ABU DHABI GAS LIQUEFACTION Co Ltd v EASTERN BECHTEL Corporation and Another

EASTERN BECHTEL Corporation and Another v ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES Co Ltd

23 June 1982 *Court of Appeal*

Lord Denning MR
Watkins and Fox LJJ

On 23 March 1973 Abu Dhabi Gas Liquefaction Company Limited (ADGLC), a Bermudan company, entered into a contract with a joint venture of Eastern Bechtel Corporation (Bechtel), a Panamian company, and Chiyoda Chemical Engineering and Construction Company Limited (Chiyoda), a Japanese company, for the provision of a liquefied natural gas (LNG) plant on Das Island, Abu Dhabi. Bechtel-Chiyoda entered into two sub-contracts each dated 30 April 1973 with Ishikawajima-Harima Heavy Industries Company Limited (IHI), one between Chiyoda and IHI for (*inter alia*) the supply and fabrication of two huge tanks for the storage of LNG and the other between Bechtel and IHI for (*inter alia*) the erection of the tanks. The sub-contracts were in similar but not identical terms; the former was expressed to be governed by Japanese law and the latter was expressed to be subject to English law. Both the main contract and the sub-contract governed by English law contained provisions for the reference of disputes to arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. However, after disputes arose, agreements were made between ADGLC and Bechtel-Chiyoda and also between Bechtel-Chiyoda and IHI for the arbitrator in respect of the disputes arising under each sub-contract to be appointed by agreement or in default by the English High Court.

After one of the tanks had been built a leak developed in it which led in turn to extensive investigation and repairs. The other tank was also partially taken out of commission. ADGLC (a company with the same name as the Bermudan company but situated in Abu Dhabi to whom the rights of the Bermudan company had been assigned) claimed that

Bechtel-Chiyoda were liable to them under the terms of the main contract for the loss and damage allegedly occasioned the amount of which was estimated to be over $200,000,000. Bechtel-Chiyoda denied liability to ADGLC and also relied on certain provisions in the main contract by which they contended that any liability to ADGLC was limited and ADGLC were liable to reimburse them any amounts incurred by them in excess of certain sums. Bechtel-Chiyoda also held IHI liable under either or both of the sub-contracts for the leak in the tank and its consequences. No agreement was reached on the appointment of the arbitrator to determine the disputes arising between ADGLC and Bechtel-Chiyoda and between Bechtel-Chiyoda and IHI (under the sub-contract governed by English law) because both ADGLC and IHI opposed the appointment of the same arbitrator in relation to each contract.

ADGLC and Bechtel-Chiyoda made separate applications to the High Court for the appointment of an arbitrator, Bechtel-Chiyoda contending on the hearing of those applications that the same person should be appointed as arbitrator to determine the disputes under each contract. Bingham J held that the same person should not be appointed arbitrator in relation to both sets of disputes and made orders appointing Sir Henry Fisher as the arbitrator of the disputes between ADGLC and Bechtel-Chiyoda and Sir John Megaw as arbitrator in respect of the disputes of the sub-contract governed by English law between Bechtel-Chiyoda and IHI.

Bechtel-Chiyoda appealed against both orders contending that the same arbitrator should be appointed. By the time the appeal was heard, pleadings had been served pursuant to directions given by the arbitrators setting out the basis of ADGLC's case, the defence of Bechtel-Chiyoda to that case, and Bechtel-Chiyoda's claim against IHI, in which Bechtel-Chiyoda passed on, in substance, the allegations made by ADGLC against them. No defence had then been served by IHI to that claim.

***HELD**, allowing the appeal:*

(1) Under Section 10 of the Arbitration Act 1950 the Court had power to appoint the same arbitrator in each arbitration.

(2) It was highly desirable that this should be done so as to avoid inconsistent findings.

(3) However, if there were any disadvantages to a party resulting from the same arbitrator having heard the same or a similar issue in one arbitration which arose in the other, then there could be liberty to apply to the Court for the appointment of another arbitrator, if the parties consented.

(4) Subject to the consent of the parties to that provision, Sir John Megaw should be appointed as the arbitrator in both arbitrations.

(The parties consented to the order proposed by the Court of Appeal.)

Humphrey Lloyd QC and Robert Akenhead appeared on behalf of Bechtel-Chiyoda, instructed by Kenneth Brown, Baker, Baker.
Ian Hunter QC appeared on behalf of ADGLC, instructed by Freshfields.
John Roch QC and Richard Siberry appeared on behalf of IHI, instructed by Lovell, White & King.

Commentary

The headnote and this commentary contain facts not referred to in the judgments but which were before the Court. They help to explain the course of the case, the decisions taken and their implications.

The situation presented to the Court of Appeal was not unusual. The main contract between ADGLC and Bechtel-Chiyoda contained a provision requiring disputes to be submitted to ICC arbitration, as did one of the sub-contracts with IHI. (In September 1982 the ICC published a useful Guide on Multi-Party Arbitrations (ICC publication No 404) designed to overcome many of the ordinary difficulties, but that Guide makes it clear that "the ICC Court of Arbitration can provide for a multi-party arbitration proceeding only where all of the parties have agreed to it . . . either at the time the dispute or disputes arise or at the time the parties enter into their various contractual arrangements. That a multi-party arbitration proceeding needs a contractual basis is beyond doubt . . ." However, there are no means whereby, under the ICC Rules, all three such parties could be compelled to join in a single hearing before the same arbitrator or arbitrators.

In England a party in the position of Bechtel-Chiyoda would normally try to break loose of its contractual shackles by commencing proceedings in the High Court and, if applications to stay the proceedings and to refer the dispute to arbitration were made, would then try to defeat those applications by relying on the principles set out in *Taunton-Collins* v *Cromie* [1964] 1 WLR 633. (The principles stated in that case are not a universal panacea: see, for example, *Berkshire Senior Citizens Housing Association Ltd* v *Fitt* (1979) 15 BLR 27.) That course was not however open to Bechtel-Chiyoda since both ADGLC and IHI would have been entitled to a stay of the proceedings under Section 1 of the Arbitration Act 1975. Unlike Section 4 of the Arbitration Act 1950, a party seeking a stay under the 1975 Act is entitled to it as of right (and there is no discretion vested in

the Court) once it is established that the proceedings have been brought in respect of a pre-existing dispute.

Bechtel-Chiyoda therefore took the prudent step of reaching separate agreements with ADGLC and IHI whereby the ICC arbitration clause was replaced by provision for arbitration in England with the English High Court having power to appoint in default of agreement. These arrangements were of course not enough by themselves since neither ADGLC nor IHI would agree to "their" arbitration being linked with the other or to the same arbitrator being appointed in each arbitration. There being "a default of agreement", the main contractors therefore applied to the High Court.

Apparently Mr Justice Bingham was impressed with the fears expressed on behalf of IHI. In the absence of the agreement of all parties it was impossible for the hearings of both arbitrations to take place simultaneously so that IHI would be treated for all purposes as if they were third parties to the ADGLC claim. Since IHI were effectively in that position but were denied the opportunity of participating in the main contract arbitration they had reason to fear that if the same arbitrator were appointed he might inevitably begin to form opinions adverse to them during the course of the main contract arbitration which it would be difficult for them to dispel when it came to the hearing of the sub-contract arbitration before the same person. Since they had no right to be present during the course of the main contract arbitration they might not even know what was being said about them. Mr Justice Bingham therefore rejected the submission that the same arbitrator should be appointed to both arbitrations.

The Court of Appeal decision resulted in a compromise. Bechtel-Chiyoda's appeals were allowed since the same arbitrator (Sir John Megaw) was appointed in respect of both arbitrations. The Court of Appeal however indicated that the arbitrator should have a "pre-trial conference" in order to determine what were the issues common to each arbitration, with a view to determining those issues first, if that were practicable. The Court of Appeal also proposed that any party who feared that the conduct of either proceeding might ultimately prejudice him could have liberty to apply to the Court for the appointment of a new arbitrator in respect of the arbitration that might be so affected. The parties agreed to this proposal. The result was therefore not entirely satisfactory but was nevertheless a not unreasonable result given the limited powers available to the English courts.

Some standard forms try to bring about tri-partite arbitrations when a dispute arises between contractor and sub-contractor which is the same as or related to a dispute between the main contractor and the employer. Careful drafting is required for these provisions to be successful in practice — in the *Berkshire* case cited above, doubt was expressed as to whether such a clause could be successfully

devised and operated (although with care and experience it can be). However, as the commentary to that case points out, tri-partite arbitrations do not proceed without difficulties — see *A. Monk & Co Ltd* v *Devon County Council* (1978) 10 BLR 9. The FCEC "Blue" Form of sub-contract which is frequently used both in the United Kingdom (in connection with the ICE Form of Contract) and overseas (in connection with the FIDIC Form of Contract) does contemplate a tri-partite arbitration occurring. In practice however the form of arbitration envisaged by that sub-contract requires a great deal of agreement on the part of the employer for it to be effective. There is no provision in the ICE Conditions or in the FIDIC Conditions which requires an employer to assent to a tri-partite arbitration. The 1980 editions of the JCT form of building contract do however contain provisions designed to compel an employer to join in such a tri-partite arbitration.

If there is no contractual basis for a tri-partite arbitration it is almost impossible to bring it about except in the limited form illustrated in this case. In some countries provisions may exist in the local law which will enable the courts to consolidate arbitrations. For example, in the United States there have been a number of cases in which related arbitrations have been consolidated or combined. They were mainly concerned with domestic arbitrations; there may be little practical value to the international community in these provisions since few international construction arbitrations take place anywhere in the United States so that they might be within one of the jurisdictions which permit consolidation to be achieved.

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THE MASTER OF THE ROLLS: This case raises an important point in the conduct of arbitrations. There is a small island in the Persian Gulf called Das Island. Huge tanks have been erected on Das Island for the purpose of liquifying the gas which comes from oil. It is liquified by being reduced to an exceedingly low temperature in these huge tanks. They are about 100 yards in diameter and 100 feet high.

Contracts were made in 1973 for the erection of the plants. The employers were the Abu Dhabi Gas Liquefaction Company Limited. The main contractors were two companies, the Eastern Bechtel Corporation and the Chiyoda Chemical Engineering and Construction Company Limited. They were joint contractors. A Japanese company called Ishikawajima-Harima Heavy Industries Company Limited (I.H.I.) were the sub-contractors. The main feature of the contract was that the Eastern Bechtel Corporation were the contractors in respect of all the work of erecting the tanks and installations.

The Eastern Bechtel Corporation sub-contracted the work in two portions. There was a contract for supplying the materials. They came from Japan. There was another contract for installing and erecting them on the island. So there were two sub-contracts.

All the earlier contracts were governed by English law and provided for arbitration in London. But the contract for supplying materials from Japan was governed by Japanese law and provided for arbitration in Japan. There was also the question of the design of

certain parts of the erection which would come within one or other of the contracts.

The tanks were built and installed between 1973 and 1975. Unfortunately, after a time cracks appeared in one of them. There was brittleness in the structure. The costs of repairing the tank ran into millions and millions of pounds. The question arose as to who was responsible for the cost of the repairs. The employers (the owners) claimed against the main contractors. The main contractors claimed against the sub-contractors. It was said that the cracks were not caused by any faulty design or installation: but because of settlement caused by the sandy nature of the island.

Very big issues arise in these proceedings. The most important is what was the cause of the cracks. But many other points arise on the construction of the contracts: how far the main contractors are liable or are exempt by clauses in the contract: or, as between the contractors and the sub-contractors, whether there was a contract or indemnity and as to the meaning of various clauses. Many points of construction and law arise. As one can see, there are many points on the facts as to causation: and many of the points of law may depend eventually on the facts.

That being the general outline of the case, it is quite plain that this matter cannot be dealt with by the courts. Under Section 1 of the Arbitration Act 1975 these disputes are bound to go to arbitration.

The issue which came before Mr Justice Bingham was whether there should be separate arbitrations for the two contracts — the main contract and the sub-contract — or whether there should be one arbitrator only for both proceedings. Mr Justice Bingham held that there should be separate arbitrations, for this reason: The sub-contractors, for instance, might say that the arbitrator's decision in the first arbitration might affect his decision in the second arbitration. If he had already formed his view in the first arbitration, they would be prejudiced. It would be most unfair to them: because he would be inclined to hold the same view in the second arbitration.

On the other hand, as we have often pointed out, there is a danger in having two separate arbitrations in a case like this. You might get inconsistent findings if there were two separate arbitrators. That has been said in many cases, see *Taunton-Collins* v *Cromie & ors* [1964] 1 WLR 633. It is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question, such as causation. It is very desirable that everything should be done to avoid such a circumstance. Mr Justice Bingham thought he could not do it. That is why he ordered two separate arbitrators for the two arbitrations.

But, after full discussion before us, it seems to me that a way can be found to resolve the problem. I would agree with the submission

that has been made that, on the appointment of an arbitrator, this court cannot impose conditions. The case of *Bjornstad & Anr* v *The Ouse Shipping Company Limited* [1924] 2 KB 673 was a special decision relating to security for costs. Otherwise the powers of the court are simply contained in Section 10 of the Arbitration Act 1950, which says:

> "In any of the following cases —
> (a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; ...
> any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the High Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

That is the application which is made before us. It seems to me that there is ample power in the court to appoint in each arbitration the same arbitrator. It seems to me highly desirable that it should be done so as to avoid inconsistent findings. On the other hand, it is equally desirable that it should be done so that neither party should feel that any issue has been decided against them beforehand: or without their having an opportunity of being heard in the case. It seems to me that the solution which was suggested in the course of the argument should be adopted, namely that the same arbitrator should be appointed in both arbitrations: but, at an early stage, he should have what may be called a "pre-trial conference" with all the parties in the two arbitrations. At that pre-trial conference there should be a segregation of issues. There will be some issues which can be separated and can be decided by themselves. They should be decided in the first arbitration at that stage.

If necessary, there can be recourse to the courts on points of construction and so forth. At all events, points which can be separated should be dealt with separately in the first place.

There may be some which cannot be separated — namely, the very important point of causation. In those circumstances, the arbitrator will have control of the case. At the second stage, he may well think it right to be relieved from arbitrating any further in the arbitration. He can then be replaced by a new arbitrator in respect

of those issues. That can be done on application. In that way, all the parties can feel that there has been a fair hearing: and that they will not have been prejudiced by any preconceived notions of the one arbitrator.

In order that this can be done, we suggest that there should be liberty to apply to either party. That would have to be by consent. Apart from that, it seems to me that the right solution of this difficulty is to allow the appeal. The same arbitrator should be appointed for both arbitrations. As the matter stands, I think he should be Sir John Megaw.

I would allow the appeal accordingly.

WATKINS LJ: I agree. There is no power in this court or any other court to do more upon an application such as this than to appoint an arbitrator or arbitrators, as the case may be; we have no powers to attach conditions to that appointment, and certainly no power to inform or direct an arbitrator as to how he should thereafter conduct the arbitration or arbitrations. But there can be no doubt, it seems to me, that, having regard to the submission which impugns the holding of two separate arbitrations and to the merits of there being only one, a wide discretion as to the conduct of the arbitrations should be granted to the single arbitrator by the parties or insisted upon by himself. The ideal solution to the manner of resolving the issues involved here would have been a proceeding by way of arbitration which closely resembles our civil action in which plaintiff and defendant and third and other parties litigate all disputes betwen them in a single hearing. Unhappily the parties to this vast dispute are unable to agree a procedure of that kind. So it is that two arbitrations have arisen and I.H.I. in particular are fearful that, if one arbitrator is appointed for both arbitrations, they, being parties to the second arbitration only, will be disadvantaged.

For the reasons which have already been explained by my Lord, with which I entirely agree, I think those fears are unfounded; since, in the hands of an arbitrator of the calibre of the one who is to be appointed by this court, it is extremely unlikely that an embarrassment will be caused either to them or to any other party by the procedure which ultimately in his discretion he will choose to adopt.

The agreement by the parties to there being liberty to each of them to apply generally to this court would I suggest be a sensible precaution, not only for their possible benefit, but also for the single arbitrator appointed in the event of difficulties arising over procedural and other matters referred to in argument in this court.

For those reasons, I agree that there be a single arbitrator appointed as proposed by my Lord, and so would allow the appeal.

FOX LJ: There is in my view a great general advantage in a case as complex as this in appointing a single arbitrator and, indeed, having a single hearing. That advantage of a single arbitrator is that it will avoid the inconsistencies which may arise if two arbitrators are appointed, one for each arbitration. The difficulty in relation to the appointment of a single arbitrator in practical terms is this, that it may be that matters will be determined and evidence will be heard in the first arbitration by the single arbitrator in the absence of I.H.I. which may be to the prejudice of I.H.I. and which will in some way affect the arbitrator's judgment or attitude to the case when he comes to hear the second arbitration, and it is said that that is a risk which the court should not require that I.H.I. be exposed to.

If in fact there is a single arbitrator and he can at a preliminary stage separate the issues (and there may be further advantages in the way of saving time by that course being adopted, for example in relation to the question of indemnity) it may be that the decision on one or more such issues will very much shorten or perhaps eliminate any further dispute. But, it is said, we are still left with the risk that the single arbitrator may be affected in the second arbitration by what passed in the first.

As to that, I think there are two matters to be borne in mind. First, I am not myself convinced that with an arbitrator such as either of those who have been suggested in this case, the risk of such an event occurring is other than slight. If in fact he feels that there is a possibility of prejudice at the time he has completed the first arbitration, or at some point of time before that, he can himself seek release from the second arbitration.

The second point is that, if the parties consent, there could be liberty to either side to apply to the court if at any stage before the first arbitration is finished they feel that there are risks of some prejudice arising in the second arbitration by reason of what has occurred in the first. There should then be liberty to apply to the court for the appointment of a second arbitrator in the second arbitration.

In the circumstances it seems to me that the general advantages of a single arbitrator are very considerable and that the disadvantages which is primarily relied upon is very unlikely to exist and by agreement between the parties can probably be removed altogether. In the circumstances, I would agree to the order which my Lord proposes.