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KRUPPA V BENEDETTI: WHEN IS AN AGREEMENT TO ARBITRATE NOT AN AGREEMENT TO ARBITRATE? WHEN IT'S AN AGREEMENT TO ENDEAVOUR TO ARBITRATE

Nicholas Fletcher (Berwin Leighton Paisner LLP) · Wednesday, August 20th, 2014

By Nicholas Fletcher QC and Victoria Clark of Berwin Leighton Paisner LLP

In the recent decision of Christian Kruppa v Alessandro Benedetti and Bertrand des Pallières [2014] EWHC 1887 (Comm), Mr Justice Cooke sitting in the English Commercial Court was asked to decide whether or not or a governing law and jurisdiction clause constituted an "arbitration agreement" within the meaning of Section 6(1) of the Arbitration Act 1996 ("the Act").

The relevant clause read as follows:

> "*In the event of any dispute between the parties … the parties will endeavour first to resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction.*"

Internally contradictory clauses that include an arbitration clause and a jurisdiction clause are not uncommon in practice and the courts generally adopt a pro-arbitration stance rather than decline to give effect to an arbitration provision. For example, when faced with the conjunction of an arbitration clause and an exclusive or non-exclusive jurisdiction agreement, the courts have tended to give priority to the arbitration clause and to restrict the jurisdiction clause to ancillary matters relating to the supervision or enforcement of the arbitration and awards.

Mr Justice Cooke himself adopted this approach in his decision in Sul America CIA Nacional de Seguros SA v Enessa Engenharia SA [2012] I Lloyd's Rep 275. In a passage that was cited to him by both parties, he said:

> "*The English courts, when faced with an exclusive jurisdiction clause and an arbitration agreement, look to the strong legal policy in favour of arbitration and the assumption that the parties, as rationale businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal. … A liberal approach to the words chosen by the parties in*

> *their arbitration clause must now be accepted as part of our law."*

In this case, however, the dispute centred on whether the clause in question could be construed as a binding agreement to arbitrate. The defendants submitted that the word "arbitration" on its own was sufficient for the court to find a binding arbitration agreement. They argued that the court should give effect to the words "Swiss arbitration" and confine the jurisdictional provisions to ancillary matters, in line with the court's policy in favour of arbitration. Mr Justice Cooke disagreed and his decision highlights some of the very real difficulties with badly drafted or "pathological" arbitration clauses.

Before examining the decision in more detail, it is helpful to consider section 6(1) of the Act, which is in very similar terms to section 7 of the UNCITRAL Model law, and defines an arbitration agreement. Section 6(1) provides as follows:

> *"6(1) In this part an "arbitration agreement" means an agreement to submit to arbitration present, or future disputes (whether they are contractual or not)."*

The first difficulty that Mr Justice Cooke identified with the wording of the clause in this case was that the parties had not agreed to submit to arbitration. They had agreed to "endeavour to first resolve the matter through Swiss arbitration". He took the view that an agreement that a party will "endeavour" to resolve a dispute through Swiss arbitration lacked the essential requirement that the parties must agree to submit to a binding arbitration.

In addition, the clause did not specify the number of arbitrators or how the arbitrators would be appointed and, because the clause failed to specify a cantonal seat, it was not clear to which cantonal court a request to appoint arbitrators would have to be made in the absence of agreement. The effect of this was that the parties would have to reach further agreement on these points before any reference could proceed. Mr Justice Cooke saw this as being further evidence that there was no binding agreement to arbitrate, only an agreement to attempt to resolve disputes by a process of arbitration.

The second difficulty was that the clause appeared to provide for a two stage dispute resolution process whereby the parties should first "endeavour to resolve" the matter through Swiss arbitration and, if unresolved, either party could refer the dispute to the English courts. Mr Justice Cooke held that it is logically not possible to have an effective multi-tiered clause consisting of one binding tier (arbitration) followed by another binding tier (litigation). His view was that the parties must have intended that there would be an attempt to agree a form of arbitration between them in Switzerland and, if they failed to do so, the English court would have non-exclusive jurisdiction.

Mr Justice Cooke concluded that the clause lacked the requirement to submit to a binding arbitration and that, in the light of the two-stage process envisaged by the clause, such a requirement would be inconsistent with the clause as a whole. On this basis, he held that the clause did not require the parties to refer any dispute to arbitration in the sense required by section 6(1) of the Act.

The decision provides a salutary lesson for those drafting arbitration clauses. Both parties accepted that English law required that the clause should be construed with the aim being to ascertain the

intention of the parties and what a reasonable person would have understood the parties to have meant with all the relevant background knowledge that they had at the time. However, it is always going to be difficult to ascertain the intention of the parties from a badly drafted agreement. Did the professionals who drafted the clause in this case really intend that there should be an attempt to agree a form of arbitration in Switzerland or did they perhaps think that the words “Swiss arbitration” made it sufficiently clear that they intended to refer disputes to arbitration?

An effective arbitration agreement is an essential pre-condition to arbitration but, in spite of this, a significant percentage of arbitration clauses are pathological in some way. Whether this is due to a lack of expertise on the part of those drafting clauses, imperfect compromises over the negotiation of a clause, or overly complicating the language used, the net result is often a clause that defies construction, harmonious or otherwise.

Back in October 2010, the IBA Council approved Guidelines for Drafting International Arbitration Clauses that were specifically designed to assist parties and their counsel to achieve effective arbitration clauses which unambiguously embody the parties’ wishes. In spite of these and other guidelines, cases like Kruppa v Benedetti demonstrate that, for whatever reason, pathological arbitration clauses are no closer to extinction.

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