Options to Arbitrate: Plain Language and Commercial Sense Prevail

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BACKGROUND

In *Aiteo Eastern E&P Company Limited v Shell Western Supply and Trading Limited* [2022] EWHC 2912 (Comm), Mr Justice Foxton dismissed the challenges brought under s 67 of the Arbitration Act 1996 by Aiteo Eastern E&P Company Limited ("Aiteo") against two partial awards made by a tribunal in arbitral proceedings.

The underlying dispute concerned two interlocking facility agreements (the "Facility Agreements"). Aiteo borrowed funds from Shell Western Supply and Trading Limited ("SWST") and other lenders under the Facility Agreements. The Facility Agreements included a clause giving SWST, but not Aiteo, the option to refer disputes to arbitration (the "Option to Arbitrate"). Specifically, the Option to Arbitrate provided that SWST and the other lenders "*may elect to refer*" any disputes arising out of or in connection with the Facility Agreements to arbitration.

Aiteo and SWST fell into a dispute regarding Aiteo's compliance with the Facility Agreements, culminating in a formal demand for repayment being issued to Aiteo on 23 October 2019. Two days later, Aiteo commenced proceedings against SWST and the other lenders in the Federal High Court of Nigeria. Aiteo also obtained an interim injunction from the Federal High Court of Nigeria restraining SWST and the other lenders from enforcing their rights under the Facility Agreements.

On 12 November 2019, SWST and most of the other lenders filed a notice of appeal in the Nigerian courts asserting that, due to the Option to Arbitrate, the Nigerian proceedings should be stayed and that the Federal High Court of Nigeria had acted without jurisdiction in granting the injunction (the "Notice of Appeal"). On 11 December 2020, SWST commenced arbitration before an arbitral tribunal seated in London (the "Tribunal") in accordance with the provisions of the Facility Agreements. SWST also obtained an anti-suit injunction from the High Court of England and Wales restraining Aiteo from continuing the proceedings in the Nigerian courts.

Aiteo responded by objecting to the jurisdiction of the Tribunal but the Tribunal issued a decision rejecting this objection. Aiteo then brought an application in the High Court of England and Wales challenging the Tribunal's jurisdiction decision.

The Decision

The Option to Arbitrate did not specify any explicit requirements for how to exercise it—it merely said that SWST could "*refer*" a dispute to arbitration. Aiteo argued that, nonetheless, the Option to Arbitrate contained various implied formal requirements. On Aiteo's construction, SWST could only "*refer*" a dispute to arbitration using the Option to Arbitrate by either: (i) commencing arbitration, or (ii) making "*at least an unequivocal and irrevocable commitment to arbitrate the relevant dispute(s) without delay*." Aiteo argued that neither requirement had been satisfied, and therefore, the Tribunal had not been validly formed and did not have jurisdiction.

The High Court rejected Aiteo's interpretation of the Option to Arbitrate, both because it was contrary to the plain meaning of the contractual language used, and because it was commercially illogical:

- In regard to the plain meaning of the contractual language, it is generally understood that a party can "*refer*" a dispute to arbitration without actually commencing arbitration. This was the approach taken in *Anzen Ltd v Hermes One Ltd* [2016] 1 WLR 4098 where, in relation to an arbitration clause that gave a party the right to "*submit*" a dispute to arbitration, the Privy Council held it is possible to submit a dispute to arbitration without actually commencing arbitration. Likewise, both the New York Convention and the UNCITRAL Model Law contain provisions concerning circumstances in which a court will "*refer*" a dispute to arbitration, and it is "*overwhelmingly the case*" in most jurisdictions that have applied these rules that a court is able to refer a dispute to arbitration without actually granting an order mandating the commencement of arbitration.

- Furthermore, the commercially absurd consequences that would follow from Aiteo's proposed interpretation did not justify a departure from the plain meaning of the language used in the Option to Arbitrate. For example, under Aiteo's interpretation, the only way in which SWST could successfully prevent a claim brought against it by Aiteo from proceeding in court would be by commencing arbitration itself, notwithstanding that it was the defendant to the claim that Aiteo had brought. Similarly, Aiteo was unable to articulate clearly what was required for SWST to make an "*irrevocable commitment*" to arbitrate, and why it was commercially sensible to read this requirement into the Option to Arbitrate.

- Finally, the Court noted that the natural meaning of the interlocking dispute resolution provisions in the Facility Agreements led to "*infelicities*." For instance, Aiteo could not commence arbitration "*unless and until*" SWST exercised its Option to Arbitrate. This meant that the Option to Arbitrate exposed Aiteo to the risk (which had eventuated in this case) that it would go to the effort of commencing court proceedings only for SWST to respond by confirming, for the first time, that it wished to arbitrate instead. However, this did not justify Aiteo's alternative interpretation, particularly because, as noted above, Aiteo's alternative interpretation itself led to commercially absurd consequences.

As a result, Mr Justice Foxton concluded that "*it is the message which matters, not the medium*" under the Option to Arbitrate, and he refused to imply any formal requirements as to how this message must be delivered. The Notice of Appeal had validly exercised the Option to Arbitrate as it "*unequivocally required Aiteo to refer the disputes raised in the Nigerian Proceedings to arbitration*."

The Court also noted for completeness that if Aiteo's interpretation of the Option to Arbitrate had been correct, Aiteo's application would have failed regardless. Specifically, Aiteo's argument that the Option to Arbitrate could only be exercised by commencing arbitration was hopeless because that is precisely what SWST had done: it commenced arbitration one year after Aiteo initiated court proceedings in Nigeria. Aiteo attempted to circumnavigate this fundamental problem by claiming that the Option to Arbitrate also included an implied term that it "*would lapse on its own terms after a reasonable period*." The Court gave short shrift to this argument by pointing out, among other things, that such an implied term would "*not sit well*" with a separate provision in the contract that explicitly provided that a delay by SWST in exercising any of its contractual rights would not operate as a waiver.

Comment

This case serves as a reminder that courts will be slow to read implicit terms into arbitration clauses, unless it is necessary to give them efficacy. This is consistent with the supportive role that the courts in England and Wales take when it comes to supervising arbitrations seated in the jurisdiction. This includes interpreting arbitration clauses in a manner that typically seeks to give them effect rather than undermining the clauses' efficacy.

Accordingly, when drafting an arbitration clause, if you wish for the clause to include special procedural requirements, then you should use clear language to achieve that outcome. Likewise, if you end up in a dispute, you should think twice before attempting to construe the arbitration clause in a way that deviates from the plain meaning of the language used, particularly if your proposed reinterpretation is commercially

nonsensical. Nevertheless, the outcome in every case such as this will turn on the specific facts and circumstances.

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Please do not hesitate to contact us with any questions.

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