Dispute Resolution

Bringing A Party To Court Without Breaching An Arbitration Agreement

Introduction

The purpose of arbitration agreements is clear – they bind the parties to bring their disputes to arbitration instead of before the Court. However, the English High Court case of *Louis Dreyfus Commodities Kenya Ltd v Bolster Shipping Company Ltd* [2010] EWHC 1732 (Comm) provides an example of how a party to an arbitration agreement can bring the other party into court proceedings without breaching the agreement.

The consignee of a load of cargo brought proceedings against the owner of the vessel on which the cargo was transported, alleging “quality cargo damage”. In turn, the owner applied to join the shipper of the cargo as a party to the proceedings. However, there was an arbitration agreement between the owner and the shipper that required all disputes between them to be referred to arbitration.

Tomlinson J held that the joinder of the shipper was not in breach of the arbitration agreement. The main aim of the joinder was to obtain information and evidence from the shipper, which did not in itself contravene the arbitration agreement. Further, the owner did not assert any claim against the shipper or identify any dispute between them.

This holding demonstrates the narrow scope of an arbitration agreement, and may instinctively seem to present a loophole through which a party can be dragged to court. However, it also recognizes that litigants should not be easily denied their right to bring disputes before the Court, and that the proceedings in question must be properly examined to assess whether they are truly in breach of an arbitration agreement.

Brief Facts

(1) The Plaintiff was the shipper of a cargo of corn, and the Defendant was the owner of the vessel. Both were parties to a bill of lading which contained an arbitration clause (“the Arbitration Clause”), requiring all disputes or differences between the parties arising out of the underlying contract to be referred to arbitration.

(2) Suministros was the consignee of the cargo. Upon delivery, Suministros asserted that there was a “quality cargo damage”, caused by a “brown germ”. Suministros then commenced
proceedings in the Mexican Court against the Defendant as owner of the vessel which transported the damaged cargo.

(3) The Defendant set out its defence before the Mexican Court, alleging that it was not liable for pre-shipment damage, and pointing to the role allegedly played by the Plaintiff in relation to the storage of the goods before shipment.

(4) The Defendant also applied to join the Plaintiff as party to the Mexican proceedings. The Plaintiff then applied for an anti-suit injunction, submitting that the joinder amounted to a breach of the Arbitration Clause.

Issues

The Court had to determine whether the Defendant’s application for joinder constituted a breach of the Arbitration Clause.

Holdings Of The High Court

The joinder application was found not to be in breach of the Arbitration Clause. In reaching this decision, the Court considered the purpose and possible outcomes of joining the Plaintiff as party to the proceedings, and concluded that it did not fall within the scope of the Arbitration Clause.

The Mexican proceedings

The Court first had to analyse the nature of the Defendant’s application to the Mexican Court. In particular, it considered the nature of the Plaintiff’s potential involvement in the proceedings, as well as in whose favour a judgment might be made.

(i) In its application to join the Plaintiff, the Defendant did not assert any liability on the part of the Plaintiff.

(ii) A joinder application did not necessarily mean that the Plaintiff, as a third party, would be bound by the judgment.

(iii) However, there was the possibility that the Plaintiff might be held liable to Suministros, particularly if the Plaintiff took an active role in defending itself in proceedings, and might thus be bound by the judgment of the Mexican Court.

(iv) The Court thus found that the Defendant was in effect asking the Mexican Court to render judgment against the Plaintiff, or at least to ensure that they were bound by the terms of that judgment.
Whether application is a breach of Arbitration Clause

The Court accepted that the Defendant’s basic purpose in involving the Plaintiff in the Mexican proceedings was to ensure the availability of the information and evidence necessary to prove the Defendant’s case against Suministros as to the condition of the cargo on shipment.

(i) Using the proceedings as an instrument to obtain evidence from the Plaintiff did not constitute a breach of the Arbitration Clause. Otherwise, simply seeking to compel a witness to give evidence or produce documents would amount to a breach of contract.

(ii) The Plaintiff had no contractual obligation to provide documentation or render cooperation; therefore, the Defendant was not asserting any disputed contractual right through the application.

The fact that the Mexican Court could render a judgment that would bind the Plaintiff was insufficient to render the Defendant’s application a breach of the Arbitration Clause.

(i) While the application could ostensibly lead to Suministros making a claim against the Plaintiff, an arbitration clause does not require a party to – when sued by a third party – refrain from suggesting that the third party should look to the contractual partner for recompense instead.

(ii) While the wording of the joinder application effectively invites the Mexican Court to render judgment against the Plaintiff, it is not – without more – a clear breach of the Arbitration Clause. The Defendant did not assert any claim against the Plaintiff, nor did it identify any issue between itself and the Plaintiff arising from the underlying contract as to which any judgment could be binding between them.

The Court thus found that the application did not fall within the scope of the Arbitration Clause. In applying to join the Plaintiff as party to the Mexican proceedings, the Defendant did not breach the Arbitration Clause in the bill of lading.

Concluding Words

The Court may appear to be treading a thin line in allowing a party to an arbitration agreement to bring its contracting partner to court through joinder, effectively avoiding the very protection the arbitration agreement is meant to provide. After all, if the effect of a joinder is still to bring the contracting partner to court, where judgment on its liabilities may be made, does it matter that proceedings were initiated by a third party? This concern is particularly apt in this case, where the Plaintiff’s potential liability to the third party is closely related to the Plaintiff and Defendant’s liability to each other under the bill of lading.

However, one must consider the fact that arbitration clauses tend to cover only disputes arising from the relevant contract between the parties in question; here, the Defendant made no claim against the Plaintiff on any matter relating to the underlying contract. The basis of arbitration has
always been consent between the parties to the arbitration agreement. Therefore, where proceedings are commenced by a third party, and there is no express consent in the arbitration agreement to the exclusion of the court proceedings in question, the Court may be unwilling to confine the matter to arbitration by granting an injunction. As highlighted above, the Court will not take away a litigant’s right to utilize court proceedings unless it is truly warranted.

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