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Arbitration and Arbitrators

Arbitration has many advantages over the litigation in terms of informality and costs. However, such advantages can be lost in a second, if:

- a) Party has no control over the appointment of arbitrator; and/or
- b) Party agrees through rules of any institution that displaces their right of appeal.

In a recent case with a client, unfortunately the client lost the matter in LMAA Small Claim Procedure in spite of the fact that technical issues clearly favoured them. **The award that was provided by the arbitrator contained no reasons whatsoever.** Instead after the award was issued, the arbitrator then gave informal reasons with a **disclaimer** that such informal reasons cannot be used in any further proceeding in relation to the Award. In the disclaimer, this LMAA arbitrator, appointed by President of LMAA even wrote that the informal reasons were provided on an *understanding* that these informal reasons will not be used in any proceedings. The arbitrator did the above in spite of the fact that the Arbitration Act 1996 clearly provides in section 52(4):

The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

In this matter, our client was not aware of any understandings whatsoever with any of the parties to give any Award without reasons. When the Arbitrator was questioned as to why he was doing like this, he said the losing party has already given up all their rights to appeal pursuant to Small Claims Procedure of LMAA. So the arbitrator was of the view in a way - whether he gives reasons or not, it should not matter! Then why did the arbitrator put a disclaimer? May be he thought unsuspecting party will not make it an issue and later it would be considered as there was an understanding. Then to the surprise, 10 days later, the same arbitrator issued new additional award with reasons once he realized the mistake as per the law on the basis that we requested to correct the award, that by law he cannot issue other than to correct clerical errors and/or something not touched in the claim. This raises the question mark on ethical conduct that the parties can expect.

This is one of the major risks when parties so readily agree to standard arbitration clauses. For the sake of completeness, the waiver of right of appeal is not equivalent to the waiver to receive reasons for the Award! It seems there is clearly a risk in opting for *Small Claims Procedure of LMAA* as seen by this experience. However, the parties can jointly select the sole arbitrator and can adopt some or part of LMAA Small Claim Procedure rules. At times, Small Claims Procedure actually turns out to be costly

for smaller disputes as the losing party has to pay not only for arbitration charge of GBP 3000 and on top of it GBP 4000 to the winning party's legal cost. Therefore for smaller disputes the costs can go as high as GBP 11000, if one were to include their own lawyer's cost.

Similarly, parties give the authority to appoint the arbitrator to Institutional authorities are losing the main advantage of running the arbitration themselves. The parties should appoint their own arbitrator themselves. There are many real-life factors that should not be overlooked in relation to appointment of the arbitrators such as qualifications, experience, ethical standard, the likely influence of a bigger opposing party or their insurer on the arbitrator, how often a particular arbitrator is appointed by a law firm/party/insurer and so forth.

The standards required of arbitrators vary considerably. At one spectrum, there are senior judges and barristers who are arbitrators that are used to strict ethical codes, and another spectrum is also men/women from industry who can be equally good but also the standards in various aspects can vary among them. In the real world, a party cannot overlook this aspect. As they say in the law firms, cases are won or lost at the time of appointment of the arbitrators. Therefore, parties should ensure in the clause concerning arbitration that they keep the right of appointing their own arbitrator and not pass it to some authority to appoint on their behalf. Otherwise, the client would lose the main advantage of arbitration over litigation. In Litigation, at least the best of the qualified and ethical judges are available for resolving the disputes. Importantly, ethical issues cropping up will be less likely.

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