Legal Briefing

Chalbury McCouat International Ltd v P.G. Foils Ltd

[2010] EWHC 2050 (TCC), Mr Justice Ramsey

This case demonstrates the importance of fully considering and agreeing on the dispute resolution mechanism prior to the commencement of your building contract.

Here, the parties had agreed and incorporated an arbitration clause into the contract. However, the clause failed to identify the seat of the arbitration and when a dispute arose, the parties were unable to agree on the appointment of an arbitral tribunal. Accordingly, Chalbury McCouat International Ltd ('Chalbury McCouat') sought the assistance of the English court to exercise its powers under section 18 of the Arbitration Act 1996 ('the 1996 Act').

The Facts

Chalbury McCouat, an English company with its principal place of business in England, entered into a contract on 8 February 2008 ('the Contract') with PG Foils Ltd to dismantle its manufacturing plant in Vaassen in the Netherlands. PG Foils Ltd is an Indian company operating in Rajasthan and the parties had entered into a further, separate agreement by which the plant would then be reassembled in India.

A dispute arose in relation to the payment under the Contract. Chalbury McCouat attempted to invoke the arbitration clause in the Contract which stated that the dispute was to be referred to "arbitration as per prevailing laws of European Union in the Europe". However, PG Foils Ltd withheld its consent to appoint the arbitral tribunal. It alleged that since the performance of the Contract was to be completed in India and that the Contract was signed and executed in the India, either an "Arbitral Tribunal in India" should be appointed, or alternatively the provisions of the Indian Arbitration and Conciliation Act 1996 should apply.

Chalbury McCouat subsequently issued an arbitration claim form, obtained permission to serve the claim form outside the jurisdiction and then applied to the Court to exercise its powers under section 18 of the 1996 Act to appoint the arbitral tribunal.

The Issue

The dispute resolution clause within the parties' agreement was clear that failing resolution by discussion, the dispute should be referred to arbitration. However, the arbitration clause was silent as to the seat of the arbitration.

Accordingly, in order for the Mr Justice Ramsey to appoint the arbitral tribunal by virtue of section 18 of the 1996 Act, he first had to consider whether or not there was a connection with England and Wales, in accordance with section 2(4) of the 1996 Act.

The Decision

Mr Justice Ramsey referred to the Departmental Advisory Committee's Report of January 1997 and the Court of Appeal's decision in International Tank & Pipe SAK v Kuwait Aviation Fuelling Co KSC (1975) and found there will be a sufficient connection with England and Wales if the proper law of the contract is English law. However, it this case, there was no express choice of law stating what law (lex causae) was to be applied to the substance of the dispute.

As the law to be applied to the procedure of the arbitration (lex fori) was the laws of European Union, the Judge found that this suggested that the proper law to be applied to the dispute should be determined under the law of the European Union, which are set out in the Rome Convention.

In accordance with Article 4 of the Rome Convention, the performance of the work of dismantling the plant was to be carried out by Chalbury McCouat, an English company with its principal place of business in England. On this basis, Mr Justice Ramsey therefore considered that the contract was most closely connected with England and the arbitral tribunal were likely to find that the proper law is English law.

So far as the seat of the arbitration is concerned, he found that the reference to "arbitration as per prevailing laws of European Union in the Europe" means that the seat of arbitration was likely to be Europe, possibly England and unlikely to be India. Furthermore, the fact that payment under the Contract was made in England was further evidence of a connection with England.

Accordingly, Mr Justice Ramsey held that because of the connection with England, it was appropriate for the Court to exercise its powers under section 18 of the 1996 Act. He ordered that the President (or in his absence the Vice-President) of the London Court of International Arbitration (LCIA) make the necessary appointment of a sole arbitrator.

Comment

In this case, the parties' resolution of their dispute was ultimately prolonged by the fact that their contract had failed to identify the choice of law to be applied to the substance of the dispute, as well as failed to indentify the seat of the arbitration. This resulted in further disagreements regarding the appointment of the arbitral tribunal and potentially further costs. This exemplifies the importance of discussing and agreeing your dispute resolution clause at the outset of any project.

In addition, this case is a further demonstration of the English court's support of the arbitral process. Though there had been some difficulty in the interpretation of the parties' contract, Mr Justice Ramsey nevertheless stated:

> *"When parties have agreed to arbitrate then I consider that the court should strive to give effect to that intention and should seek to support the arbitral process."*

Stacy Sinclair
September 2010