In the arbitrator's mind

Arbitrators and judges must make findings on the material placed before them. But what about the points of law that may be involved?

VIEW FROM THE BAR

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The proposition that an arbitrator, as with a court, must reach its decision on the basis of evidence that is before it, and must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment, is well settled.

In *Fox* v *PG Wellfair Ltd* [1982] 2 EGLR 11, the Court of Appeal set aside the decision of an expert arbitrator for breach of the rules of natural justice, where the arbitrator had rejected a large part of the expert evidence put forward by the only witness called to give evidence, without giving any indication during the hearing that he was minded to do so.

The court held that the arbitrator was not entitled to reject expert evidence on the basis of his own knowledge without giving the party relying on that evidence an opportunity to deal with his criticisms.

To similar effect, in *Zermalt Holdings SA* v *Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, Bingham J set aside the award of a rent review arbitrator in a documents-only arbitration, who had based his award on matters that had not been referred to by the parties' surveyors in their evidence, without giving the parties an opportunity to address him.

In setting aside the award, and removing the arbitrator, the judge stated that he fully accepted and understood the difficulties in which experts find themselves acting as arbitrators. There was an unavoidable inclination for such experts to rely on their own expertise. In respect of general matters, that was not objectionable; rather, it was desirable, and a very large part of the reason why an arbitrator with expert qualifications is chosen.

Nevertheless, the rules of natural justice did require, even in an arbitration conducted by an expert, that matters that were likely to form the subject of decision, in so far as they were specific matters, should be exposed for comments and submissions of the parties. If arbitrators are impressed by a point that has never been raised by either side, then it is their duty to put it to them so that they have an opportunity to comment.

If arbitrators feel that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is their duty to give the parties a chance to comment. If arbitrators are to any extent relying on their own personal experience in a specific way, then that again is something they should mention, so that it can be explored.

It is not right that a decision should be based on specific matters that the parties have never had a chance to deal with, nor is it right that a party should first learn of adverse points in the decision against them. That is contrary both to the substance of justice and to its appearance.

This principle applies not merely to arbitrators, but to all quasi-arbitral tribunals. A recent example of a transgression by an expert tribunal is provided by *Irwell Valley Housing Association* v *O'Grady* [2015] UKUT 310 (LC). In that case, the First-Tier Tribunal (Lands Chamber) (FTT) had made use of a specific comparable that had not been referred to by either party, and without affording the parties the opportunity to comment on it. The Deputy President said it was not permissible for the FTT to undertake further research of its own in order to make good any deficiencies in the evidence after the hearing.

But even if it wished to do so, it was necessary for it to provide the parties with notice of the fruits of its investigations if they were to form any significant part in its reasoning. In practice, therefore, the burden of supplementing inadequate evidence adduced by the parties with further material that might be readily available to the FTT should be undertaken before the hearing was concluded.

Legal issues

So much for findings on the evidence. What about decisions concerning legal issues? Where the tribunal is a court or an arbitrator, with a lawyer appointed to determine matters of law, is the position analogous? That is to say, if having heard or read the arguments posed by the parties, the tribunal takes a different view, is it bound to give the parties a chance to comment?

Yes, at least in relation to arbitration. First, the judgment in *Zermalt* is couched in terms that are wide enough to include issues of law, as well as evidential issues. Secondly, section 33 of the Arbitration Act 1996 imposes a duty on the tribunal to "act fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent", and to "adopt procedures suitable for the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined".

Arbitrators should therefore avoid the temptation of arriving at a conclusion that may not have been envisaged by either party, by reference to matters on which the parties have not had an opportunity of addressing them.

Lorand Shipping Ltd v *Davof Trading (Africa) BV* [2015] 1 Lloyd's Rep 67 provides a recent example of the court setting aside an arbitrator's award under section 68 of the 1996 Act on this ground. Eder J held that the course adopted by the tribunal in its award was not one that had been advocated by either party; and that such course was adopted without any proper notice to the parties.

Courts, too, are usually scrupulous to allow parties the chance to comment on authorities or lines of argument that may have occurred to our clever judges, but not to the parties or their representatives. Independent experts, by contrast, operate in a rather less constrained world, where different considerations apply. Here too, however, the parties may be well advised to agree that the expert should allow opportunities for comment.

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