SLAUGHTER AND MAY/

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INTERPRETING AGREEMENTS TO RESOLVE DISPUTES BY ARBITRATION OR OTHER METHODS

In two recent cases, the High Court has considered complex dispute resolution clauses providing for arbitration alongside other dispute resolution mechanisms. Both cases provide a helpful reminder of the English courts' readiness to uphold parties' dispute resolution agreements and the importance of clear drafting to enable the courts to give effect to those agreements.

In *Bugsby Property v Omni Bridgeway*, the High Court held that a clause entitling any party to refer specified disputes to an independent King's Counsel (KC) for a final and binding opinion – in addition to a separate arbitration clause – was not an arbitration agreement.

In *Barclays v VEB*, in a rare example of the English courts stepping in to determine the jurisdiction of an arbitrator, the High Court gave effect to a unilateral option clause where one party retained the option to require disputes to be litigated, but arbitration proceedings had already commenced in accordance with the parties' arbitration agreement.

Both cases demonstrate the English courts' readiness to uphold parties' arbitration and dispute resolution agreements. At the same time, they highlight the importance of clear and unambiguous drafting and the need for careful consideration at the drafting stage as to how complex agreements providing for one than one method of dispute resolution will operate.

1. Not an arbitration agreement? *Bugsby Property v Omni Bridgeway*

1.1 Background

Omni provided litigation funding to Bugsby to bring court proceedings concerning an unsuccessful bid to buy the Olympia Exhibition Centre. Section 10.2 of the litigation funding agreement (LFA) between Bugby and Omni stated that disputes between the parties would be resolved by London seated arbitration under the LCIA Rules. It further specified the governing law of any arbitration (English law), the language to be used (English) and the number of arbitrators (one).

After the court ruled in Bugsby's favour in the court proceedings, the parties to the LFA entered a Variation Agreement to amend the LFA. Clause 19.2 of the Variation Agreement provided that if any dispute arose in relation to the interpretation, enforcement, or adjudication of the Variation Agreement or the LFA, any party shall be "entitled to resolve the dispute by referring it to an independent King's Counsel who will be instructed to provide the Parties with a final and binding opinion". Clause 19.2 was expressly stated to supersede and replace Clause 10.3 of the LFA which, whilst not identically drafted, similarly provided the option for certain specified disputes to be referred to an "independent Queen's Counsel".

Subsequently, the underlying proceedings settled, and a dispute arose between Bugsby and its funders as to whether the LFAs were enforceable and the amount of the claim proceeds out of which the defendants were to be paid.

Omni purported to commence LCIA arbitration pursuant to Section 10.2 of the LFA. Bugsby challenged the jurisdiction of the arbitrator appointed in the LCIA arbitration and purported to exercise its right to appoint a KC under Clause 19.2 of the Variation Agreement. Omni refused to agree the appointment of a KC as arbitrator. Bugsby applied to the High Court under Section 18 of the Arbitration Act 1996 (failure of appointment procedure) (the Act) to exercise its powers to appoint an arbitrator pursuant to Clause 19.2.

The distinction between agreements to appoint an arbitrator and clauses providing for some other form of alternative dispute resolution (ADR) process outside of the courts is significant. Were Clause 19.2 found to be an arbitration agreement, this would mean that the KC arbitrator would resolve the dispute in a quasi-judicial manner and arbitration procedural laws (here, the Act) would provide the framework for the arbitration. Importantly, the resulting "opinion" from the KC would be a finding and binding arbitral award that would be directly enforceable as if it were a court judgment, including internationally under the New York Convention.

In contrast, ADR processes are more limited, do not have a statutory basis or procedural protections and decisions are not directly enforceable.

1.2 Not an arbitration agreement

The High Court held that, properly construed, there was no good arguable case that Clause 19.2 of the Variation Agreement was an arbitration agreement. In reaching its decision, the Court found that:

- Clause 19.2 did not provide for parties to make submissions or for evidence to be heard, for an award to be issued and did not use language commonly associated with arbitration. In the judge's opinion, this suggested that the reference to a KC would not constitute a judicial inquiry, as would be required were the Clause to be an arbitration agreement. The Clause stated that the KC would be "instructed" to "provide the Parties with an opinion". As the Variation Agreement was a professionally drafted contract, it could be inferred that words such as "opinion" were likely to have been carefully chosen and the Court was entitled to accord more weight to their natural meaning.
- Clause 19.2 of the Variation Agreement had to be read in the context of the LFA, which it amended, in particular Section 10.2. When read in that context, it was clear that Section 10.2 of the LFA provided for LCIA arbitration whereas Clause 19.2 provided for no particular procedure. In the judge's view, this strongly suggested that Clause 19.2 was intended to set-out a different process to that in Section 10.2.
- Although the phrase "exceptional urgency" in Section 10.3 of the LFA was not retained in Clause 19.2 of the Variation Agreement, the process of referring disputes to a KC for an opinion suggested that Clause 19.2 was intended to provide a simpler and swifter process than the LCIA arbitration process in Section 10.2.

Even if the Court was wrong on that, the judge held that Clause 19.2 of the Variation Agreement was narrower than Section 10.2 of the LFA. Because Omni had already commenced "mandatory" LCIA arbitration under Section 10.2, the "permissive" right to resolve a dispute by reference to a KC under Clause 19.2 had been lost. Although it was not necessary for the Court to determine the point, the judge also found that they would not have exercised their discretion to appoint an arbitrator under Clause 19.2 for the same reason. The Court of Appeal has refused Bugsby permission to appeal the High Court's decision.

2. *Barclays v VEB*

2.1 Background

UK bank Barclays and Russian bank VEB entered a currency swap agreement on 1992 ISDA Master Agreement terms, but with some bespoke provisions including a bespoke unilateral option (or asymmetric) clause. The option clause provided that any disputes were to be resolved by London seated LCIA arbitration, but, notwithstanding this, Barclays alone retained a right to require by notice in writing that a dispute instead be heard by the English courts, provided that Barclays gave notice within 14 days of service of a request for arbitration.

After VEB became subject to sanctions, Barclays exercised its contractual right to terminate the swap agreement. VEB brought Russian court proceedings, in breach of the parties' dispute resolution agreement, to recover sums owed from Barclays. Barclays successfully obtained from the High Court final anti-suit and anti-enforcement injunctions against VEB in relation to the Russian proceedings. As a result, VEB suspended the Russian proceedings and commenced an LCIA arbitration pursuant to the parties' dispute resolution agreement. Barclays gave notice to VEB requiring the dispute to be heard by the English courts and challenged the arbitrator's jurisdiction. VEB disputed the validity of Barclays' notice and rejected Barclays' request for consent that the arbitrator lacked jurisdiction. After hearing submissions from the parties, the arbitrator gave a reasoned ruling granting Barclays permission to apply to the High Court under Section 32 of the Act (determination of preliminary point of jurisdiction) to determine the arbitrator's jurisdiction.

2.2 The High Court's decision

In two separate judgments, the High Court first gave Barclays permission to continue its application on the basis that it had met the necessary threshold conditions, before finding in favour of Barclays that the arbitrator did not have jurisdiction to determine the dispute.

Application met the threshold conditions

The High Court acknowledged that recourse to the court under Section 32 "remains the exception rather than the

rule", as it is typically for the tribunal to determine its own jurisdiction (Section 30). However, the judge found that Barclays' application had met the threshold requirements set out in the Act for the court to step-in, namely that: (i) the court's determination would be likely to produce substantial costs savings; (ii) the application was made without delay; and (iii) there was good reason why the matter should be decided by the court. In reaching its decision, the judge held that:

- Whilst the court was "not a rubber stamp of approval" for the arbitrator's decision, a reasoned ruling by a tribunal carefully considering the Section 32 criteria (as had been provided in this case) was itself a good and cogent reason for the court to determine the tribunal's jurisdiction.

- It was material that it was "almost certain" there would be a jurisdiction challenge to the court (e.g. under Section 67 of the Act) should the present application fail because of the size of the claim, the jurisdictional issues in dispute and the importance each party placed on their rights under the dispute resolution agreement. Such a challenge would generate significant wasted costs, delay and uncertainty for the parties.

- These issues had to be considered in the context that the parties had contractually agreed to resolve their disputes as a matter of "exceptional urgency".

Arbitrator did not have jurisdiction

As to the substantive application, the High Court found that the arbitrator did not have jurisdiction to hear the dispute because Barclays had validly given notice to VEB requiring it to withdraw the arbitration proceedings in accordance with the terms of the option clause. The notice did not put VEB in an impossible position such that it would not be able to pursue arbitration or court litigation. It was "fanciful" that the English courts would construe the anti-suit injunction, which required VEB not to commence or pursue any other claim or proceedings arising out of the swap agreement other than by means of LCIA arbitration, as precluding VEB from commencing proceedings in the English courts pursuant to the option clause.

Further, Barclays had not waived its right to rely on the option. While Barclays could have chosen to require the dispute to be referred to the English courts before VEB commenced the arbitration, Barclays was under no obligation to do so under the option clause. The option clause required Barclays to give notice to VEB within 14 days of service of the request for arbitration and VEB did not at any time before serving its request for arbitration indicate its intention to commence arbitration. In addition, Barclays' references to arbitration rather than court proceedings in earlier court documents and court orders concerning the anti-suit injunction did not amount to a waiver as it was not necessary for Barclays to say anything about its option at that stage when the issue between the parties concerned whether VEB should continue the Russian proceedings in breach of contract.

3. Takeaways

Both cases demonstrate the importance of clear drafting of arbitration and other dispute resolution provisions, and careful consideration of how different dispute resolution mechanisms are to interact with one another. This is particularly the case where commercial parties opt for more complex arrangements, such as providing for arbitration and an alternative form of dispute resolution to resolve disputes, or where parties are to have different rights to exercise those mechanisms, as in the case of unilateral option clauses.

The English courts will strive to uphold parties' bargains. The case of *Barclays* provides a helpful reminder of the courts' willingness to do so even in the case of complex unilateral option clauses, which have been found to be invalid by the courts of some jurisdictions. This is also the case where giving effect to the parties' contractual agreement requires a pragmatic and common-sense approach to the interpretation of court orders.

However, whether a clause is an arbitration clause is a question of construction and will turn on the wording of each clause. The English courts will typically give a wide and generous interpretation to arbitration clauses. However, the decision in *Bugsby* highlights that, where parties agree more than one dispute resolution mechanism in a contract, parties need to be clear in their drafting and on what they are looking to achieve. Where there is an arbitration clause in an agreement and there is a 'clear contrast' in the wording used in that clause and another dispute resolution clause in the same agreement, that may suggest the dispute resolution clause was not intended to be an arbitration agreement.

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