Kluwer Arbitration Blog

When is a “Court” not a Court? A Few Thoughts After Helice Leasing S.A.S. v PT Garuda Indonesia (Persero) TbK [2021] EWHC 99 (Comm)

Milo Molfa, Serena Boscia Montalbano, Angus Thompson (Curtis, Mallet-Prevost, Colt & Mosle LLP)
· Monday, March 8th, 2021

In a recent High Court case, it was held that a reference in a contract to the “court” did not mean a court at all but meant instead – perhaps alarmingly – arbitration. This decision in *Helice Leasing S.A.S. v PT Garuda Indonesia (Persero) TbK* [2021] EWHC 99 (Comm) may be a cause of concern for those drafting commercial contracts and dispute resolution clauses. How could the High Court reach such a decision that appears to defy the plain meaning of “the court”? Should drafters be concerned that references in their contracts to a “court” will be construed to mean arbitration? If so, how might they avoid such a conclusion? Below we consider these questions.

The Defendant had become, by novation of a lease agreement, the lessee of an aircraft. The Claimant, the lessor of the aircraft, instituted court proceedings against the Defendant for non-payment of rent. The Defendant then applied, amongst other things, to stay the proceedings under section 9 of the Arbitration Act 1996, on the grounds that the Claimant’s proceedings breached the parties’ agreement to arbitrate. The lease provided, in clause 15.2, that:

> Each of Lessor and Lessee hereby agrees that any dispute arising out of or in connection with this Lease Agreement, including any question regarding its existence, validity or termination, shall be referred and finally resolved by arbitration under the Rules of the London Court of International Arbitration (the “**LCIA Rules**”), which rules are deemed to be incorporated by reference into this clause.

In response, the Claimant argued that it was not obliged to refer the proceedings to arbitration and that clause 13.2 provided an exception to the arbitration agreement contained in clause 15.2. Under clause 13.2:

> If an Event of Default occurs…Lessor may at its option (and without prejudice to any of its other rights under this Lease Agreement or that may arise by operation of Applicable Law), at any time thereafter…proceed by appropriate court action or actions to enforce performance of this Lease Agreement or to recover damages for the breach of this Lease Agreement.

It thus fell on the Court to interpret the contract and to decide whether clause 13.2 carved out from the arbitration agreement a right on the part of the Lessor to bring court proceedings.

The Parties' Arguments

In support of its construction, the Claimant relied on the ordinary meaning of the words, and argued that the reference in clause 13.2 to the "court" permitted the Claimant to proceed by court litigation rather than arbitration. Clause 13.2 thus was a unilateral option of the lessor to litigate by court, not merely by arbitration, which according to the Claimant made "good commercial sense". In response, the Defendant contended that the Lessor's right in clause 13.2 was subject to clause 15.2, and that the "appropriate" action, to use the language of clause 13.2, was arbitral proceedings in accordance with clause 15.2. The Defendant also noted the reference in clause 13.2 to the "court" was in all likelihood an error, a "remnant" from the original template lease agreement. That template provided for New York law and New York court jurisdiction. When the template agreement was amended and arbitration under LCIA rules was adopted, the reference in clause 13.2 to the "court" was erroneously left unchanged. More importantly though, the Defendant pointed to a circularity in the Claimant's construction, which "presupposes that which [the Claimant] is required to prove". Whether an Event of Default had occurred was one of the issues to be determined in the proceedings, and yet the Claimant could only bring those proceedings if an Event of Default had occurred.

Judgement

In granting the stay, Calver J began by noting that clause 15.2 was not expressed to be subject to clause 13.2, which would be expected if clause 13.2 did carve out from clause 15.2 a right of the Lessor to issue court proceedings. He continued:

> in order to give the contract a business common sense construction, I consider that 'court action' in clause 13.2(b) must reasonably have been intended by the parties to mean action before the London *Court* of International arbitration, that is action within clause 15.2. (Emphasis in original).

That conclusion was supported by clause 2.1 of the lease that appeared also to refer to the LCIA as "the courts" and which "throws some light on what was objectively intended".

But what was conclusive for the judge was that, on the Claimant's construction, clause 13.2 was effectively inoperative. The right under clause 13.2 applied "if an Event of Default occurs", not "if an Event of Default is alleged." (Emphasis in original). A dispute over whether an Event of Default had occurred is a "dispute" and could therefore only be resolved by arbitration pursuant to clause 15.2, and not through the courts.

The Claimant's construction also conflicted with commercial common sense. If the court could decide whether an Event of Default occurred, that would "emasculat[e]" the agreement of the Parties in clause 15.2 to refer "any dispute" to arbitration. And if the Claimant had a unilateral

right to issue court proceedings, what would happen to any cross-claims brought by the Defendant? Would the Defendant have to bring its cross-claims by arbitration whilst the Claimant sought damages in court? That conclusion, with its potential for "confusion, cost and delay" seemed unlikely and unappealing to the judge. Since, therefore, it was for the arbitrators to decide whether an Event of Default had occurred, "it makes no sense" for the Lessor to then go to court to enforce the lease, rather than arbitrators themselves enforcing the lease. To hold that the reference in clause 13.2 to the "court" meant anything other than the LCIA would run counter with the "one-stop shop construction of such arbitration clauses advocated by the House of Lords in *Fiona Trust v. Privalov* [2007] UKHL 40."

A Dangerous Precedent?

Although Calver J only made a passing reference to the *Fiona Trust* decision in his judgment, and although each contract can only be interpreted on its own terms, that case appears to have encouraged the liberal or commercial interpretation of the contract adopted by the judge. Lord Hoffmann, drawing "a line under the authorities to date" on the interpretation of arbitration agreements, and making "a fresh start", held that, as a presumption, parties to an arbitration agreement "as rational 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." (at para 13) In other words, arbitration agreements should, as a general rule, be interpreted to give effect to arbitration as a "one-stop method" for the resolution of disputes.

In *Helice Leasing*, even the express words in clause 13.2, that the Lessor had the right to turn to the "court", were not enough to overturn that presumption. Commercial commonsense dictated that "court" in fact referred to the LCIA, a conclusion that may seem startling. The judge did not refer to any precedent (other than the *Fiona Trust*) on this point.

But this is not simply a case of the commercial commonsense meaning of the contract – in particular of the broadly-drafted agreement to arbitrate in clause 15.2 – overriding the plain meaning of "court" contained in clause 13.2; for the court was also satisfied that "court" in clause 13.2 was probably a mistake, a "hangover" from the template agreement. Thus, Calver J would have been prepared to amend the contract to make clause 13.2 consistent with the agreement to arbitrate in clause 15.2, which however he did not find necessary. This error and the circularity in the Claimant's construction are the peculiar facts of the contract that led the High Court to reach the decision that it did. Drafters need not be too concerned then, barring a similar error in their contracts, that a liberal interpretation will prevail over their express words.

Conclusion

The case nonetheless strikes a few notes of caution. First, if parties do intend to carve out from a broad agreement to arbitrate a unilateral right to bring court proceedings, they should make that abundantly clear: the agreement to arbitrate should be expressly subject to the right of one party (in this case, the Lessor) to bring court proceedings. Secondly, to avoid the accusations of circularity that the Defendant raised in *Helice Leasing*, that right should not be conditional on an event of default having "occurred". And finally, the case is a reminder of the pitfalls of precedents and template agreements. A drafter may blithely amend the jurisdiction clause (and other boiler plate

clauses) in the template. But the rest of the contract must be checked carefully for consistency. Otherwise, the parties risk time consuming, costly applications, or satellite litigation, that could have been avoided by consistent and unambiguous drafting.

This entry was posted on Monday, March 8th, 2021 at 8:25 am and is filed under Arbitration Act 1996, Arbitration Agreement, Arbitration clause, England, English Arbitration Act, English courts, English Law, Helice Leasing, LCIA Rules
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.