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ENGLISH HIGH COURT UPHOLDS RULE RESTRICTING APPOINTMENTS IN ICA ARBITRATIONS

Aldcroft v International Cotton Association Limited [2017] EWHC 642 (Comm)

Introduction

In a decision handed down on 30 March 2017, David Foxton QC (sitting as a Deputy High Court Judge) ("the Judge") held in *Aldcroft v International Cotton Association Limited* [2017] EWHC 642 (Comm) that a rule in the Arbitrators' Code of Conduct of the International Cotton Association that restricted the number of appointments an arbitrator could undertake was not void and unenforceable as an unreasonable restraint of trade. The rule was a legitimate means of pursuing the objectives of avoiding delays and avoiding the perception of bias, lack of impartiality, and justifiable doubts as to impartiality.

Background

This case concerns a challenge brought by an arbitrator, Mr Aldcroft, against the International Cotton Association ("the ICA"), under the byelaws and rules of which an estimated 80-85% of international trade in raw cotton is carried out. Mr. Aldcroft worked as a full-time arbitrator in ICA disputes, typically acting in between 15-18 arbitrations per year.

The rule in question, approved by the Arbitration Strategy Committee of the ICA in November 2014, is known as the "3 and 8 rule" and has two components: (1) an arbitrator is limited to accepting 3 appointments as an arbitrator from the same (or related) party in a calendar year; and (2) an arbitrator may not have more than 8 active first-tier ICA arbitration cases open at any time.

The rule was introduced to the ICA's Arbitrators' Code of Conduct after a process of review that started in 2007, in which the Arbitration Strategy Committee identified several key issues raised by global traders, viz., that the costs of ICA arbitration were too high, that the length of time to complete references was too long, and that arbitration awards tended to be pro-merchant in disputes with weavers, spinners, and manufacturers. One particular concern was the perception of arbitrators having favoured 'clients'. The 3 and 8 rule was introduced to promote neutrality and impartiality in ICA arbitrations.

Mr. Aldcroft applied for injunctions requiring the ICA to withdraw or abandon complaints that he had failed to comply with the 3 and 8 rule and contended that the introduction of the rule by the ICA was an unreasonable restraint of his trade as a full-time cotton-industry arbitrator.

Judgment

The Judge dismissed Mr. Aldcroft's application.

The Judge based his conclusion first on the finding that the 3 and 8 rule was introduced as a measure intended to address perceptions that the arbitration process had a pro-merchant bias, in particular where this resulted from repeat appointments by a merchant of the same arbitrator, and to reduce what was perceived as the risk of delay in resolving arbitration references resulting from a small number of arbitrators having appointments in a large number of arbitrations at the same time. The 3 and 8 rule did not have the goal of favouring part-time arbitrators.

Cases regarding professional societies form a distinct subset of the cases relating to restraints on trade because of the highly technical advice and services professionals provide and the reliance placed upon the society's code of conduct by the public. A restraint on trade by way of a code of professional conduct had to be reasonably related to the objects of the society. The test for reasonableness is construed widely; a court may intervene only when a professional society acts arbitrarily or capriciously. The courts will be slow to interfere with the constitution and rules of a cooperative society which has been freely entered into by the members and which the members are free to alter, and which binds them only as members and which they are free to leave; if a member could cease to be a member at his pleasure there would be no ground for complaint. The courts will only intervene when the rule adopted falls outside the range of decisions reasonably open to the body for the purpose of meeting its legitimate objectives as a professional society.

The Judge held that it was possible to define Mr. Aldcroft's trade in terms which exist independently of the ICA rules; despite the fact that 80-85% of the world's international cotton trade was conducted on ICA terms, Mr. Aldcroft was not an 'ICA Arbitrator', but rather simply an arbitrator within the cotton industry. It was open to parties to an arbitration to contract on terms other than those provided by the ICA.

Despite this, it is always possible for a provision to be so unusual and egregious that there 'comes a point' when the doctrine applies. The Judge held that the 3 and 8 rule does not come close to that point, and that the rule was within the range of means open to the ICA to achieve its legitimate objectives. Though there were different options available, the ICA did not need to conduct analysis to identify the ideal solution; it needed only to identify a reasonable solution. The rule was not ambiguous, and linked cases would be considered a single reference under the rules. The restriction on party autonomy did not violate the public interest, as other arbitration options were open to parties to arbitration. A provision that bars appointments outright is reasonable even though it is more restrictive than Section 24(1) of the Arbitration Act 1996, which simply allows parties to challenge appointments.

Concluding Remarks

This case shows the narrow scope of the doctrine of unreasonable restraint of trade. Decisions of professional bodies or co-operatives, including arbitral institutions such as the ICA, will only be susceptible to judicial intervention when they do not come within the range of decisions reasonably open to them for the purpose of meeting legitimate objectives.