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Clarity in Dispute Resolution Clauses

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How do English and BVI courts address inconsistencies in arbitration clauses? The English Court of Appeal decision in *AdActive Media Inc v Ingrouille* [2021] EWCA Civ 313 demonstrates that English courts will make every effort to honour the express terms of a contract.

In *AdActive*, the Court of Appeal examined three apparently inconsistent dispute resolution clauses which appeared sequentially in an agreement. The issue was whether there was an irreconcilable inconsistency between a "Governing law" clause (clause 15) and the provision for arbitration in a "Disputes" clause (clause 17). The result of the appeal was that a California judgment could not be recognised or enforced in England, because section 32 of the English Civil Jurisdiction and Judgments Act, 1982 prohibited the recognition or enforcement of a foreign judgment if bringing those proceedings was contrary to the underlying arbitration agreement.

The "Governing law" clause designated the law of the Federal or State Court of the Los Angeles County in California as the governing law and provided that the state courts in Los Angeles County have jurisdiction. Federal courts are more formal in nature and deal with cases involving federal laws, whilst county courts preside over state and local municipal law cases. A second clause, headed "Consent to Suit" (clause 16), provided that the parties consented to the jurisdiction of the courts of California in relation to "any legal proceedings arising out of or relating to the agreement." Although the phrase "legal proceedings" could have been misleading because it is relatively wide and lends itself to different meanings, the Court of Appeal found that there was no inconsistency between this clause and the Governing law and Disputes clauses. The Court of Appeal found that the phrase could only be interpreted as referring to court proceedings especially since the agreement contained an arbitration clause which immediately followed the consent to suit clause. Clause 17, the "Disputes" clause, provided that except for claims in relation to certain specific clauses in the agreement, all disputes in relation to the agreement were to be settled or decided by way of arbitration.

First, the Court of Appeal *in AdActive* reiterated the well-established principle under English law that English courts should, *"give effect to every clause of the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement*".[1)] Upon an examination of the relevant dispute resolution clauses, the Court of Appeal found that it was apparent from each clause and their respective headings that they generally dealt with different aspects of jurisdiction and there was no irreconcilable inconsistency between all three dispute resolution clauses (clauses 15, 16 and 17). The court relied on the judgment in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1WLR 4117 (previously

discussed here and here) for the principle that contracting parties could not have intended that a significant clause, such as an arbitration clause, would be invalid. This principle originates from a purposive interpretation approach. Based on this reasoning, the court adopted a purposive interpretation of the language of the contract to give effect to, rather than defeat, the underlying aim or purpose of the contract. The court noted that an interpretation resulting in an arbitration clause being void and of no legal effect at all gives rise to a powerful inference that such a meaning could not rationally have been intended by the parties.

The court found that the structure of the provisions provided consistency and noted that the clauses were grouped together, not scattered in unrelated areas. This meant that it was objectively less probable that the clauses were inconsistent. The court reconciled the various dispute resolution clauses contained in the agreement by finding that all claims and disputes arising under the agreement were to be referred to arbitration pursuant to clause 17 except for the specified exceptions under clauses 7 and 8. The excepted category of claims brought under clauses 7 and 8 which related to the use and protection of confidential information and protection of the work product respectively, were specifically to be dealt with by the federal and state courts of Los Angeles County.

Secondly, the court found that the language used in the various dispute resolution clauses lacked similarity and demonstrated the absence of any inconsistency. The court noted that the thrust of the "Disputes" clause as contained in clause 17 was to subject all claims, disputes, etc. to arbitration save for the specified exceptions, of claims brought under clauses 7 and 8 of the contract which could only be brought by way of court proceedings before the federal and state courts of Los Angeles County. This was in contrast to the "Governing law" clause 15 which was concerned with the appropriate court as the venue for cases, suits, actions, etc. which fell within the specified exceptions.

The Court of Appeal's decision suggests that parties should exercise care when drafting an agreement. As the English courts will seek to reconcile potentially inconsistent clauses where possible and are reluctant to declare an arbitration agreement void or unenforceable unless it is manifestly inconsistent with or repugnant to the rest of the agreement.

A similar warning was echoed in the BVI case of *Anzen Limited and others v Hermes One Limited [2016] UKPC 1* in litigation that went up to the Judicial Committee of the Privy Council on the interpretation of an arbitration clause in a shareholder's agreement providing that either party 'may submit the dispute to binding arbitration.' The question was whether that clause entitled the appellant to a stay of litigation under section 6(2) of the relevant act of the time, the BVI Arbitration Ordinance, 1976. There, the Judicial Committee of the Privy Council cautioned that *'clauses depriving a party of the right to litigate should be expected to be clearly worded.'* However, the court recognised the public policy shift towards upholding arbitration clauses and continued: *'even though the commercial community's evident preference for arbitration in many spheres makes any such presumption a less persuasive factor nowadays than it was once.'* The court allowed the appeal, rejected the High Court and Court of Appeal rulings and found that the shareholder was entitled to enforce the arbitration clause by a stay of litigation pursuant to the Arbitration Ordinance, 1976. Whilst the court recognised that the term 'may' suggested that arbitration was optional and not mandatory, the court applied the principle in the House of Lords case *Bremer Vulkan Schiffbauund Mashinenefabrik v South India Shipping Corp Ltd [1981] AC 909* that parties to arbitration agreements are mutually obligated to cooperate in the pursuit of arbitration. Consequently, whilst the clause did not prohibit shareholders from commencing

litigation, its wording permitted the other party to enforce the arbitration clause by the imposition of a stay of litigation and insisting on arbitration.

By the advent of the current BVI Arbitration Act, 2013 the mechanisms for upholding arbitration clauses are now even more robust. For instance, section 59(1) of the BVI Arbitration Act, 2013 provides useful guidance and parameters for binding arbitration agreements, whether signed or unsigned or whether those agreements are for determination of all or some specific disputes by way of arbitration. The Act provides for the recognition of arbitration agreements irrespective of whether they were entered into in the BVI or elsewhere and Part III of the Act provides that arbitration agreements must be in writing and can take the form of a separate agreement or be contained in a clause of an existing contract. The Act also provides guidance on how the tribunal of choice will determine the governing law of the substantive dispute. Section 32 of the Act even includes mechanisms for severing arbitration clauses and treating it as an independent agreement – a useful mechanism for upholding the power to arbitrate even if the main agreement fails or is later found to be invalid.

For users of arbitration, the crucial lesson to be taken from these cases is that careful attention should be paid to ensuring that the dispute resolution clauses accurately and clearly state the intended objective and avoid ambiguity. Clarity of language and intent is critical for ensuring that parties are able to enforce the use of the intended jurisdiction, choice of law and forum when disputes arise. Should there be any ambiguity, this could lead to potentially costly and drawn-out issues that could require a court judgment to resolve. In the BVI, the courts will make every effort to honour the express terms of a contract, and the BVI Arbitration Act, 2013 contains robust mechanisms for upholding arbitration clauses in order to provide a level of reassurance for parties which is also supported by past case law. Nonetheless, the ambiguous wording in *AdActive* and *Anzen Limited* resulted in extensive litigation and delay for both cases; a cautionary tale for all.

References

?1 Chitty on Contracts (33rd ed.) (2018 and 2nd cumulative supplement 2020) at 13-071.

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