May 2009

Review

Shipping

A Commercial Man

This article was first published by Asian Dispute Review October 2007 and subsequently by the Society of Maritime Arbitrators, New York.

INTRODUCTION

Who qualifies as a "commercial man" when appointing an arbitrator? It is not uncommon, particularly in standard form contracts in certain trades, to provide that an arbitrator must be a "commercial man" – an expression that covers both men and women. What does it take to be a "commercial man"? Can a lawyer qualify as one, for instance?

The narrow view would suggest that lawyers cannot qualify. The original intention behind the qualification was to exclude them from arbitral panels because they were thought to be less practical, more pedantic and more concerned with legal principles than with helping parties to resolve their disputes in a timely and efficient manner. Consequently, the preference has been to empanel experienced business people instead, as they are likely to be more familiar with the trade than the average lawyer and to have a greater knowledge of the background to (and the customs adopted in) the particular industry.

Such a narrow approach is, however, now unwarranted. Should otherwise knowledgeable commercial men be excluded from arbitral panels merely because they once practised as lawyers or are still currently in practice?

HONG KONG AND ENGLISH CASE LAW

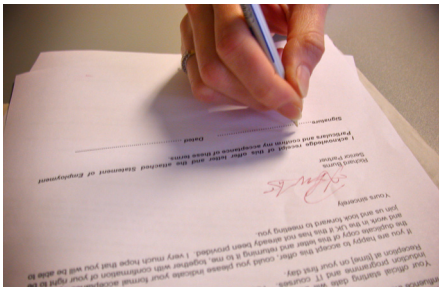
Courts are rarely asked to resolve the issue of whether an arbitrator qualifies as a commercial man. The reality is that such challenges are commonly made at the commencement of the arbitration proceedings and the challenged arbitrator then usually resigns the appointment. Typically, the cases that do proceed to litigation are those where parties challenge the arbitral award at the enforcement stage.

The term "commercial man" is specifically designed to be general, so that a wide field of people with commercial experience can be included.

The only Hong Kong case to have considered the issue is *Vincor Shipping Co Ltd v. Transatlantic Schiffahrtskontor GmbH*. In this case, the court relied on two English cases, The first was *Rahcassi Shipping Co SA v. Blue Star Line Ltd* [1967] 2 Lloyd's Rep 261. The court in that case declined to lay down any general principles about who qualifies as a commercial man, but stressed that the term should be given a sensible and practical construction. The court made it clear that the phrase "commercial man" is not so vague as to render the arbitration provision invalid. The term is specifically designed to be general, so that a wide field of people with commercial experience can be included.

In the second English case, *Pando Compania Naviera SA v. Filmo SAS*, the court held that a retired practising solicitor who later became a full-time arbitrator – and who acted as director of several shipping companies – was a commercial man as envisaged by the court in *Rahcassi*. In confirming the *Rahcassi* construction of the term "commercial man", the court in *Pando* said that "like an elephant, they are more easily recognised than defined." What is important is the commercial experience of such individuals. The mere fact that a challenged arbitrator previously practised as a lawyer cannot in itself disqualify him as a commercial man, so long as he has subsequently qualified as a commercial man.

In view of these two English authorities, the Hong Kong court in *Vincor Shipping* found that a retired solicitor who had been a full-time employee of a correspondent of a mutual insurance



association did possess practical commercial experience in the commercial shipping industry and therefore qualified as a commercial man.

UNITED STATES CASE LAW

Can a lawyer who is still in practice qualify as a commercial man? The issue has not been reviewed by any English or Hong Kong courts, but has been considered in the United States.

Can a lawyer who is still in practice qualify as a commercial man?

The first important case was a decision of the Court of Appeals for the Second Circuit, *WK Webster & Co v. American President Lines Ltd*. In this case, the arbitrator had practised as an admiralty lawyer early in his career. He then worked as a manager for several companies involved in maritime cargo claims and insurance. He was a consultant with a law firm at the time that he was appointed as an arbitrator, and, prior to the making of the arbitral award, he had become a partner of that firm. American President Lines sought to vacate the award, alleging that the arbitrator was not a commercial man.

The Court of Appeals rejected this argument, holding that the arbitrator in question possessed substantial practical experience of the commercial workings of the maritime industry. Adopting the English decision in *Pando*, the court ruled that the arbitrator's experience must be taken as a whole – that is to say, both experience acquired as a maritime lawyer and experience gained during his non-legal career should be taken into account. The fact that the arbitrator was a practising lawyer at the time of the arbitration could not disqualify him from being a commercial man.

A more recent authority, which relies on both the Webster and Pando decisions, is *US Ship Management Inc v. Maersk Line Ltd*. This case centred on several arbitrations between Maersk Line Ltd (Maersk) and US Shipping Management Inc (USSM), in which Maersk had appointed one Emery W Harper as arbitrator. The arbitration panel made an award in favour of Maersk. USSM challenged the decision, arguing that Mr Harper was not qualified to serve as an arbitrator because he failed to meet the contractual requirement that each arbitrator be a "commercial person knowledgeable in the operation and chartering of container vessels and the operation of scheduled container services."

Mr Harper had been a maritime lawyer for more than 30 years. During that time, he not only acquired a formidable amount of knowledge about the container vessel industry, but also had spent many after-work hours participating in discussions with container service companies and executives of his clients. After he ceased practice as a lawyer, Mr Harper established his own consultancy firm, which managed maritime commercial ventures. His work consisted of legal and non-legal matters, including the development of business opportunities.

The US District Court for the Southern District of New York ruled that Mr Harper did indeed qualify as a commercial man. The Court of Appeals for the Second Circuit agreed.

In the light of the *Webster* and *US Ship Management* decisions, therefore, it is clear that practising lawyers can qualify as commercial men, provided that they possess substantial (and relevant) practical commercial knowledge and experience.

WILL THE HONG KONG COURTS FOLLOW SUIT?

While the US decisions discussed above have undoubtedly relied upon English authority in reaching their findings, there is no certainty that Hong Kong or English courts will, in turn, rely on them. Whilst US precedents have no binding effect in those jurisdictions, they are persuasive and there is a reasonable chance that the *Webster* and *US Ship Management* decisions will be followed in similar cases. There are no obvious policy reasons why courts in either jurisdiction should take a different approach and, as mentioned previously, both US decisions are in line with prior English authorities.

RELEVANT TIME FOR QUALIFICATION

On a final note, the relevant time for assessing whether someone qualifies as a commercial man is the date of their appointment. This is made clear by the English decision in *Pan Atlantic Group Inc v. Hassneh Insurance Co of Israel Ltd*. Technically speaking, the case was concerned with a different qualification requirement – namely, that the arbitrator must be a "disinterested executive official of insurance or reinsurance companies." However, as a matter of construction, the decision equally applies to arbitration clauses requiring arbitrators to be commercial men. The practical effect of the *Pan Atlantic* decision is that an appointed arbitrator will qualify as a commercial man if, at the date of appointment, he possesses the necessary substantial commercial and practical experience.

... a person retains the status of a commercial man, whether or not they have retired from commerce or are still engaged in it.

SUMMARY

In view of the English and US authorities, it is submitted that the position may be summarised as follows.

- A lawyer will not qualify as a commercial man if he has only a general familiarity with the industry, acquired solely through practising law, but no practical commercial experience gained from working in the sector itself.
- A lawyer who has substantial commercial experience, which has been acquired after retiring from legal practice, will qualify as a commercial man.
- A lawyer will also qualify as a commercial man if he has acquired substantial commercial experience before becoming a full-time practising lawyer.

The focus is not, therefore, on whether an individual is (or was) a practising lawyer but, rather, is on:

- whether the individual is (at the time of his appointment) in fact familiar with the customs and practices of the trade; and
- whether that familiarity derives from substantial, practical and non-legal experience gained through the conduct of commerce rather than the practice of law alone.

Moreover, a person retains the status of a commercial man, whether or not they have retired from commerce or are still engaged in it.

FURTHER INFORMATION

For more information relating to this article, please contact:

Mary Thomson
Senior Consultant: Commercial & Dispute Resolution
T: +852 2523 1819 ext. 3623
E: mary.thomson@hammonds.com

WWW.HAMMONDS.COM

If you do not wish to receive further legal updates or information about our products and services, please write to: Richard Green, Hammonds LLP, Freepost, 2 Park Lane, Leeds, LS3 2YY or email richard.green@hammonds.com.

These brief articles and summaries should not be applied to any particular set of facts without seeking legal advice. © Hammonds LLP 2009.

Hammonds LLP is a limited liability partnership registered in England and Wales with registered number OC 335584 and is regulated by the Solicitors Regulation Authority of England and Wales. A list of the members of Hammonds LLP and their professional qualifications is open to inspection at the registered office of Hammonds LLP, 7 Devonshire Square, London EC2M 4YH. Use of the word "Partner" by Hammonds LLP refers to a member of Hammonds LLP or an employee or consultant with equivalent standing and qualification.

2796/03/09