Dispute Resolution Hotline

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CHANCERY DIVISION (ENGLAND AND WALES HIGH COURT):- ARBITRATION MANDATE: INTENTION TRUMPS UNCERTAINTY

The England & Wales High Court (Chancery Division) held:

- Courts should avoid holding a clause void for uncertainty, especially in case of a partly-performed contract;
- Mere difficulties of interpretation are not the same as ambiguity to the meaning of a clause;
- Courts/Arbitrators to decide based on parameters fixed in the contract and implied terms should address ambiguities in a clause.

INTRODUCTION

The Chancery Division of the England & Wales High Court ("**High Court**") in the case of *Associated British Ports* ("**ABP**") *versus Tata Steel UK Limited* ("**Tata Steel**")[1] recently reiterated the parameters of "*certainty*" of an arbitration clause for its enforceability.

BACKGROUND FACTS

ABP owns and operates several ports in United Kingdom including Tidal Harbour in Wales, situated near Tata Steel's iron and steel works. All commodities used by Tata Steel were imported through Tidal Harbour. ABP and Tata Steel entered into a license agreement dated 1st March 1995 ("**License**") to facilitate Tata Steel's use of the facilities of Tidal Harbour. The Licence granted Tata a licence to use ABP's jetty at the Tidal Harbour for the purpose of receiving Tata's vessels, goods and materials intended for use at Port Talbot and Llanwern works.

Clause 22 of the License provided that in the event of "*any major physical or financial change in circumstances*" post September 15, 2007 affecting the operation of Tata's works or the operation of the Tidal Harbour, either party could serve notice on the other requiring the terms of the License to be re-negotiated. The parties were then required to amend terms "*reflecting such change in circumstances*". In the event of failure to do so within six months mutually, the matter would be referred to an Arbitrator, whose decision would be binding.

In February 2016, Tata Steel gave notice of a major financial change in circumstances, citing *inter alia* significant market challenges and rightsizing of their operations. Tata Steel requested a 50% reduction in the fixed License fees. ABP, in response, argued that the reasons set out in the notice was insufficient to trigger the operation of Clause 22 and therefore it was unenforceable.

ISSUES

ABP initiated proceedings before the High Court for declaratory relief with respect to the proper construction of the arbitration clause in the License. In response, Tata filed an application for stay of the proceedings under Section 9 of the English Arbitration Act, 1996 ("**Act**"). The issues before the High Court were:-

- **Validity of the arbitration clause**- If Clause 22 is valid, whether the arbitrator can amend the License fee as a term under the agreement.
- **Clause 22 of the License is void for uncertainty**- The triggering event "*any major physical or financial change in circumstances*" does not create a binding obligation to refer a dispute to arbitration;
- **Scope of Arbitrator to amend the License**: - Absence of sufficient objective criteria to guide an arbitrator to decide if there is a major physical or financial change and revise the Licence terms.

JUDGMENT AND ANALYSIS

The High Court considered the above issues in light of Sections 9(1) and 9(4) of the Act respectively.[2] On the first issue, after hearing submissions of both parties with respect to amendment to fees, the High Court held that there was no inconsistency in relation to other clauses in the License and Clause 22 covering fees. The other Licence provisions that may result in a variation of the fee contemplate relatively minor annual adjustments to take account of readily foreseeable changes in a long-term agreement. They do not provide a mechanism for altering the fee to take account of a major change in circumstances. Therefore, the High Court concluded that clear words would be needed to construe that a clause involving extensive revisions would exclude the fee component. Any major physical or financial change in circumstances which affects the operation of the parties' facilities is likely to affect the fees payable as well.

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With respect to the second issue on Clause 22 being uncertain, the High Court held that such clauses need to be ascertained on a case to case basis. While analysing the issue of ambiguity on "*major physical or financial change in circumstances*", the High Court recognised that the market conditions under which both parties operated are extremely volatile. It may be difficult to ascertain when it is sufficiently serious to constitute a major physical or financial change. Relying on precedents, the High Court held that "*there is an important difference between a clause whose content is so uncertain that it is incapable of creating a binding obligation, and a clause which gives rise to a binding obligation, the precise limits of which are difficult to define in advance, but which can nonetheless be given practical content" (emphasis added).*[3] In the present case, the clause could be given practical content. Not only did the clause require a major physical or financial change in circumstances, but also this change should have affected the operation of the Tidal Harbour or of Tata's nearby steel works. Therefore, the clause was not entirely open-ended and was held to be valid and binding in this regard.

ABP argued on the uncertainty of Clause 22 due to absence of a criteria for the Arbitrator to determine the trigger event and amend the terms of the License. It was submitted that it was not sufficient to state that the revised terms must be 'reasonable' because that is not in itself an objective standard and there is no objective method by which the Arbitrator can choose between the competing submissions of the parties as to what changes should be made to the Licence. The High Court agreed with the view that it is essential to establish a '*yardstick*' or an '*objective criteria*' for a court or arbitrator to identify the price, rent or other terms and conditions.

However, the High Court highlighted that the Arbitrator will not be acting in vacuum and the existing terms would come to the aid. The arbitrator could find guidance both within the contract, nature of the change and in the parties' submissions, providing a criteria objective enough for the clause to be '*certain*'.

The High Court placed reliance on the significance of reading the agreement as a whole to understand the intention of the parties and ascertain the implied terms to lend meaning to Clause 22. If the intention of the parties was that the matter should be left to the parties, the court cannot infer an implied term imposing an objective criteria or reasonableness. The implied term cannot be contradictory to the intention of the parties. On the other hand, since the parties provided for arbitration in their agreement, the intention was to appoint an independent third party to settle their differences.

The clause was a binding obligation to refer the dispute to arbitration without any uncertainty. Accordingly, the proceedings were stayed. Relying on series of ruling, the High Court set forth some general principles regarding uncertain contractual clauses-

1. Wherever possible, the courts should strive to give meaning to contractual clauses agreed by the parties.[4]
2. Mere difficulties of interpretation are not the same as ambiguity of meaning. A court should hold a contract or some part of it void only when it is legally or practically impossible to give the agreement any practical content.[5]
3. In cases where the contract has been performed by one or more parties over a period of time, courts should be especially reluctant to find a clause void for uncertainty.[6]
4. A court must always endeavor to give effect to the parties' intentions.

This judgment clarifies that in case of existence of arbitration clauses, it must be kept in mind that the impugned provision is more than a mere agreement to settle amicably. This ruling re-emphasises the principle that the intention of parties plays the most crucial role in determining and adjudicating a dispute and the implied terms of the contract need to be looked at to adjudicate disputes. It is also noteworthy to mention that the Indian Supreme Court in the past, in several cases have adopted the same approach and held that interpretation should be approached in a commercial manner and not in a legalistic or semantic manner. If the clause reflects a clear intention to arbitrate, it should be respected.

– Payel Chatterjee & Vyapak Desai
You can direct your queries or comments to the authors

[1] [2017] EWHC 694 (Ch)

[2] Section 9(1) of the act allows a party to an arbitration agreement to seek stay of proceedings in a court if it concerns a matter which, under the agreement, must be referred to arbitration. If Section 9(1) is fulfilled, Section 9(4) of the act requires the court to grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of having effect.

[3] Jet2.com Ltd v Blackpool Airport Ltd [2012] EWCA Civ 417

[4] *Hillas & Co Ltd v Arcos Ltd* (1932) 32 Lloyd's Rep 359

[5] Astor Management AG & Ors v Atalaya Mining plc & others [2017] EWHC 425 (Comm)

[6] *Mamidoil-Jetoil Greek Petroleum Co SA v OKTA Crude Oil Refinery AD* [2001] EWCA Civ 406

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