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High Court provides guidance on election to arbitrate under unilateral option clause

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Introduction

In *Aiteo Eastern E&P Company Limited v Shell Western Supply and Trading Limited*,[1] the High Court found that a party was not required to commence arbitration proceedings or to give an undertaking to that effect to exercise a unilateral option to arbitrate. In rejecting a jurisdictional challenge to two awards under section 67 of the Arbitration Act 1996, the Court found that a party had successfully exercised its unilateral option to arbitrate by actively challenging the jurisdiction of national courts in favour of arbitration. This was sufficient as an unequivocal election to arbitrate the relevant dispute. The jurisdictional challenges under section 67 were consequently dismissed.

Background

Challenge under section 67 of Arbitration Act

Parties to an arbitration seated in England and Wales may apply to the courts under section 67 of the Arbitration Act to challenge an award on the grounds that the tribunal lacked substantive jurisdiction. A challenge under section 67 can result in the setting aside of the award if the tribunal is held to have lacked jurisdiction. As such, the threshold for successful challenges is necessarily burdensome and applications are rarely brought (and even fewer are successful).[2]

Unilateral option clauses

Typically, unilateral option clauses provide for disputes to be referred to:

- arbitration, but give one party the exclusive right to elect to refer a dispute to litigation before the courts**I** or
- a court, but give one party the exclusive right to elect to refer the dispute to arbitration instead.

In particular, lenders often seek to include unilateral option clauses in their agreements with borrowers and other counterparties due to the flexibility that they provide should a dispute arise.

The English courts consistently uphold unilateral option clauses giving one party the right to take a dispute to arbitration. They will even protect a party's right to exercise this option through a stay of proceedings if necessary.[3] (for further details, see "Courts' attitude towards unilateral option clauses").

Facts

Aiteo and Shell Western Supply and Trading Ltd (SWST) entered into a facility agreement governed by English law, under which Aiteo borrowed $512 million from SWST for acquiring an interest in some Nigerian oil fields. The facility agreement contained a unilateral option clause in favour of SWST, with an option to commence arbitration in London under the International Chamber of Commerce International Court of Arbitration (ICC) Rules:

> *41.1.1 Subject to Clause 41.2 (Finance Parties' option),* ***any Party to this Agreement (other than an Obligor) may elect to refer for final resolution any dispute arising out of or in connection with this Agreement****, including any question regarding its existence, validity, or termination or any non-contractual obligations arising out of or in connection with this Agreement (a 'Dispute')* ***by arbitration under the Rules of Arbitration of the International Chamber of Commerce*** *(the 'ICC') in force at that time (the 'ICC Rules'), which ICC Rules are deemed to be incorporated by reference into this Clause 41.*
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> . . .
>
> *41.2.1* ***Before a Finance Party has submitted a Request for Arbitration or Answer*** *as defined in the Arbitration Rules of the ICC (as the case may be),* ***the Finance Party may by notice in writing to the Borrower require that all Disputes or a specific Dispute be heard by a court of law****. If the Finance Party gives such notice, the Dispute to which such notice refers shall be determined in accordance with Clause 41.3 (Jurisdiction).* (Emphasis added)

A dispute arose between the parties in August 2019, following which SWST made a formal demand for repayment of the loan. Aiteo commenced proceedings against SWST before the Nigerian courts and sought a declaration of non-liability. It successfully obtained an injunction restraining SWST from taking further steps to recover the debt. SWST appeared in the Nigerian courts on a conditional basis, seeking a stay of the proceedings and filing a notice of appeal (NOA). SWST challenged the jurisdiction of the Nigerian court and sought to have the injunction set aside, submitting that Aiteo was bound by the arbitration provisions in the facility agreement.

In December 2020, SWST served a request for arbitration (RFA) on Aiteo and separately sought (and obtained) anti-suit injunctive relief in the English courts. In its first award, made in March 2022, the ICC tribunal dismissed a jurisdictional challenge made by Aiteo. In its second award, made in July 2022, the tribunal consolidated the arbitration commenced by SWST with an arbitration commenced by SWST

and other lenders under a separate but related facility agreement.

Aiteo challenged both awards under section 67 of the Arbitration Act, arguing that SWST had not validly exercised the election to arbitrate in the facility agreement and that, as such, there was no valid and binding arbitration agreement between the parties. Accordingly, Aiteo submitted, the tribunal had lacked substantive jurisdiction over the disputes.

In the section 67 challenge, Aiteo argued that the option to arbitrate under clause 41 could be exercised only by commencing an arbitration or, at the very least, by making an unequivocal and irrevocable commitment to arbitrate without delay. SWST argued that it had validly exercised the option by filing the NOA, or alternatively, by delivery of the RFA.

Decision

What was required to exercise the option to arbitrate?

Foxton J dismissed Aiteo's submission that the election to arbitrate had required formal commencement of arbitration proceedings or at least an "unequivocal and irrevocable commitment to arbitrate the relevant dispute(s) without delay".

The judge noted the reasoning of the Judicial Committee of the Privy Council in a decision on similar issues in *Anzen v Hermes*.[(4)] In that case, the Privy Council had noted that it was uncommercial to require a party to incur the costs of formally commencing an arbitration and pursuing a claim for negative declaratory relief, when it was the other party that had initiated a dispute resolution process in breach of an arbitration provision.[(5)]

Foxton J held that the only requirement for the election to arbitrate to be effective was the making of an "unequivocal statement" by one party requiring the other to arbitrate the identified dispute.[(6)] This could be made by serving a request for arbitration, seeking a stay or through some other communication.

Provided that the necessary unequivocal statement had been made, the exercise of a contractual choice did not require further steps to be taken, such as the seeking of a stay. The deciding factor was the message, rather than the medium.[(7)]

Had the option to arbitrate been properly exercised?

Exercise of option by NOA

The provisions of the NOA contended unequivocally that Aiteo's claims arose out of an agreement under which the parties had agreed to resolve disputes by arbitration and that the Nigerian court was required to give effect to that agreement.

Accordingly, the judge held, the NOA contained an unequivocal election to refer to arbitration the disputes that had been raised in the Nigerian proceedings. This unequivocal election meant that the inchoate arbitration agreement between the parties was fully constituted and Aiteo was placed under a negative covenant not to pursue claims in another forum.[(8)]

Exercise of option by RFA

The judge accepted SWST's submission, in the alternative, that the service of the RFA had effectively exercised the option to arbitrate. He dismissed Aiteo's further argument that the option to arbitrate would lapse if not exercised within a reasonable time. The facility agreement contained clear waiver provisions in favour of SWST and the doctrines of waiver and estoppel would provide sufficient protection against unfairness.[(9)]

Comment

The Court's commercial approach in this case will reassure parties that have the benefit of a unilateral option clause that it is not strictly necessary to commence arbitration for them to exercise an option to arbitrate. Parties facing proceedings brought in breach of an option clause should not, the Court confirmed, be required to incur the costs and effort of commencing separate proceedings to enforce the obligations of a counterparty not to bring claims in a non-contractual forum. However, parties should ensure that they follow the specific requirements of a unilateral option clause and that any election to arbitrate is made unequivocally. In drafting their agreements, parties should consider very carefully both the mechanics of a unilateral option clause and whether use of such a clause poses risks to the enforcement of an award in certain jurisdictions.

For further information on this topic please contact Marie Berard, Benjamin Barrat or Nicole Mah at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com, benjamin.barrat@cliffordchance.com or *nicole.mah@cliffordchance.com). The Clifford Chance LLP website can be accessed at www.cliffordchance.com.*

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Endnotes

(1) [2022] EWHC 2912 (Comm).

(2) The Commercial Court Annual Report 2020-21 confirmed, at page 15, that only a small minority of the 19 section 67 applications filed in 2019-20 were successful.

(3) *NB Three Shipping v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm); *Law Debenture Trust Corp v Elektrim Finance BV* [2005] EWHC 1412 (Ch).

(4) *Anzen v Hermes One Limited (British Virgin Islands)* [2016] UKPC 1.

(5) *Aiteo,* at [23] iii).

(6) *Aiteo*, at [25].

(7) *Aiteo*, at [31].

(8) *Aiteo*, at [34].

(9) *Aiteo*, at [40]-[41].