

ENGLISH COMMERCIAL COURT REVIEWS JURISDICTION CLAUSES

Kruppa v Benedetti & Anor [2014] EWHC 1887

Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd [2014] EWHC 2104

Introduction

In two recent decisions, the English Commercial Court has reiterated the importance of including clear and certain jurisdiction clauses in contractual arrangements.

The cases discussed below once again emphasise the importance of ensuring that every contract – no matter how brief or apparently straightforward – contains a clear and comprehensive governing law and jurisdiction clause. A failure to include any provisions on governing law and jurisdiction, or the inclusion of unclear and contradictory provisions, can lead to complex, lengthy and therefore expensive disputes over the governing law and dispute resolution procedures to be applied to a dispute.

Our previous mailing on drafting governing law and jurisdiction clauses can be found [here](#).

Kruppa v Benedetti & Anor [2014] EWHC 1887

On 11 June 2014, the Commercial Court released its decision in *Kruppa v Benedetti & Anor* [2014] EWHC 1887 in which it declined to grant a stay pursuant to section 9 of the Arbitration Act 1996.

Background

The claimant and defendants had entered into three separate agreements, each of which contained the same governing law and dispute resolution clause:

“Governing law and jurisdiction. Laws of England and Wales. In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction.”

Following a dispute between the parties, the defendants made an application pursuant to section 9 of the Arbitration Act 1996 to stay the proceedings commenced by the claimant. The sole question for the court was whether the governing law and jurisdiction clause constituted an “*arbitration agreement*” within the meaning of section 6(1) of the Arbitration Act 1996.

Decision

Mr Justice Cooke declined to grant the stay requested by the defendants. In particular, he found that the governing law and jurisdiction clause did not require the parties to refer any dispute to arbitration in the sense required by the Arbitration Act 1996 but merely envisaged the parties attempting to refer the matter to arbitration by agreement between them.

In a short judgment, Mr Justice Cooke noted:

- The parties had not specifically agreed to refer any dispute to arbitration but had instead agreed to “endeavor” to resolve the matter through Swiss arbitration, with an express fallback provision, should they fail to do so in this way.
- an agreement that a party will “endeavor” to first resolve the matter through arbitration was different from an agreement to refer a dispute to arbitration. In the present case, the clause contained no agreement as to the number or identity of the arbitrators which would require further agreement on the part of the parties or the appointment of arbitrators by a court of the seat of arbitration.
- It was logically not possible to have an effective multi-tier clause consisting of one binding tier (i.e. arbitration) followed by another binding tier (i.e. litigation). If a dispute was referred to arbitration, any award would, normally, be binding upon the parties and no second stage would arise.

Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm)

On 1 July, the Commercial Court released its decision in *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* in which it rejected an application brought under section 67 of the Arbitration Act 1996 for an order that the arbitral tribunal lacked jurisdiction to hear and determine a claim brought by Prime Mineral Exports Private Limited ("PMEPL") against Emirates Trading Agency LLC ("ETA").

Background

The applicant, ETA, agreed to purchase iron ore from the respondent, PMEPL, pursuant to the terms of Long Term Contract dated 20 October 2007. A dispute arose between the parties, which was referred to arbitration pursuant to an arbitration clause in the contract which provided:

“In case of any dispute or claim arising out of or in connection with or under this LTC including on account of a breaches/defaults mentioned in 9.2, 9.3, Clauses 10.1(d) and/or 10.1(e) above, the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.”

The arbitral tribunal found that it did have jurisdiction. ETA challenged this conclusion in the Commercial Court on the basis that the arbitration clause in the agreement between the parties contained a condition precedent which had not been satisfied. PMEPL claimed either that the

clause contained no enforceable obligation, and that even if it did, the respondent had satisfied it.

Decision

Mr Justice Teare rejected ETA's application, holding that the arbitration clause did contain an enforceable obligation, but that this had been satisfied by PMEPL.

Enforceable obligation

Mr Justice Teare considered previous authorities in determining whether the clause was a mere "agreement to negotiate" and therefore unenforceable. He found that it was not, noting in particular:

- The agreement was not incomplete as no term was missing.
- Further, it was not uncertain - an obligation to seek to resolve a dispute by friendly discussions in good faith had an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute.
- The difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty.
- Enforcement of such an agreement when found as part of a dispute resolution clause was in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration.

Satisfaction of condition precedent

ETA had sought to argue that the discussions to resolve a dispute must have continued for "*four continuous weeks*" before a party could invoke arbitration.

Mr Justice Teare rejected this construction, finding that the meaning reasonably to be attributed was that if, notwithstanding the friendly discussions to resolve the dispute required by the first part of the clause (which may last one day or one week or more depending upon the nature of the dispute and the proposals put forward to resolve it), no solution can be found for a continuous period of 4 weeks, then arbitration could be invoked:

- The discussions may last for a period of 4 weeks but if no solution was achieved a party could commence arbitration.
- Alternatively, the discussions may last for less than 4 weeks in which case a party must wait for a period of 4 continuous weeks to elapse before he could commence arbitration...

In the circumstances, PMEPL had satisfied this condition. The judge further noted that even if his view as to the continuing of the discussions for four weeks was wrong, and it was necessary to show that the friendly discussions lasted for four continuous weeks then they did so - although no meetings lasted for four continuous weeks the discussions could fairly be regarded as doing so.

8th July 2014