Hybrid Dispute Resolution Clauses

Can parties to commercial agreements have their cake and eat it too?

Whilst not all commercial agreements result in disputes, there will always be disputes that arise from commercial agreements. How disputes are to be resolved is therefore an important element of the agreement between the parties rather than a matter of boiler-plate.

The choice of dispute resolution mechanism can be complex - it depends upon a number of factors including whether the judgment or arbitral award will be enforceable in the jurisdiction where the defaulting party has assets, as well as the perceived need for interlocutory remedies, anti-suit injunctions, multi-party solutions and confidentiality.

Typically, however, parties have agreed on how disputes are to be resolved at the time of contracting, and long before any dispute has arisen. Two recent first instance decisions upholding hybrid dispute resolution clauses have injected refreshing flexibility into this area. The cases confirm that it is open to the parties to agree to one party retaining the option to choose whether to arbitrate or litigate at the time of the dispute, even though this is not the primary dispute resolution mechanism provided for in the contract.

The first case, *NB Three Shipping Ltd v. Harebell Shipping Ltd* [2005] 1 AER 200 concerned a case where the contract contained a jurisdiction clause but also gave one party the option to refer disputes to arbitration. The second case, *Law Debenture Trust Corporation plc v. Elektrim Finance BV and Others* [2005] 2 AER 476 was the mirror image - there the contract contained an arbitration agreement and, in addition, gave an option to certain parties to litigate before the English courts.
UNILATERAL CLAUSES: A RECENT DEVELOPMENT

Until the mid 1980s mutuality was an essential ingredient in a valid arbitration clause which had to provide for bilateral rights of reference.

It was not until *Pittalis v. Sherefettin* [1986] 1QB 868 that the Court of Appeal qualified this requirement. Here, a tenancy agreement gave the tenant the right to refer a dispute to an independent surveyor. When the tenant sought to exercise this right the landlord contended that the option to refer could not be invoked because it was a unilateral and so invalid. The Court of Appeal disagreed. Fox LJ said "There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exerciseable by one of the parties only seems to me to be irrelevant … Both sides, therefore, have accepted the arrangement and there is no question of any lack of mutuality." Despite this, uncertainty remained about the general applicability of the decision. Pessimists were worried that the case was decided on its facts alone; for optimists, it was authority that unilateral arbitration clauses were valid under English law.

**NB THREE SHIPPING LTD V. HAREBELL SHIPPING LTD**

*Three Shipping* confirmed the optimists’ view: it upheld the validity of a contractual dispute resolution mechanism with two streams namely a jurisdiction clause plus a unilateral right on the part of one of the parties to choose to arbitrate instead. The case also provides helpful insight into the confusion that can ensue where although the method of dispute resolution is prescribed, the mechanics of its operation are not.

In *Three Shipping* the defendant owners agreed to charter two vessels. The charterparties provided that the courts of England had jurisdiction to settle any dispute, and that the owner had the option to refer any dispute to arbitration:

‘47.02 The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the Owner shall have the option of bringing any dispute hereunder to arbitration…

47.10 Any dispute arising from the provisions of this Charterparty or its performance which cannot be resolved by mutual agreement which the Owner determines to resolve by arbitration shall be referred to arbitration in London …’

A dispute arose and the claimant charterers issued proceedings in the High Court. The owners subsequently sought to exercise their right to refer the dispute to arbitration and applied to the court to stay the proceedings pursuant to section 9(1) of the Arbitration Act 1996.

Morison J upheld the application for a stay and confirmed that clause 47.10 satisfied the requirements of an arbitration agreement “since a one sided choice of arbitration is sufficient”. In so doing he confirmed the optimists’ view of *Pittalis*. Having identified that clause 47 was designed to give better rights to owners than to charterers Morison J went on to consider the operation of the clause. He started from the premise that clause 47.10 contemplated that the parties would discuss whether or not to arbitrate the dispute. He cautioned that "It would have been better had the precise circumstances in which the
option could be exercised or lost were spelt out …” but concluded failure to do so did not render the clause unenforceable. He did not regard the option as open-ended but stated that “It would cease to be available if Owners took a step in the action or they otherwise led Charterers to believe on reasonable grounds that the option to stay would not be exercised”.

**LAW DEBENTURE TRUST CORPORATION PLC V. ELEKTRIM FINANCE BV AND OTHERS**

To the extent that *Three Shipping* left open the question of the validity of an arbitration agreement with a unilateral right on the part of one party to opt for English Court proceedings, this issue was resolved shortly afterwards in *Elektrim*. There the agreement between the parties stated in clause 29.2 that disputes were to be submitted by any party to arbitration for final settlement under the UNCITRAL Arbitration Rules and went on to provide:

“29.6 The agreement by all the parties to refer all disputes … to arbitration …. is exclusive such that neither [the Elektrim defendants] shall be permitted to bring proceedings in any other court or tribunal …

29.7 Notwithstanding clause 29.2, for the exclusive benefit of the Trustee and each of the Bondholders, [the Elektrim defendants] hereby agree that the Trustee and each of the Bondholders shall have the exclusive right, at their option, to apply to the courts of England, who shall have non-exclusive jurisdiction to settle any disputes…”.

Elektrim gave notice of arbitration. Some two months later the Trustee issued proceedings to have the issues between the parties determined and subsequently sought a determination under section 72 of the Arbitration Act 1996 that there was no valid arbitration agreement and that the English courts had jurisdiction by contract to hear the dispute. Mann J considered the construction and effect of clause 29. He concluded that, in the circumstances, the Trustee was contractually entitled to litigate the dispute and to stop Elektrim pursuing a parallel arbitration dealing with the same matters as there was a dual dispute resolution regime. The effect of clause 29.7 was to give the Trustee a unilateral option. This option was “probably” subject to only one limit, that is that the Trustee could not blow hot and cold. If the Trustee started an arbitration it would have waived its right (or option) to go by way of litigation. By the same token if the Trustee participated sufficiently in an arbitration, it may well be held to have waived its rights to exercise its option.

Mann J rejected submissions by the Defendants’ Counsel that since the Trustee’s case involved the possibility of an arbitration being brought to a halt by litigation commenced by the Trustee, Elektrim would be forced to ask the Trustee whether it wished to arbitrate before commencing the arbitration. Whilst this may well be right as a matter of construction, as with *Three Shipping* the case illustrates that confusion, delay and expense can arise if parties do not spell out how dual dispute resolution regimes such as this are to operate.

**CONCLUSION**

The validity of hybrid dispute resolution clauses giving one party superior rights has been endorsed by the English Courts. Whether such clauses would be upheld in other jurisdictions is a matter for local law. Although not fatal in *Three Shipping or Elektrim*, parties intending to include such clauses would be well advised to address the mechanics of operation of the unilateral options.
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