1981 A. No. 4268

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR. JUSTICE BINGHAM)

Royal Courts of Justice.
Wednesday, 23rd June, 1982.

Before:

THE MASTER OF THE ROLLS
(Lord Denning)
LORD JUSTICE WATKINS and
LORD JUSTICE FOX

- - - -

ABU DHABI GAS LIQUEFACTION COMPANY LIMITED (Plaintiffs) Respondents

v.

EASTERN BECHTEL CORPORATION (First Defendants Appellants
and
CHIYODA CHEMICAL ENGINEERING & CONSTRUCTION COMPANY LIMITED (Second Defendant Appellants

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MR. IAN HUNTER, Q.C. (instructed by Messrs. Freshfields) appeared on behalf of the Respondents.

MR. HUMPHREY LLOYD, Q.C. and MR. ROBERT AIKENHEAD (instructed by Messrs. Kenneth Brown Baker Baker) appeared on behalf of the Appellants.

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EASTERN BECHTEL CORPORATION and
CHIYODA CHEMICAL ENGINEERING & CONSTRUCTION COMPANY LIMITED (Plaintiffs) Appellants

v.

ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES CO. LTD. (Defendants) Respondents

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MR. HUMPHREY LLOYD, Q.C. and MR. ROBERT AIKENHEAD (instructed by Messrs. Kenneth Brown Baker Baker) appeared on behalf of the Appellants.

MR. JOHN ROCH, Q.C. and MR. RICHARD SIBERRY (instructed by Messrs. Lovell White & King) appeared on behalf of the Respondents.

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(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Ltd., Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W.C.2).

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REVISED JUDGMENT

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 of 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 inconsistgent findings if there were two separate arbitrators. That has been said in many cases, see Taunton-Collins v. Cromie & ors. (1964) 1 Weekly Law Reports 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 King's Bench 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 [illegible] 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.

LORD JUSTICE WATKINS: 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 between 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.

LORD JUSTICE FOX: 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. The 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 the 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 see[illegible] 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 disadvantage 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.

(Order: Appeals allowed; Sir John Megaw to be appointed as arbitrator; costs in arbitration)

UNITED KINGDOM: COURT OF APPEAL JUDGMENT IN ABU DHABI GAS LIQUEFACTION COMPANY v. EASTERN BECHTEL CORPORATION AND CHIYODA CHEMICAL ENGINEERING & CONSTRUCTION COMPANY AND EASTERN BECHTEL CORPORATION AND CHIYODA CHEMICAL ENGINEERING & CONSTRUCTION COMPANY v. ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES CO.*

(Consolidation of Arbitration Proceedings; Appointment of Same Arbitrator in Separate Arbitrations)

[June 23, 1982]

Introductory Note

This was a consolidated appeal from decisions appointing sole arbitrators in two separate proceedings under the (English) Arbitration Act 1950. One arbitration was initiated by Abu Dhabi Gas Liquefaction Company Limited ("ADGLC"), the owner of complex gas liquefaction facilities on Das Island in the Arabian Gulf, against Eastern Bechtel Corporation and Chiyoda Chemical Engineering and Construction Co., Ltd. ("B/C"), a joint venture that was the prime contractor for the design and construction of the facilities. ADGLC alleged that two large liquefied natural gas storage tanks designed and constructed by one of B/C's subcontractors, Ishikawajima-Harima Heavy Industries Co., Ltd. ("IHI"), were defective. The second arbitration was initiated by B/C against IHI.

B/C had requested the High Court to appoint the same arbitrator in both proceedings in order to avoid the possibility of inconsistent findings of fact, particularly as to the cause of the admitted cracking of one of the two tanks.

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*[The text of the Judgment appears at I.L.M. page 1057. The Introductory Note was prepared for International Legal Materials by Thomas P. Devitt of the California Bar.]

The High Court judge (Mr. Justice Bingham) held that because he lacked authority to order consolidated proceedings or to appoint an arbitrator subject to conditions (e.g., that the arbitrator order consolidated proceedings), two different arbitrators should be appointed. The judge reasoned that if a single arbitrator were appointed, he might be prejudicially inclined to adhere to a finding made in the first arbitration on an issue common to both proceedings, despite what different evidence or arguments might be submitted on that same issue in the second arbitration.

The Court of Appeal agreed that courts have no power to order consolidation or to impose conditions upon an appointed arbitrator. The court held, however, that it did have power under section 10 of the Arbitration Act 1950 to appoint the same arbitrator in separate arbitrations,* and that it was highly desirable to do so in these cases in order to avoid the possibility of inconsistent findings of fact.

In dicta Lord Denning made several suggestions on how the single appointed arbitrator should proceed: (1) the arbitrator should hold a pre-trial conference among all three interested parties to segregate the common issues; (2) the issues pertinent only to the first (owner-prime) arbitration should then be tried, with recourse to the courts on points of law if necessary; (3) the common

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* Section 10 of the Arbitration Act 1950 generally authorizes the High Court to appoint arbitrators. The section does not expressly address the question of appointing the same arbitrator in related proceedings.

issues be should tried next, apparently with separate hearings but with both sets of hearings taking place before a decision was rendered in either case; and (4) if either the arbitrator or the parties considered that the arbitrator would be prejudiced in hearing the common issues after having decided the owner-prime issues, a different arbitrator might be appointed to hear and decide the common issues as well as any remaining issues.

Lord Justices Watkins and Fox agreed with Lord Denning's suggestions, but Lord Justice Watkins did emphasize that a large degree of flexibility should be allowed to the arbitrator by the parties or insisted upon by the arbitrator. Lord Justices Watkins and Fox also stated that prejudice as a result of the prior determination of the owner-prime issues was unlikely in view of the caliber of the arbitrator appointed (Sir John Megaw).

There were two major questions left open by the decision: (1) whether the arbitrator has power to order joint hearings on the common issues in the absence of party agreement; and (2) in what circumstances, if any, the arbitrator should or must disqualify himself from hearing and deciding the common issues following his disposition of the separate owner-prime issues.

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LORD JUSTICE WATKINS: 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

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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.

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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 King's Bench 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 [illegible] 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.

LORD JUSTICE WATKINS: 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 between 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.

LORD JUSTICE FOX: There is in my view a great [illegible] advantage

in a case as complex as this in appointing a single arbitrator and, indeed, having a single hearing. The 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 the 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 leave 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 disadvantage 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.

(Order: Appeals allowed; Sir John Megaw to be appointed as arbitrator; costs in arbitration)

UNITED KINGDOM: COURT OF APPEAL JUDGMENT IN ABU DHABI GAS LIQUEFACTION COMPANY v. EASTERN BECHTEL CORPORATION AND CHIYODA CHEMICAL ENGINEERING & CONSTRUCTION COMPANY AND EASTERN BECHTEL CORPORATION AND CHIYODA CHEMICAL ENGINEERING & CONSTRUCTION COMPANY v. ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES CO.*

(Consolidation of Arbitration Proceedings; Appointment of Same Arbitrator in Separate Arbitrations)

[June 23, 1982]

Introductory Note

This was a consolidated appeal from decisions appointing sole arbitrators in two separate proceedings under the (English) Arbitration Act 1950. One arbitration was initiated by Abu Dhabi Gas Liquefaction Company Limited ("ADGLC"), the owner of complex gas liquefaction facilities on Das Island in the Arabian Gulf, against Eastern Bechtel Corporation and Chiyoda Chemical Engineering and Construction Co., Ltd. ("B/C"), a joint venture that was the prime contractor for the design and construction of the facilities. ADGLC alleged that two large liquefied natural gas storage tanks designed and constructed by one of B/C's subcontractors, Ishikawajima-Harima Heavy Industries Co., Ltd. ("IHI"), were defective. The second arbitration was initiated by B/C against IHI.

B/C had requested the High Court to appoint the same arbitrator in both proceedings in order to avoid the possibility of inconsistent findings of fact, particularly as to the cause of the admitted cracking of one of the two tanks.

*[The text of the Judgment appears at I.L.M. page 1057. The Introductory Note was prepared for International Legal Materials by Thomas P. Devitt of the California Bar.]

The High Court judge (Mr. Justice Bingham) held that because he lacked authority to order consolidated proceedings or to appoint an arbitrator subject to conditions (e.g., that the arbitrator order consolidated proceedings), two different arbitrators should be appointed. The judge reasoned that if a single arbitrator were appointed, he might be prejudicially inclined to adhere to a finding made in the first arbitration on an issue common to both proceedings, despite what different evidence or arguments might be submitted on that same issue in the second arbitration.

The Court of Appeal agreed that courts have no power to order consolidation or to impose conditions upon an appointed arbitrator. The court held, however, that it did have power under section 10 of the Arbitration Act 1950 to appoint the same arbitrator in separate arbitrations,* and that it was highly desirable to do so in these cases in order to avoid the possibility of inconsistent findings of fact.

In dicta Lord Denning made several suggestions on how the single appointed arbitrator should proceed: (1) the arbitrator should hold a pre-trial conference among all three interested parties to segregate the common issues; (2) the issues pertinent only to the first (owner-prime) arbitration should then be tried, with recourse to the courts on points of law if necessary; (3) the common

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* Section 10 of the Arbitration Act 1950 generally authorizes the High Court to appoint arbitrators. The section does not expressly address the question of appointing the same arbitrator in related proceedings.

issues be should tried next, apparently with separate hearings but with both sets of hearings taking place before a decision was rendered in either case; and (4) if either the arbitrator or the parties considered that the arbitrator would be prejudiced in hearing the common issues after having decided the owner-prime issues, a different arbitrator might be appointed to hear and decide the common issues as well as any remaining issues.

Lord Justices Watkins and Fox agreed with Lord Denning's suggestions, but Lord Justice Watkins did emphasize that a large degree of flexibility should be allowed to the arbitrator by the parties or insisted upon by the arbitrator. Lord Justices Watkins and Fox also stated that prejudice as a result of the prior determination of the owner-prime issues was unlikely in view of the caliber of the arbitrator appointed (Sir John Megaw).

There were two major questions left open by the decision: (1) whether the arbitrator has power to order joint hearings on the common issues in the absence of party agreement; and (2) in what circumstances, if any, the arbitrator should or must disqualify himself from hearing and deciding the common issues following his disposition of the separate owner-prime issues.

1981 A. No. 4268

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR. JUSTICE BINGHAM)

Royal Courts of Justice.
Wednesday, 23rd June, 1982.

Before:

THE MASTER OF THE ROLLS
(Lord Denning)
LORD JUSTICE WATKINS and
LORD JUSTICE FOX

- - - -

ABU DHABI GAS LIQUEFACTION COMPANY LIMITED (Plaintiffs) Respondents

v.

EASTERN BECHTEL CORPORATION (First Defendants) Appellants
and
CHIYODA CHEMICAL ENGINEERING & CONSTRUCTION COMPANY LIMITED (Second Defendants) Appellants

- - - -

MR. IAN HUNTER, Q.C. (instructed by Messrs. Freshfields) appeared on behalf of the Respondents.

MR. HUMPHREY LLOYD, Q.C. and MR. ROBERT AIKENHEAD (instructed by Messrs. Kenneth Brown Baker Baker) appeared on behalf of the Appellants.

- - - -

EASTERN BECHTEL CORPORATION and
CHIYODA CHEMICAL ENGINEERING & CONSTRUCTION COMPANY LIMITED (Plaintiffs) Appellants

v.

ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES CO. LTD. (Defendants) Respondents

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MR. HUMPHREY LLOYD, Q.C. and MR. ROBERT AIKENHEAD (instructed by Messrs. Kenneth Brown Baker Baker) appeared on behalf of the Appellants.

MR. JOHN ROCH, Q.C. and MR. RICHARD SIBERRY (instructed by Messrs. Lovell White & King) appeared on behalf of the Respondents.

(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Ltd., Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W.C.2).

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REVISED JUDGMENT

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 of 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. Jusice Bingham held that there should be separate arbitrations, for this reason: The sub-contractors, for instance,

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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 Weekly Law Reports 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 King's Bench 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:

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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.

LORD JUSTICE WATKINS: 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

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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.

LORD JUSTICE FOX: There is in my view a great general advantage

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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 disadvantage 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.

(Order: Appeals allowed: Sir John Megaw to be appointed as arbitrator: costs in arbitration)