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English Court of Appeal Rules on "Experience of Insurance and Reinsurance" Arbitrator Qualifications Includes Legal Experience

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In *Allianz Insurance PLC (formerly Cornhill Insurance PLC) v. Tonicastar Ltd*, [2018] EWCA Civ 434, the Court of Appeal held that the arbitral qualification of experience of insurance and reinsurance means experience as a lawyer working for the industry and does not mean only those who have worked for the industry qualify.

The appeal in *Allianz* was brought by the reinsurers in relation to the removal of the Queen's Counsel ("**QC**") that they had appointed to act as arbitrator to determine a reinsurance dispute with the reinsured. The relevant clause in the underlying reinsurance contract between the parties stated that any arbitrator appointed to a dispute should have "*not less than 10 years' experience of insurance and reinsurance.*" This clause formed part of the Joint Excess Loss Committee's "*Excess Loss Clauses*" ("**ELC**"), which the parties had incorporated into their contract.

The reinsured successfully applied to the High Court to remove the reinsurers' choice of arbitrator for non-compliance with the required qualifications – he was a

QC (albeit with over 10 years' experience of acting on insurance and reinsurance disputes) but not an industry tradesperson.

In its application for the removal of the QC, the reinsured had relied on the unreported case of *Company X v. Company Y*. That case was based on materially the same facts and the court had held that a QC who had more than 10 years' experience of acting in insurance and reinsurance disputes did not qualify for appointment under the ELC. The High Court felt bound to follow the previous decision in *Company X v Company Y* , particularly in circumstances where it had stood unchallenged for 17 years and there was no good reason to depart from it.

The Court of Appeal, however, was not concerned that the case had stood for the past 17 years. Whilst it noted the importance of legal certainty, the Court observed that, "*certainty is also enhanced if contractual language is interpreted in accordance with its natural meaning.*"

The Court of Appeal overruled the decision in *Company X v. Company Y* because the High Court had based its decision on the mistaken assumption that parties who use the ELC clauses intended to partake in a "trade arbitration" and so only industry tradesmen could be appointed as arbitrator. The Court of Appeal found, however, that there was nothing about the clause that could "*justify reading any such limitation into the clause.*"

In coming to this decision (reported on 13 March 2018), the Court of Appeal commented that there might be some industries where the trade was clearly distinct from the law that regulated its activities. No such distinction, however, could be drawn between insurance and reinsurance law and insurance and reinsurance "itself." An insurance tradesperson needs to have an understanding of insurance law to negotiate and draft insurance contracts, and lawyers who practise in the field of insurance need to understand practical aspects of the business. As such, the Court of Appeal found that, "*the practical and legal aspects of insurance and reinsurance are so intertwined that both market professionals and lawyers who have specialised in the field for many years are commonly appointed as arbitrators in insurance and reinsurance disputes.*"

One of the Court of Appeal's final comments on the reinsured's case was that, if the drafters of the ELC had intended to restrict the parties' freedom of choice, "*a clear expression of that intention would be needed.*"

Comment

The relevant ELC clause has been revised for agreements that incorporate it as of 1 January 2018. It now covers lawyers or other professional advisors serving the industry as well as industry professionals. The Court of Appeal's decision in *Allianz*, however, will provide useful clarification for any disputes involving policies that incorporate the previous version of the ELC clause.