

BERMUDA SUPREME COURT

S -v- T (redacted)

[2018] SC (Bda) 9 Civ (12 December 2017)

The plaintiff is an exempted insurance company incorporated in Bermuda and the defendant is a company incorporated in the United States.

The plaintiff sought an order appointing a third arbitrator in the arbitration proceedings which the defendant has commenced against the plaintiff. The reference to arbitration, and the appointment of the third arbitrator, are governed by the terms of the plaintiff's insurance policy. The nature of the dispute is known to the parties. By convention, the third arbitrator acts as Chair.

Arbitration provisions in the policy

The policy provides that disputes shall be settled by arbitration under the *Bermuda Arbitration Act of 1986* ("the 1986 Act"). Each party shall nominate an arbitrator of their choice. The party-appointed arbitrators shall appoint a third arbitrator.

However the parties decided that, rather than delegate this task to the party-appointed arbitrators, they would attempt to agree upon a third arbitrator themselves, through discussion between their lawyers. These attempts proved unsuccessful, hence the plaintiff's application to the Court.

The Court's jurisdiction to appoint a third arbitrator derives from Section 15 of the 1986 Act. Both the plaintiff and the defendant agreed that the Court should exercise its jurisdiction to appoint a third arbitrator, as they had reached deadlock.

The substantive law of the policy is New York State common law, subject to certain modifications, and the law governing the conduct of the arbitration is Bermuda law.

The nominees

The plaintiff put forward three nominees but the Court only considered their preferred nominee, Michael Collins QC, who has extensive experience chairing Bermuda Form arbitrations. The defendant had no preference for either of the plaintiff's other two nominees over Mr Collins, but opposed all three on the grounds that they are English barristers or retired judges and the

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inclusion of a second arbitrator with this background would unbalance the panel.

The defendant put forward two nominees - Judge Stephen Crane, a retired judge of the New York Supreme Court with extensive experience of New York law, and Kawaley JC, who has extensive knowledge of Bermuda procedural law.

Counsel for the plaintiff argued that, in the light of Section 17 of the 1986 Act, the appointment of the Chief Justice as third arbitrator would raise 'additional legal complexities'. In particular it was argued that, as the Supreme Court rather than Court of Appeal would be exercising an appellate jurisdiction, it would be undesirable for a Puisne Judge to sit in appeal over the Chief Justice. Justice Hellman decided that because there was very limited scope under the terms of the policy for such a situation to arise, it need not influence his decision.

Factors taken into account

Justice Hellman was satisfied that all three nominees would be independent and impartial third adjudicators and suitable for the position. He rejected the plaintiff's position that the third arbitrator should necessarily be an English Queen's Counsel or retired English judge and should on no account be a retired US judge. He equally rejected the defendant's position that the third arbitrator should on no account be an English Queen's Counsel or retired English judge.

He applied a modified form of the threefold test used by Aikens J (as he then was) in *Re XL Insurance -v- Toyota*, 14 July 1999 (unreported), asking who is best qualified: (i) to deal with the substantive issues; (ii) to deal with the procedural issues; and (iii) to act as Chair. In the unredacted version of the judgment he gave his detailed conclusions in relation to these headings for each of the nominees.

The decision

The Court appointed Michael Collins, QC as the third arbitrator. Justice Hellman stated he was, in his judgement, "the best all-round candidate... well equipped to deal with issues arising under both the substantive and the procedural law of the

arbitration and will bring to the tribunal his particular strengths as a skillful and experienced Chair.”

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.