision in the Technology and Construction Court in March 2017, the Judge (Mrs Justice Jefford) considered a challenge by an unsuccessful party in an ICC arbitration. The case is Symbion Power LLC-v- Venco Imtiaz Construction Company [2017] EWHC 248 (TCC).

The Dispute

The dispute arose from a contract to construct a power station in Kabul, Afghanistan. The Prime Contractor and the Respondent in the arbitration, Symbion Power LLC ("Symbion"), engaged the Sub-Contractor and Claimant in the arbitration, Venco Imtiaz Construction Company ("Venco") to carry out civil and structural works. The Sub-Contract was largely in the form of the FIDIC Red Book 1999 Edition. The Prime Contract was terminated in May 2009 and this led to the termination of the Sub-Contract. In March 2013 Venco commenced an arbitration against Symbion. Each party appointed an arbitrator and the two party appointed arbitrators in turn nominated a Chairman. One of the party appointed arbitrators later withdrew through ill-health and was duly replaced. The seat of the arbitration was London.

An award ("the Award") was rendered in July 2016 and Venco was largely successful in the arbitration. In due course Symbion applied to the court under Section 68(2)(d) of the Arbitration Act 1996 alleging serious irregularity on the part of the Arbitral Tribunal in failing to deal with issues that were put to it. The court was asked to set aside or vary the Award rather than remit it to the Arbitral Tribunal in the light of some very unusual facts.

In the event the Judge rejected the application and so the question of whether the Award should be set aside or remitted did not arise. However, the Judge did discuss this issue.

Set Aside or Remit?

The reason why it was argued on behalf of Symbion that the Award should be set aside arose from an email sent in mid-2014 by Symbion's party-appointed arbitrator to Symbion's arbitration Counsel, the email not being copied to any other member of the Arbitral Tribunal or to any representative of Venco. The email expressed highly negative views of the Chairman of the Tribunal and said that both party-appointed arbitrators were upset by his conduct. The arbitrator sending the email said he was planning to meet the Chairman of the Tribunal and would encourage him to resign.

The email was headed "HIGHLY CONFIDENTIAL: NOT TO BE USED IN THE ARBITRATION". The response was to the effect that the recipient Counsel did not feel the need to discuss the matter but would keep the confidence.

The email only came to light when it was disclosed as part of the challenge to the Award, with Symbion saying that the internal conflict in the Tribunal meant that the remission of the matter to it would be inappropriate. Symbion was instructing different lawyers at this stage.

The Judge unsurprisingly gave this argument short shrift, stating that the Tribunal appeared to have worked effectively for 2 years after the email in question. She went on to say:

"More to the point, I am astonished that such an e-mail was sent in the first place. Where arbitrators are nominated and/or appointed by the parties, it is inevitable that there will be some correspondence or discussion between them prior to appointment to which the other party will not be privy. That will be necessary to ascertain suitability for appointment, availability and so forth. That discussion may extend to the selection of the chairman for similar reasons. But once the tribunal is appointed, it seems to me wholly inappropriate for one arbitrator to communicate with the party that appointed him without notice to the other members of the tribunal and the other party."

Analysis

These comments must surely be right. If problems arise between the members of an Arbitral Tribunal they must be dealt with openly between all the members, however difficult discussions might be. If it is thought that issues should be communicated to the parties then it must follow that any communication from the Tribunal should be sent to both parties and not just one. Communications between a party-appointed arbitrator and those nominating him or her regarding the choice of a Chairman are permissible at the outset but must cease as soon as the Tribunal is fully constituted.

As a very young solicitor I was taught that nobody in the Litigation Department in my firm was ever to say that they were "surprised" or, even worse, "astonished" at what the opposition did. We were meant to be one step ahead at all times and therefore nothing that happened was ever to be something that we had not anticipated. I have to say, however, that I share the astonishment of the Judge that this should ever have happened. The fact that the arbitrator in question headed his email as he did indicates that he must have felt disquiet about it. If that is the case it is nearly always better to say nothing rather than send a communication which may, despite any intention to the contrary, be drawn to the attention of a wider audience.

Although not an issue in the case, it is worth noting that the entire arbitration would probably have been avoided if the parties had appointed a Dispute Adjudication Board ("DAB") as provided for in the Sub-Contract. No DAB having been appointed, under the terms of Clause 20.8 of the Sub-Contract Conditions (identical to the Red Book clause) Venco was entitled to proceed straight to arbitration to resolve the disputes.

Finally, the inquisitive can easily discover the identities of the arbitrators in question through the Internet.

John Wright **April 2017**