

Commercial Court clarifies requirements for appointing arbitrators

In *ARI v WXJ* [2022] EWHC 1543 (Comm) Foxton J considered when an arbitrator is validly appointed under English arbitration law. [James Leabeater QC](#) and [Gideon Shirazi](#) acted for the party pseudonymised as WXJ.

The facts of the case were that an LMAA arbitration clause required the arbitration respondent to appoint an arbitrator within a limited time period, failing which the claimant could appoint its arbitrator as sole arbitrator. The respondent contacted an arbitrator JJJ and asked him whether he was willing to accept an appointment. JJJ said that he was conflict-free and willing. While telling JJJ that they would revert in due course about the appointment, the respondent notified the claimant that they had appointed JJJ. JJJ subsequently indicated an unwillingness to act because the rates were too low. The claimant appointed its arbitrator as sole arbitrator, and the respondent appointed a replacement arbitrator. The parties did not agree on which entity constituted the tribunal.

Foxton J discussed the requirements for the appointment of an arbitrator. The court considered that the requirements of contract formation need not be satisfied for an arbitrator to be appointed. All that is required is a clear and unconditional communication of acceptance of the appointment by the arbitrator, which is then notified to the other party, or communication of an unconditional willingness by the arbitrator to accept the appointment, which the appointment party then acts upon by communicating the appointment to the appointee and the other party.

This will be of significant interest to those practising in international arbitration. From a broad policy perspective, this decision reflects the generally pro-arbitration stance adopted by the English courts. However, the judgment may raise the possibility that arbitrators could be found to have accepted an appointment without having intended to do so. In particular, arbitrators who wish to accept appointments subject to their terms and conditions (for example in relation to fees) should raise that from the outset.

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